



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11944

Hearing Date: May 31, 2023
Decision Issued: June 2, 2023

PROCEDURAL HISTORY

On January 13, 2023, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping during work hours.¹

On February 28, 2023, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 13, 2023, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 31, 2023, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Witnesses

ISSUES

¹ The Written Notice is poorly drafted and incorrectly alleges that Grievant was removed because of excessive absences. The evidence showed that Grievant knew the reason for his removal.

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the University'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 University 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:

Norfolk State University employed Grievant as a Police Sergeant. He had been employed by the University as a classified employee for approximately 23 years. No evidence of prior active disciplinary action was introduced during the hearing

Grievant reported to the Supervisor. Several months prior to December 2022, the Supervisor believed he had observed Grievant asleep when Grievant should have been working. When the Supervisor discussed his observation with Grievant, Grievant claimed he was not asleep, but rather was praying. The Supervisor informed Grievant that employees are not allowed to sleep while on duty.

Grievant's shift began on December 25, 2022 at 8 p.m. and was scheduled to end at 8 a.m. on December 26, 2022.

In the morning of December 26, 2022, Grievant parked his police vehicle in the parking lot of a resident hall. He remained seated in the driver's seat. He left the vehicle's engine running because it was cold outside and he needed to run the vehicle's heater. At

approximately 6:30 a.m. on December 26, 2022, Grievant logged into his church's prayer line. Grievant was not on an approved break at that time.

At approximately 6:37 a.m., the Supervisor drove his police vehicle into the parking lot of the resident hall and observed Grievant. The Supervisor drove his vehicle next to Grievant's vehicle so that the driver's side of the Supervisor's vehicle was closest to the driver's side of Grievant's vehicle. The two vehicle were a few feet apart. The Supervisor expected Grievant to notice his arrival and then they would begin a conversation. Grievant did not notice the Supervisor's arrival because he was asleep. The Supervisor waited approximately two minutes and watched Grievant with his eyes closed continue to sleep. Because Grievant had previously claimed he was praying when the Supervisor raised the issue of whether Grievant was sleeping at work, the Supervisor decided to video record Grievant. The Supervisor recorded Grievant sleeping for approximately 30 seconds.

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 III offenses include safety infractions that endanger the safety of others. Grievant was responsible for protecting people on campus. By sleeping, he endangered his safety and the safety of others on campus. The University 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, the University's decision to remove Grievant must be upheld.

Grievant denied being asleep. He argued he was praying and simply appeared to be asleep. He presented evidence that he logged into his church's prayer line at approximately 6:30 a.m. and logged out approximately 16 minutes later. This argument is not persuasive for several reasons. First, the Supervisor was able to drive to Grievant's location, approach Grievant, and remain within a few feet of Grievant's vehicle without Grievant noticing the Supervisor. If Grievant was merely praying, he would have noticed the Supervisor. Second, the Supervisor watched Grievant sleeping for approximately two minutes. Based on the Supervisor's experience, he was able to distinguish between a person praying and a person sleeping. Third, the video taken by the Supervisor is of poor quality but appears to show Grievant with his eyes closed and asleep.

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

Grievant asserted that he was taking over-the-counter pain medication for an injury he suffered. The evidence is not sufficient to show that the pain medication caused him to fall asleep. Grievant did not make the Supervisor aware he had taken medication on December 26, 2022.

Grievant argued that the University could have taken lesser disciplinary action and corrected his behavior. Although the University could have taken lesser disciplinary action and still fully corrected Grievant's behavior, the University acted within its authority under the Standards of Conduct

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"³ 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 the Grievant of a Group III Written Notice of disciplinary action with removal 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
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

³ Va. Code § 2.2-3005.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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