

Issue: Group III Written Notice with Suspension (sleeping during work hours); Hearing Date: 11/16/17; Decision Issued: 11/17/17; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 11103; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11103

Hearing Date: November 16, 2017
Decision Issued: November 17, 2017

PROCEDURAL HISTORY

On July 11, 2017, Grievant was issued a Group III Written Notice of disciplinary action with a ten workday suspension for sleeping during work hours.

On August 8, 2017, 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 he requested a hearing. On October 3, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On November 16, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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. 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:

The Virginia Department of Transportation employs Grievant as an Operator Bridge Tunnel. No evidence of prior active disciplinary action was introduced during the hearing.

On May 29, 2017, Grievant entered the Facility, signed the log in sheet to show he had reported to work at 3 a.m. He then went to a truck in another part of the Facility. He entered the truck and sat in the driver's seat. He fell asleep and remained asleep for more than 30 minutes. The Supervisor discovered Grievant sleeping in the truck. He observed that Grievant had his head back and eyes closed with his mouth slightly open. The Supervisor observed Grievant for approximately 25 minutes and concluded Grievant was asleep and not under any physical distress. The Supervisor took a picture of Grievant asleep. The Supervisor opened the passenger side door and Grievant awoke.

The Manager told Grievant to return to the log book and change the time he began his shift to reflect the actual time he began his shift. Grievant returned to the log book and changed his start time from 3 a.m. to 4:30 a.m. It does not appear that Grievant was paid for 1.5 hours from 3 a.m. to 4:30 a.m.

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.”¹ 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.”

Sleeping during work hours is a Group III offense. On May 29, 2017, Grievant began working at 3 a.m. and entered a truck. He fell asleep in the truck during work hours. 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. In lieu of removal, an agency may suspend an employee for up to 30 workdays. In this case, the Agency suspended Grievant for ten work days. The Agency’s suspension 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”² 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 Agency should have used progressive disciplinary action and given him lesser disciplinary action that did not cause him an excessive financial hardship. An agency may, but is not required to provide progressive disciplinary action. The Agency established that its level of discipline was in accordance with the discipline permitted under the Standards of Conduct. The Agency established that it considered mitigating circumstances relating to Grievant’s work duties and personal circumstances. The Agency established that its level of discipline was consistent with how it disciplined similarly situated employees. There is no basis for the Hearing Officer to mitigate the disciplinary action.

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² *Va. Code § 2.2-3005.*

The Supervisor required Grievant to change the log book to show he began working at 4:30 a.m. instead of 3 a.m. when he reported to the Facility. The Agency did not pay Grievant for the 1.5 hours from 3 a.m. to 4:30 a.m. The Manager testified that the Manager erred by requiring Grievant to change his start time from 3 a.m. to 4:30 a.m. Grievant is entitled to be paid for being at work from 3 a.m. to 4:30 a.m.³

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a ten workday suspension is **upheld**. The Agency is **ordered** to provide Grievant with **back pay** in the amount of 1.5 hours with credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and 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.

³ The Agency could not alter his work shift after he reported to work. If the Agency had actually changed his work shift to begin at 4:30 a.m., it would have meant that he was not working at the time the Supervisor observed him sleeping. To uphold a Group III offense, an agency must show the employee was asleep during work hours. If his shift began at 4:30 a.m., his work hours would have begun at that time and not when he was sleeping.

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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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