

Issues: Group I Written Notice (unsatisfactory performance), Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 04/18/17; Decision Issued: 06/23/17; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10973; 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: 10973

Hearing Date: April 18, 2017

Decision Issued: June 23, 2017

PROCEDURAL HISTORY

On January 25, 2017, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance. On January 25, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping during work hours.

On February 2, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 27, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 18, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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:

The Department of Social Services employed Grievant as a Webmaster/Security Officer.

In August 2016, Grievant was assigned responsibility to complete a Media Alert Automation Project. Grievant performed some of the tasks required to compel the project. On January 4, 2017, the Supervisor sent Grievant an email regarding the project requirements. Grievant was given a deadline of January 18, 2017 to complete the project. The project should have taken Grievant no more than a week to complete. Grievant was working only on this assignment.

On January 19, 2017, the Supervisor sent Grievant an email regarding the status of the project that was due the day before. Grievant replied that he was "getting close". On January 24, 2017, Grievant asked for information that had already been sent to him on January 12, 2017. As of January 25, 2017, Grievant had not completed the project.

On January 24, 2017, Grievant reported to work at 12:45 p.m. The Supervisor asked Grievant where he had been and Grievant said he had been at the doctor's office and that he had sent her an email. The Supervisor said she had not received an email from Grievant explaining his absence. Grievant went to his desk and began working.

Grievant placed his head down on his desk and fell asleep. At 2:15 p.m., Ms. W sent the Supervisor a message asking the Supervisor to come to Grievant's desk

because Grievant was asleep.¹ The Supervisor was participating in a telephone conference call. At approximately 2:30 p.m., she went to Grievant's desk and observed him sleeping. She spoke with three co-workers as they watched Grievant sleeping. After Grievant began snoring the Supervisor decided to awaken Grievant. She loudly called Grievant's name and he woke up. The Supervisor asked Grievant if he needed to go home. He said he did not need to go home. He walked for a little while and consumed caffeine and then completed his work for the day without further sleeping at his desk.

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."² 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."

Group I Written Notice

"[U]nsatisfactory work performance" is a Group I offense.³ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was given the deadline of January 18, 2017 to complete the Media Alerts Automation Project. The deadline was reasonable. He did not complete the project by the deadline. His work performance was unsatisfactory thereby justifying the issuance of a Group I Written Notice.

Grievant argued that the Agency changed the requirements of the project. Insufficient evidence was presented to support the conclusion that the project requirements changed enough to justify Grievant's failure to meet the deadline.

Group III Written Notice

Sleeping during work hours is a Group III offense. On January 24, 2017, Grievant fell asleep during work hours. He was observed sleeping by several staff. He

¹ Ms. W testified she sat next to Grievant in the office and in the Spring or Summer of 2016, she observed Grievant sleeping at his desk. She pushed him to awaken him.

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See Attachment A, DHRM Policy 1.60.

slept for over 15 minutes until he was awoken by the Supervisor. 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"⁴ 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 Group III Written Notice should be mitigated because he suffers from bipolar disorder and, on January 24, 2017, his doctor changed his medications which made him drowsy. He was taking clozapine and olanzapine. These drugs have side effects of drowsiness.

Taking a drug that causes drowsiness is not, in itself, sufficient to show mitigating circumstances. Only if an employee can show that a drug actually caused the employee to fall asleep would mitigating circumstances exist. The reason for this is because many things in life can cause a person to become drowsy especially if an employee is not sleeping well and does not get enough sleep.

Grievant has not presented sufficient medical evidence to show that his medication caused him to sleep at work. In Grievant's January 25, 2017 response to the Agency's Notice of Intent to take disciplinary action, Grievant wrote that "I haven't been sleeping well if at all" After walking to a local convenience store and consuming caffeine, Grievant was able to finish his work duties. Although Grievant's medication made him drowsy, the Hearing Officer cannot conclude that taking medication cause sedation. Based on the Rules, the Hearing Officer cannot find mitigating circumstances exist to reduce the Group III Written Notice.

⁴ *Va. Code § 2.2-3005.*

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. 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 14th St., 12th 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 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 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.⁵

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.