



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12200

Hearing Date: February 20, 2025

Decision Issued: March 21, 2025

PROCEDURAL HISTORY

On October 4, 2024, Grievant was issued a Group III Written Notice of disciplinary action with termination for sleeping while on duty. The Written Notice indicated that the termination was effective September 26, 2024.¹

On October 22, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 12, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On February 20, 2025, a hearing was held remotely via the Microsoft TEAMS platform. The hearing was initially scheduled to be an in-person hearing, but it was held remotely due to inclement weather and poor travel conditions.

APPEARANCES

Grievant
Agency's Advocate
Agency Party Designee
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Group III Written Notice?

¹ Agency Ex. at 1.

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Prior to his removal, Grievant was a Corrections Officer at a Department of Corrections Facility. Grievant was employed with the Agency for approximately 15 years.² No evidence of prior active disciplinary action was introduced during the hearing. The evidence presented during the hearing indicated that aside from the matters giving rise to this disciplinary action, Grievant's performance had been satisfactory to the Agency.³

Grievant and Officer-1 were assigned to a transportation security post in a Room at the Hospital. Grievant and Officer-1 were responsible for monitoring an inmate-patient receiving treatment at the Hospital. Although the Hospital had a secured area where some inmate-patients received treatment, the Room where Grievant was on post on August 19, 2024, was in the unsecured area of the Hospital, which meant that the Room was accessible to the public.⁴

Grievant and Officer-1 worked an overnight shift in the Room beginning on August 18, 2024. Their shift began at approximately 6:00 p.m. on August 18, 2024, and ended when the officers were relieved from their post, around 8:00 a.m. on August 19, 2024.⁵

² Hearing Recording at 1:14:00-1:14:40, 1:30:12-1:31:26.

³ Hearing Recording at 47:50-48:22 and see Agency Ex. at 5

⁴ Hearing Recording at 31:29-32:56.

⁵ Hearing Recording at 54:26-56:47.

As part of Captain's duties, she traveled to various hospitals throughout the week to check on the inmate-patients receiving treatment at the hospitals and ensure that the officers on duty were awake and alert.⁶

On August 19, 2024, at approximately 5:22 a.m., Captain conducted a security round to the Room. Captain testified that as she entered through the doorway of the Room, she observed Grievant seated in a chair on the other side of the Room. Captain observed that Grievant's head was slightly down, his eyes were closed, and he appeared to be asleep.⁷ Captain stood in the doorway of the Room and took a photograph of Grievant.⁸

As Captain entered the Room, Officer-1 who was seated inside the Room near the doorway, spoke to Captain and they began a dialogue. Captain testified that she then walked across the Room to get closer to Grievant. Captain took a second photograph of Grievant.⁹ Captain also observed that the Inmate-Patient was properly restrained to the bed by both his wrists and his legs.¹⁰

Captain testified that from the time that Captain first observed Grievant and took the first photograph and while she moved closer to Grievant and took the second photograph, Grievant did not move or otherwise acknowledge Captain's presence. Captain testified that she continued her dialogue with Officer-1 and as Officer-1 spoke louder, Grievant appeared to wake up.¹¹ Captain testified that after Grievant awoke, she advised him to get up, take a break, and walk around to become alert.¹²

The photographs that Captain took of Grievant showed Grievant seated and slightly slouching in a chair. Grievant's head was slightly tilted forward and toward his right shoulder. Grievant's eyes appeared to be closed. Grievant appeared to be asleep in the photograph.¹³

Captain then notified her supervisors that she had observed Grievant sleeping on duty and her supervisors advised her of the appropriate personnel to immediately contact at the Facility.¹⁴ Later that same afternoon, Captain followed up with an email to her supervisors and Facility personnel setting forth in writing a report of her observations of Grievant and the actions she took following her observation of him sleeping while on duty.¹⁵

At approximately 11:26 a.m. on August 19, 2024, the Facility provided Grievant with a "Correctional Officer Procedural Guarantee Investigation Notice." The notice advised Grievant that the Agency was investigating the following allegation:

⁶ Hearing Recording at 15:53-17:17.

⁷ Hearing Recording at 17:17-19:48 and see Agency Ex. at 3-4.

⁸ Agency Ex. at 9.

⁹ Hearing Recording at 18:10-19:48 and Agency Ex. at 8.

¹⁰ Hearing Recording at 27:58-29:21.

¹¹ Hearing Recording at 17:17-24:18.

¹² Hearing Recording at 23:41-24:18.

¹³ Agency Ex. at 8 and 9.

¹⁴ Hearing Recording at 29:32-31:29 and Agency Ex. at 3-4.

¹⁵ Agency Ex. at 3-4.

On August 19, 2024, at approximately 0522 hours, [Captain], was conducting security rounds at [Hospital] on the [Room], for [inmate-patient], an inmate assigned to [Facility]. During the above security check, [Grievant] was observed sleeping while on hospital duty. Therefore [Grievant] is being referred for Group III.¹⁶

The Agency also placed Grievant on Pre-Disciplinary Leave with Pay effective beginning August 19, 2024. The memorandum notifying Grievant that he was being placed on pre-disciplinary leave also advised Grievant that the Agency had begun an investigation into a potential violation of Operating Procedure 135.1 for sleeping during working hours.¹⁷

At approximately 12:17 p.m. on August 19, 2024, Grievant sent an email to the Warden, the Assistant Warden, and other Facility personnel regarding the incident at the Hospital. Grievant wrote:

At approximately 0522 hours [Captain] was conducting security rounds at [the Hospital Room]. Myself and [Officer-1] was just [finishing] watching the election on TV when [Captain] walk up and said I was Sleep. I [think] [Officer-1] call my name once and I open my eyes and the Captain is referring me to a group three and I have been put on suspension. Therefore this report is being written.¹⁸

On August 20, 2024, the Facility issued an "Administration of Employee Discipline: Due Process Notification" to Grievant.¹⁹ The notification provided Grievant with notice of the charges that were being considered, evidence supporting those charges, and the disciplinary action that may result. The notification also indicated that Grievant would be provided a reasonable opportunity to respond to the charges at a meeting to take place on "TBA."²⁰

The Warden met with Grievant on October 4, 2024.²¹ At that time, the Agency issued to Grievant a Group III Written Notice with termination with an issuance date of October 4, 2024.²² The Written Notice listed the effective date of the termination as September 26, 2024. The Written Notice described the Nature of the Offense as:

On August 19, 2024, at approximately 0522 hours, [Captain], was conducting security rounds at [Hospital], on the . . . [Room], for [inmate-patient], an inmate assigned to [Facility]. During the above security check, [Grievant] was observed sleeping while on hospital duty.²³

¹⁶ Agency Ex. at 15.

¹⁷ Agency Ex. at 16.

¹⁸ Agency Ex. at 12.

¹⁹ Agency Ex. at 6-7.

²⁰ Agency Ex. at 6-7.

²¹ Hearing Recording at 1:02:45-1:04:54.

²² Agency Ex. at 1-2.

²³ Agency Ex. at 1-2.

CONCLUSIONS OF POLICY

The responsibility of the Hearing Officer is to determine whether the Agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the Hearing Officer reviews the evidence *de novo* (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).

Whether the Grievant engaged in the behavior and whether the behavior constituted misconduct

The Agency has met its burden of proving that Grievant was asleep while on duty at the Hospital and that such behavior was misconduct.

The unrefuted evidence showed that Grievant was asleep while he was on duty in the Hospital Room on August 19, 2024. Captain credibly testified that as she first entered the Room, she observed Grievant in a chair across the Room with his head slightly down and his eyes shut. Captain spoke with Officer-1 and then moved closer to Grievant and testified that Grievant remained asleep with his head slightly down and his eyes shut. Grievant did not move or otherwise acknowledge Captain as she moved closer to him. Captain took photographs of Grievant that appeared to show Grievant sleeping.²⁴

Grievant described working long hours and that, at the time of the incident, he may not have recognized that he was feeling overworked.²⁵ Although working long hours and feeling overworked may have contributed to, and explain Grievant falling asleep on duty, Grievant was expected to report for duty in the mental and physical condition to perform the duties of his post. The post that Grievant was working on August 19, 2024, required that he maintain constant sight supervision of the Inmate-Patient.²⁶ If Grievant was unable to perform his duties because he had insufficient rest or was feeling sleepy, he was expected to notify the Facility so that relief could be provided without compromising security.²⁷

When Grievant was asleep while on duty at the Hospital, he was not vigilant, and he was not maintaining constant sight supervision of the Inmate-Patient.

The Agency has met its burden of proving by a preponderance of the evidence that Grievant engaged in misconduct when he was asleep while he was on duty at the Hospital.

²⁴ Hearing Recording at 17:17-31:29 and see Hearing Recording at 1:25:48-1:30:12 and Agency Ex. at 8-9.

²⁵ Hearing Recording at 1:14:40-1:18:24, 1:31:26-1:35:01, 1:38:06-1:40:27.

²⁶ See Agency Ex. at 18-24 and Hearing Recording at 33:26-36:43, 41:58-47:50.

²⁷ Hearing Recording at 56:47-58:06.

Whether the Agency's discipline was consistent with law and policy

Sleeping during working hours is a Group III offense.²⁸ Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination.²⁹

Captain and Warden both testified that when security personnel fall asleep and are not alert or aware of their surroundings while on a transportation security post (like at a Hospital), it presents the opportunity for an inmate to escape and puts the officers, Hospital staff and patients, and the public at risk. This is especially true in an otherwise unsecured setting, like the Hospital Room, where the only security measures are the correctional officers monitoring the inmate-patients. Warden testified that security personnel are most vulnerable to danger or harm when they are working outside of a secured perimeter, like when they are on duty at a Hospital.³⁰

Grievant argued that given his long years of good service to the Agency, the Agency should have offered him an opportunity to resign in lieu of termination. Although an Agency has discretion to offer an employee an opportunity to resign in lieu of termination, an Agency is not required to do so and there is no evidence to suggest that the Agency's failure to offer Grievant an opportunity to resign in lieu of termination in this case violated law or policy.

The Agency has met its burden of proving that the discipline it issued to Grievant was consistent with law and policy.

Due Process

Grievant argued that the Agency failed to provide him with sufficient due process because he was not provided the opportunity to meet with the Warden before the Agency decided to terminate Grievant's employment. Grievant argued that the Agency should have given him such consideration due to his long years of good work performance. The Agency argued that Grievant was provided with notice that the Agency was considering disciplinary action as early as August 19, 2024, and that Grievant was provided an opportunity to respond on August 28, 2024.³¹ The Agency pointed to an email that Grievant submitted on August 19, 2024, as demonstrating that Grievant had the opportunity to respond to the allegations before the Agency decided to terminate his employment. The Agency also argued that the Grievant was provided an opportunity to present evidence through this grievance hearing process which cured any deficiencies in the due process provided by the Agency. Although limited information was provided as to whether Facility officials met with Grievant after providing him with the "Administration of Employee Discipline: Due Process Notification" and before his employment with the Agency was terminated, this hearing process cures any such deficiencies that may have

²⁸ See Virginia Department of Corrections Operating Procedure 135.1., Procedure XIV.B.8.

²⁹ See Virginia Department of Corrections Operating Procedure 135.1., Procedure XIV.A.

³⁰ Hearing Recording at 26:47-27:47, 31:29-32:56, 33:26-36:43, 48:20-52:00.

³¹ See Agency Ex. at 5, a disciplinary recommendation form that lists "Due Process Meeting: COPGA 8/19/2024; Due Process 8/20/2024 and 8/28/2024" and see Hearing Recording at 1:23:43-1:25:13.

occurred during the Agency's pre-disciplinary due process. Grievant had the opportunity to present any evidence and arguments he wished during the hearing.

Grievant also appeared to argue that he was terminated from employment before he received the Written Notice on October 4, 2024, when he met with the Warden.³² The Warden testified that he believed that a human resources staff person had unsuccessfully attempted to contact Grievant on or about October 1, 2024, to schedule a time for Grievant to meet with the Warden.³³ The human resources staff did not testify and it was unclear during the hearing how the October 4, 2024 meeting between the Warden and Grievant was scheduled and how that may have affected the date of the Agency's termination of Grievant from employment. The information on the Written Notice showed that there may have been a discrepancy as to when the Agency issued the discipline and when the Agency terminated Grievant's employment. The Written Notice was issued on October 4, 2024. The Written Notice identified the "Effective Date" of Grievant's termination as September 26, 2024. During the hearing, Grievant appeared to suggest that he believed he had been terminated on October 1, 2024. An Agency may not terminate an employee *prior* to the actual date of the disciplinary action underlying the termination, that is the date of the associated Written Notice. In this case the Written Notice was issued October 4, 2024, and that would be the appropriate effective date of termination.

Mitigation

Grievant asserted that he was a loyal and good employee with approximately 15 years of service who regularly worked additional hours when the Facility needed him. Grievant argued that based on his long history of dedicated and good work performance, the Agency should have mitigated the discipline and given him a second chance.

Grievant asserted that he was aware of other employees of the Facility who had been given "second chances" after engaging in misconduct. Grievant generally referenced someone who had left a weapon on post. Grievant did not provide any additional details about that offense or when it occurred. Grievant also generally mentioned being aware of someone sleeping on post without facing termination. Grievant refused to provide additional details regarding when that incident may have occurred or other information that would allow this Hearing Officer to determine whether the Facility was treating Grievant differently from other similarly situated employees. Further, it was not clear, based on the information Grievant provided, that Facility management was aware of any such misconduct.³⁴ The Warden credibly testified that during at least the last three years, he was aware of no circumstance when a Facility correctional officer had been found sleeping while on duty in an unsecured hospital room and received any discipline other than a Group III written notice with termination.³⁵

Virginia Code § 2.2-3005.1 authorizes hearing officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation

³² Hearing Recording at 1:18:30-1:19:30 and see 1:02:45-1:05:24.

³³ Hearing Recording at 1:02:45-1:05:24.

³⁴ Hearing Recording at 1:35:01-1:37:34, 1:40:27-1:45:00.

³⁵ Hearing Recording at 1:45:56-1:48:47.

must be “in accordance with rules established by the Department of Human Resource Management....”³⁶ Under the Rules for Conducting Grievance Hearings, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

The outcome of this case is unfortunate. Based on the testimony at the hearing, Grievant was a good and dedicated employee who the Warden described as a “very effective, efficient, and good officer.”³⁷ A Hearing Officer is not a super-personnel officer, however, and must give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy. In this case, the Agency has demonstrated that its discipline was consistent with law and policy.

DECISION

For the reasons stated herein, the Agency’s issuance to Grievant of a Group III Written Notice of disciplinary action with termination is **upheld**. However, **the termination upheld is effective October 4, 2024**, consistent with the date that the Written Notice was issued and Grievant is awarded back pay and benefits to the extent the Agency may have prematurely terminated his employment.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

³⁶ Va. Code § 2.2-3005.

³⁷ Hearing Recording at 47:50-48:22.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar-day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.³⁸

Angela Jenkins

Angela L. Jenkins, Esq.
Hearing Officer

³⁸ See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant.