

Issue: Group III Written Notice with Termination (sleeping during work hours);  
Hearing Date: 04/25/17; Decision Issued: 04/26/17; Agency: VPI&SU; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 10957; Outcome: No Relief – Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10957**

Hearing Date: April 25, 2017

Decision Issued: April 26, 2017

#### **PROCEDURAL HISTORY**

On December 19, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping while at work.

On January 12, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 6, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. A hearing was initially scheduled for March 7, 2017 but the Hearing Officer found just cause to continue the hearing at Grievant's request. On April 25, 2017, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
Witnesses

#### **ISSUES**

1. Whether Grievant engaged in the behavior described in the 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. 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:

Virginia Tech employed Grievant as a Multimedia Engineer. No evidence of prior active disciplinary action was introduced during the hearing.

On September 1, 2015, Grievant's coworkers observed him asleep at work. The Supervisor sent Grievant an email stating, in part:

keep in mind that failure to remain alert during your shift constitutes violation of the Standards of Conduct Policy 1.60 and must be avoided.

The Commonwealth of Virginia's Department of Human Resource Management outlines that sleeping during work hours is a Group III offense, in violation of DHRM's Standards of Conduct Policy 1.60. Group III offenses, including acts and behavior of a very serious nature and even a first offense can warrant suspension or termination.<sup>1</sup>

Grievant and other employees attended training on September 8, 2015. Grievant fell asleep during the training. On September 9, 2015, the Supervisor issued Grievant a Memo of Counseling stating:

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<sup>1</sup> Agency Exhibit 4.

This memo is to address the fact that I observed you sleeping during a ... training on September 8, 2015.

I approached you after the training to discuss the issue. You admitted to falling asleep. You indicated that the training was boring and not interesting to you and you could not keep from drifting off. You said that you brought water to help keep you alert but it didn't work.

As a reminder, this is not the first occasion we have discussed sleeping on the job. On September 1, 2015 we met after our staff meeting to discuss the fact that you were observed to be sleeping at your desk by a staff member .... During the meeting, we discussed ways that you might remediate the behavior such as getting up and walking around. I followed up our meeting with an email, dated September 1, 2015:

It is especially critical for employees designated to respond to incidents related to desktop support ... to be alert and attentive during their shifts. The Commonwealth of Virginia's Department of Human Resource Management DHRM outlines that sleeping during work hours is a Group III offense, and is a violation of DHRM's Standards of Conduct Policy, 1.60.

I expect you to make immediate and sustainable improvement in your performance in this area. If you fail to follow procedures in the future you may be subject to further disciplinary action up to and including termination.<sup>2</sup>

On November 29, 2016 at approximately 9:30 a.m., Grievant was seated in a chair at his desk cubicle. He was slouched backwards in the chair, with his head to the side. He was asleep. The Supervisor approached Grievant and observed that he was sleeping. Grievant did not notice when she entered his cubicle because he was asleep. The Supervisor placed her hand on Grievant's shoulder and shook him until he awoke.

## **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."<sup>3</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include

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<sup>2</sup> Agency Exhibit 5.

<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Sleeping during work hours is a Group III offense.<sup>4</sup> On November 29, 2016, Grievant fell asleep at his workstation during work hours. He remained asleep until he was awoken by his supervisor. Grievant admitted he was asleep. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

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 rules established by the Department of Human Resource Management ....”<sup>5</sup> 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.

Grievant argued that the disciplinary action should be mitigated because he was taking medication that made him drowsy. Grievant presented a letter dated December 15, 2016 from his medical provider stating, “[Grievant] is on a glaucoma medication which may have a side effect of drowsiness. He has been on several different ocular medications which he has had to discontinue due to this drowsiness reaction.”<sup>6</sup>

There is a difference between a medication that may cause an employee to become drowsy and a medication that actually causes an employee to fall asleep. Only the latter example is a mitigating circumstance. Grievant’s evidence shows that the medication he was taking might cause him to become drowsy. He did not show that the medication he was taking on November 29, 2016 actually caused him to fall asleep. Grievant testified that he had been taking glaucoma medication for approximately 10 years. He remained able to stay awake at his job during the first eight years. Only when he moved to his current unit two years ago and the work was less interesting and he was less active did he have difficulty remaining awake. Grievant’s testimony showed that the nature of the work he was performing may have had a material impact on

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<sup>4</sup> See, Attachment A, DHRM Policy 1.60.

<sup>5</sup> Va. Code § 2.2-3005.

<sup>6</sup> Grievant Exhibit 1.

whether he fell asleep. In light of the 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 the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

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

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

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, 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.

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.<sup>7</sup>

[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].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.