



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12297

Hearing Date: September 4, 2025

Decision Issued: September 9, 2025

PROCEDURAL HISTORY

On January 10, 2025, Grievant was issued a Group III Written Notice of disciplinary action for sleeping while on post.

On February 7, 2025, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and the matter advanced to hearing. On June 9, 2025, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On September 4, 2025, a hearing was held at an Agency facility in Goochland, Virginia.

As the hearing started, Grievant proffered four pages of exhibits that she had not proffered by the deadline the Hearing Officer had established for the parties' exchange of their proposed exhibits. The Agency objected to the exhibits as untimely. The exhibits proffered by Grievant included a note from Grievant's medical provider dated August 25, 2025 (Grievant's Exhibit 1), an Employee Recognition Award dated November 11, 2024 (Grievant's Exhibit 2), an email from a former co-worker dated July 1, 2025 (Grievant's Exhibit 3), and a photograph (Grievant's Exhibit 4). The Hearing Officer noted the Agency's objection but admitted Grievant's exhibits into the record. All of the Agency's proffered exhibits were admitted into the record without objection from Grievant (Agency Exhibits Tabbed 1-9 (pages 1-67), including a video exhibit).

APPEARANCES

Grievant
Grievant's Advocate

An Equal Opportunity Employer

Agency's Legal Advocate
Agency's Legal Advocate
Agency Party Designee
Witnesses

ISSUES

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

Grievant is a Correctional Officer at a Department of Corrections Facility. Grievant has been employed by the Agency for approximately 18 years. Based on the evidence presented, aside from the incident giving rise to this disciplinary action, Grievant's performance was satisfactory to the Agency. Grievant received an Employee Recognition Award as recently as November 11, 2024.¹ No evidence of prior active disciplinary action was introduced during the hearing.

On November 15, 2024, Grievant was taking prescribed medications to treat hypertension. Side effects of those medications included tiredness, drowsiness, and dizziness or lightheadedness.² Grievant did not advise her supervisors, human resources staff, or Facility or Agency management that she was taking medication that may cause her to feel tired or experience drowsiness, dizziness, or lightheadedness.

¹ Grievant's Ex. 2.

² Agency Ex. at 5-11.

On the morning of November 15, 2024, Grievant was on duty as the Horse Barn Officer. As the Horse Barn Officer, Grievant was required to be alert and to supervise or “watch” inmates while they performed work with horses in an outdoor area.

At approximately 10:15 am, Captain, Sergeant, and Sr-Secretary were returning to the Facility from an off-site event. As they pulled their vehicle onto the Facility grounds, they observed inmates working with horses near a parked Van. As they drove past the Van, Captain and Sergeant testified that the officer inside the Van had her head down and appeared to be asleep. Sergeant backed their vehicle next to the Van so they could identify the officer and determine whether they were sleeping. Captain, Sergeant, and Sr-Secretary testified that they then observed that Grievant was asleep in the Van. Captain instructed Sergeant to take a video or photograph of Grievant sleeping. After Sergeant took a video of Grievant, Sergeant then approached the Van to relieve Grievant from her post. Captain and Sergeant both testified that they observed an inmate also approaching the Van. Sergeant testified that she believed the inmate was approaching the Van in order to wake Grievant. Sergeant told the inmate to stand back. It was after Sergeant told the inmate to stand back that Grievant appeared to first notice that Sergeant was standing next to the Van. Sergeant told Grievant that she was relieving her of her post and Sergeant took custody of the Van and the inmates.

According to Grievant, Sergeant then instructed Grievant to assist with meal service which required Grievant to go back to the Facility and then operate a large vehicle to deliver meals.

At approximately 12:38 pm on that same day, Sr-Secretary provided an email to Captain setting forth her observations from that morning. Sr-Secretary wrote:

On 11/15/2024 at approximately 10:15 am

As a front seat passenger, I witnessed the following:

Upon entering the facility grounds, we approached a state licensed white van pulled over the left side of the roadway. I saw several inmates at the fence, feeding the horses. As [Sergeant], the driver, drove just passed the van when both [Captain] and her asked who is that? It looks like they're sleep. [Captain] requested for [Sergeant] to back up to get a closer look. After backing up beside the parked van, I saw [Grievant] asleep. She had her head, laid in her hand to the driver side window. [Captain] attempted to take a picture but was not able to due to the angle. He handed his phone to [Sergeant] to take the picture. [Sergeant] got of the vehicle to relieve [Grievant] the post. [Captain] became the driver of the vehicle I was in, and [Grievant] got in the back seat of the vehicle to return to the facility.³

On January 10, 2025, the Agency issued Grievant a Group III Written Notice. The Agency described the nature of the offense as follows:

³ Agency Ex. at 15.

[Grievant] is being issued a Group III written notice for sleeping on post. On Friday, November 15, 2024, [Grievant] was observed sleeping in the security van while assigned to the horse barn officer post. [Sergeant] observed [Grievant] in the driver seat sleep while 5 inmates tended to horses in the [Field].⁴

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."⁵

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

The preponderance of the evidence showed that on November 15, 2024, Grievant slept while she was working on post as the Horse Barn Officer at the Facility.

Grievant did not directly testify as to whether she slept while she was working on November 15, 2024. Grievant testified that Sergeant did not inform Grievant that Grievant had been sleeping when Sergeant relieved Grievant from her post. Grievant argued that as Sergeant relieved Grievant from her post, Sergeant instructed Grievant to assist with meal service which included operating a large vehicle to deliver meals. Grievant appeared to argue that such an assignment would have been risky and inappropriate for an officer who had been found sleeping on duty. Grievant admitted that she was "not alert" while she was working as the Horse Barn Officer on November 15, 2024, and testified that at that time she was still adjusting to the medication she had been prescribed to treat her hypertension. The side effects of that medication included tiredness and drowsiness.

To the extent that Grievant appeared to argue that she was not sleeping while on duty, this Hearing Officer is not persuaded. Captain, Sergeant, and Sr-Secretary each credibly testified that they observed Grievant sleeping. Sr-Secretary testified that she observed that Grievant's head was in her hand towards the window, her eyes were closed, and she was not moving. Captain testified that when he observed Grievant, she was "knocked out." Sergeant also testified to her observation that Grievant was sleeping while on post. The testimony of Captain, Sergeant, and Sr-Secretary was credible and consistent.

The post that Grievant worked on November 15, 2024, required that she be awake and alert to observe inmates as they worked outdoors to ensure that the inmates did not escape or engage in suspicious or harmful activity.⁶ The preponderance of the evidence

⁴ Agency Ex. at 1-2.

⁵ See Virginia Department of Corrections Operating Procedure 135.1.

⁶ Agency Ex. at 51-67.

showed that Grievant slept when she was supposed to be working on November 15, 2024. Although Grievant may not have intended to sleep, sleeping while working is misconduct. While Grievant slept she was not alert and she was not able to perform her work duties, including observing the inmates.

The Agency has met its burden of proving by a preponderance of the evidence that Grievant engaged in misconduct.

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

Sleeping during working hours is a Group III offense. Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination.⁷

When correctional officers fall asleep and are not alert and aware of their surroundings while on duty, it presents the opportunity for inmates to escape. In this case, Warden testified that the inmates in Grievant's custody were in close proximity to a state road along which they could have escaped. Warden also testified that there was a risk of harm to Grievant if an inmate (or inmates) had taken the opportunity, while Grievant slept, to attempt to overtake Grievant to gain control of their situation and escape.

Grievant presented evidence that on November 15, 2024, she was taking medication to treat her hypertension and side-effects of the medication included tiredness and drowsiness. It was not clear whether Grievant was arguing that her hypertension is a disability. There is not enough information in the record to determine whether Grievant's hypertension would qualify as a disability under the Americans with Disabilities Act that would require reasonable accommodation by the Agency. Even assuming Grievant were to demonstrate that she has a disability under the Americans with Disabilities Act, it is unlikely that a reasonable accommodation would be for the Agency to allow Grievant to sleep while working on a post that required her to supervise inmates. Further, the Americans with Disabilities Act requires employers to provide reasonable accommodations for an employee's disability, but it does not broadly shield employees from disciplinary action for their own misconduct.

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

Mitigation

Grievant argued that the Agency failed to consider mitigating factors, including her long years of service and good work performance. Grievant also appeared to argue that the Agency failed to properly consider that, at the time of the incident, Grievant was taking prescription medication that caused drowsiness.

The Standards of Conduct provide that an Agency may reduce the level of disciplinary action if there are mitigating circumstances, such as conditions that compel a

⁷ See Virginia Department of Corrections Operating Procedure 135.1., Procedure XIV.

reduction to promote the interests of consistency, equity and objectivity, or based on an employee's otherwise satisfactory work performance.

Warden testified that the Agency considers sleeping on duty to be a serious offense that usually warrants termination. Warden also testified that the Agency has terminated the employment of correctional officers who were found to have slept while on duty. According to Warden, the Agency decided not to terminate Grievant's employment in this case based on its consideration of mitigating factors, including the information Grievant provided about her medication as well as Grievant's years of service and work performance.

A Hearing Officer is not a super personnel officer and must give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy. That the Agency could have mitigated the discipline further, but determined that it was inappropriate to do so, is not a reason for the Hearing Officer to conclude that the Agency's actions exceed the limits of reasonableness.

Virginia Code § 2.2-3005.1 authorizes hearing officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management...."⁸ 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.

DECISION

For the reasons stated herein, the Agency's issuance to Grievant of a Group III Written Notice of disciplinary action is **upheld**.

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

⁸ Va. Code § 2.2-3005.

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.

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.⁹

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

⁹ 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.