

DECISION OF HEARING OFFICER

IN RE: CASE NO: 12433
HEARING DATE: 4-27-26
DECISION ISSUED: 5-27-26

PROCEDURAL HISTORY

On November 18, 2025, a Group III Written Notice was issued with termination for the offense of sleeping on the job and violations of Standards of Conduct OP 1.60.¹ Events were listed in the Written Notice from August 11, 2025, to October 15, 2025. After consideration, the Group III was mitigated and reduced to a Group III without termination. Grievant received his due process letter written on November 12, 2025,² to which he responded in a timely fashion. Grievant requested and received a first step and second step resolution hearing. Grievant sent a letter stating facts he believed relevant. Grievant received a letter from the first and second step agent dated January 9, 2026, upholding the Written Notice determination.³ Grievant filed a hearing before a Hearing Officer which was granted. A Hearing Officer was appointed on March 9, 2026. A pre-hearing conference was held on phone on March 23, 2026. A hearing was scheduled for April 27, 2026.

APPEARANCES

Agency Advocate
Agency Representative as Witness
Three (3) Agency Witnesses
Grievant
Four (4) Grievant Witness

ISSUES

- 1) Whether there is creditable evidence that Grievant did on several occasions fall asleep during his work shift;
- 2) Whether Grievant violated Operational Procedures 1.60⁴ by failure to follow the following directives:
 - A. Perform assigned duties and responsibilities with the highest degree of public trust;
 - B. Devote full effort to job responsibilities during work hours;
 - C. Use state equipment, time, and resources judiciously and as authorized;
 - D. Support efforts that ensure a safe and healthy work environment;

¹ Agency Exhibit 2, page 35

² Agency Exhibit 2, page 39, 40

³ Agency Exhibit 1, page 7, 8

⁴ Agency Exhibit 8, page 65-94

- E. Make work-related decisions and/or take actions that are in the best interest of the agency;
 - F. Comply with the letter and spirit of all state and agency policies and procedures, and Commonwealth laws and regulations.
- 3) Whether the Agency's discipline was consistent with law and policy;
- 4) Whether mitigating circumstances were considered?

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. 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. Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §5.8.

APPLICABLE POLICY

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq the Rules for Conducting Grievances effective July 1, 2012, and the Grievance Procedure Manual (GPM) effective January 1, 2025.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "includes 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 requires formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination." More than one (1) active Group II offense may be combined to warrant termination.

FINDING OF FACTS

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

Grievant has been a Department of Motor Vehicle employee since at least year 2020. Grievant's position was at a Virginia interstate weigh station. Grievant's duty was to evaluate tractor trailers for compliance with state statutes. Upon reviewing the scale output conformation on the screen in Grievant's office, Grievant was to either pass the vehicle

with a green light or Grievant verbally advises driver to pull over for further evaluation. Grievant worked an 8-hour shift.⁵

On April 1, 2020, Grievant was advised of his falling asleep during his work shift.⁶ Grievant was given a warning and advised Grievant could contact the Accommodations Coordinator if he wished to pursue accommodations. Grievant never contacted the agency about accommodations for a disability.⁷

In the summer and fall of 2025, the agency again noted Grievant falling asleep while on the job. Nine occasions between August 1, 2025, and October 15, 2025, were captured by video on the following dates and times:

- August 11, 2025, from 21:33 – 21:43
- August 17, 2025, from 16:40 – 16:52
- August 26, 2025, from 21:24 – 21:50
- September 8, 2025, from 21:31 – 21:41
- September 15, 2025, from 20:37 – 20:53
- September 24, 2025, from 22:18 – 22:35
- September 25, 2025, from 21:53 – 22:01
- October 5, 2026, from 21:44 – 21:53
- October 15, 2025, from 22:34 – 22:52⁸

After viewing the videos at his due process meeting, Grievant admitted he might have been “dozing”. He claimed the views were from his back and he could have been looking at the cell phone in his lap. However, some of the videos showed the phone on his desk, not in his lap.⁹

The most significant video was the September 15th stream of 16 minutes when a red truck waited for 4 minutes 47 seconds before moving on and a blue and yellow truck waited 6 minutes 11 seconds before moving on. It was stated it should take about 11 seconds to evaluate the screen information and pass a truck on. During this clip, Grievant appeared to nod his head but his head fell back down with Grievant making no movement toward acknowledging the vehicles waiting at the scales. Grievant’s cell phone was seen on Grievant’s desk, not on his lap. The other videos presented as evidence showed similar actions.

⁵ Agency Exhibit 4, page 44-50

⁶ Agency Exhibit 3, page 42

⁷ Agency Witness 2 testimony

⁸ Agency Exhibit 10 through Exhibit 18

⁹ Agency Exhibit 14

One agency witness said as he was in Grievant's room, Grievant was not moving and had his head down. However, the Witness said he could not positively say Grievant was sleeping as the Witness did not interact with Grievant by trying to wake him.

When Grievant was given an opportunity to respond to the due process hearing, Grievant did produce two letters from his physician stating Grievant had PTSD and was on prescription medication that could cause Grievant some transient somnolence although it had not been noticed by the physician. The physician further stated there was therapeutic benefit to the medication.¹⁰ This notification of disability came after all the reported incidents.

The agency issued a Group III with termination but after considering the mitigating circumstance the discipline was reduced to a Group III only without termination.

Grievant offered no other mitigating circumstances as to why he fell asleep on the job. Grievant produced Witnesses that stated they had been denied sick leave and had heard Grievant being denied sick leave. None of the Witnesses were able to state Grievant had been denied sick leave during August 1, 2025, through October 15, 2025, time frame.

Grievant continued to present irrelevant matters regarding Grievant's feelings that there was mismanagement at the facility. This Hearing Officer finally asked Grievant if he had any more information that was related to the offense and the dates listed in the Written Notice. Grievant said he could not say any of his evidence correlated with the August 11th to October 15th time frame. This Hearing Officer then ended the presentation of evidence and proceeded to closing statements.

OPINION

A Hearing Officer is a neutral person who is expected to listen in an unbiased manner to both parties' opinions. While the Hearing Officer may agree that a matter feels unfair to the Grievant, the Hearing Officer is bound by the rules created for the Hearing Officer's decision. The Agency is given deference to be able to manage its operations and employees.

Hearing Officers may order appropriate remedies but may not grant relief that is inconsistent with law, policy, or the grievance procedure.

In hearings contesting formal discipline, if the Hearing Officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the Agency's discipline was consistent with law and

¹⁰ Grievant Exhibit D & E

policy, the Agency's discipline must be upheld and may not be mitigated, unless under the record evidence, the agency's discipline exceeds the limits of reasonableness.¹¹

Further, a Hearing Officer is not a super-personnel officer, therefore in providing any remedy, the Hearing Officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.¹²

There was credible evidence that Grievant fell asleep while on his work shift. Operational Procedure 1.60 sets forth the Agency's standards of conduct. The agency noted several duties required of Grievant that were not met.

Grievant did not perform his duties to the full degree required. Grievant did not devote his full effort during work hours as some of his time was spent sleeping. Grievant was charged with using state equipment to further evaluate vehicles following state statutes. Grievant often left vehicles sitting in waiting for his evaluation. While Grievant did not endanger the environment of his workplace, he did compromise the safety of all people using the public highways by failure to properly evaluate vehicles while on the scales. Grievant was unable to make any decisions while sleeping. Grievant could not evaluate the Commonwealth laws and policy related to Traffic Safety if he was not conscious and therefore incapable of evaluating the information provided on his equipment.

Operational Procedure 1.60 provides information regarding severity of discipline for various levels of employee non-compliance. The Discipline given to Grievant was consistent with description of behaviors outlined as Group III discipline.¹³

MITIGATION

Va. 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 the rules established by the Department of Human Resource Management..." 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

¹¹ Grievance Procedure Manual, effective July 1, 2020. §5.9 pg 19

¹² Rules for Conducting Grievance Hearings effective July 2020, VI Scope of Relief pg 14. DeJarnette v. Corning, 133 F.3d 293, 299 (4th Cir. 1998)("Title VII is not a vehicle for substituting the judgement of a court for that of the employer").

¹³ Agency Exhibit 8, page 89

hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes:

- (1) whether an employee had notice of the rule, how the Agency interprets the rule, and/or the possible consequences of not complying with the rule.
- (2) whether the discipline is consistent with the Agency’s treatment of other similarly situated employees or
- (3) whether the penalty otherwise exceeds the limits of reasonableness under all the relevant circumstances.¹⁹

The Agency did consider Grievant’s evidence supplied by Grievant’s physician. The agency then made modifications to the Group III discipline by removing the stipulation that Grievant would be terminated.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice without termination is **UPHELD**.

Sondra K. Alan
Hearing Officer

APPEAL RIGHTS

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

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.^[1]

[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].

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.