

Issues: Group III Written Notice (sleeping during work hours), Group II Written Notice (unsatisfactory work performance), and Termination; Hearing Date: 11/17/17; Decision Issued: 11/20/17; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 11110; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11110

Hearing Date: November 17, 2017
Decision Issued: November 20, 2017

PROCEDURAL HISTORY

On August 28, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping during work hours. On August 28, 2017, Grievant was issued a Group II Written Notice of disciplinary action with removal for unsatisfactory work performance.

On September 15, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 16, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On November 17, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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. 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 University of Virginia employed Grievant as a Housekeeper. She had been employed by the Agency for approximately 13 years. Grievant had one active written notice. She received a Group II Written Notice on March 16, 2015 for unsatisfactory performance.

Grievant had inactive disciplinary action informing her of the Agency's expectations for her behavior. On March 19, 2010, Grievant received a Group I Written Notice for abuse of State time because Grievant was observed sleeping in a staff lounge. On November 4, 2014, Grievant received a Group I Written Notice for abuse of State time. She was reminded that her morning break is from 9 a.m. to 9:15 a.m. and her lunch is from 11 a.m. to 11:30 a.m. She was advised that "any deviation from this schedule must be discussed with supervision."¹ The Agency did not use these written notices to remove Grievant from employment in this case.

Grievant's shift began at 6 a.m. She had a break scheduled between 9 a.m. and 9:15 a.m. She was to take her lunch from 11 a.m. to 11:30 a.m. If Grievant needed to vary her schedule, she was expected to inform her supervisor.

¹ Agency Exhibit 10.

On August 8, 2017, the Supervisor entered the Building at approximately 11:50 a.m. He did not see Grievant in the Building. He worked on a project until about 12:17 p.m. He asked an employee where Grievant was. The employee said Grievant was in the breakroom sleeping. The Supervisor walked to the breakroom door. He pulled a key from the group of keys he held on his side and inserted it into the door lock. He unlocked the door² and let his key return to his side as he opened the door “half way”. He knocked on the door as he was opening it. The Supervisor observed Grievant seated and slumped forward with her right arm on a counter. Her head was resting on her right arm. She awoke and “jumped” as the Supervisor was opening the door. The Supervisor observed that Grievant’s eyes were red and she had an imprint across her the right side of her face. This indicated to the Supervisor that Grievant had been sleeping until he opened the door. He asked Grievant, “Why are you sleeping?” Grievant did not answer. The Supervisor asked Grievant a second time why she was sleeping. Grievant responded, “I am tired. I work a lot.”

After discovering Grievant asleep, the Agency decided to have an audit of the cleanliness of the Building where Grievant worked. On August 9, 2017, a Quality Assurance inspection was conducted of the Building. The auditors took pictures of problematic areas. They found what they considered to be excessive dust and dirt buildup on baseboards, trim, and in corners as well as debris and cobwebs.

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.”³ 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 Written Notice -- Sleeping

Sleeping during work hours is a Group III offense.⁴ Grievant denied being asleep on August 8, 2017. At 12:17 p.m., Grievant was in the breakroom when she should have been working. The Supervisor opened the door and observed Grievant seated, leaning forward with the side of her face resting on her arm. When she awoke, her eyes were red which is consistent with someone sleeping. She had an imprint on the right side of her face suggesting she had been resting her head on her arm for more than a brief period of time. The Agency has presented sufficient evidence to support the

² One witness testified the door lock was “loud.”

³ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ See, Attachment A, DHRM Policy 1.60.

issuance of a Group III Written Notice for sleeping during work hours. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that when the Supervisor knocked on the door, she opened the door. She asserted that the Supervisor was lying regarding observing her being asleep. Grievant's arguments are not persuasive. The Supervisor's testimony was credible. His testimony was consistent with someone who observed Grievant sleeping in the breakroom. Grievant's lunch period ended at 11:30 a.m. She did not obtain permission to vary her schedule and, thus, should have returned to work at 11:30 a.m. The Supervisor went to the Building at 11:50 a.m. but did not observe Grievant working. There was no reason for Grievant to remain in the breakroom after lunch break. If Grievant had been working, the Supervisor would have seen her working for the approximately half hour he was in the Building. The Supervisor had a key to open the locked breakroom door. It is less likely that the Supervisor would knock on the door to allow Grievant to open the door, than use his key to unlock the door to open it.

Group II Written Notice for Unsatisfactory Performance

The Agency presented pictures of Grievant's poor work performance. The evidence showed that several of the pictures were in areas with difficult access for employees working in the Building. The Building is old and looks "dingy". Grievant presented evidence showing that employees working in the Building felt that Grievant properly cleaned the building and they disagreed that the pictures showed inadequate cleaning. Based on the evidence presented it is equally likely that Grievant failed to properly clean her Building as it is that she properly cleaned her Building. Since the Agency has not established that it is more likely than not that Grievant's work performance was unsatisfactory, the Group II Written Notice must be reversed.

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 rules established by the Department of Human Resource Management"⁵ 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.

⁵ *Va. Code § 2.2-3005.*

Grievant presented testimony of employees working in the Building who strongly opposed Grievant's removal. Although Grievant may have been beloved by an important group of her customers, Grievant's otherwise satisfactory work performance was not a basis to mitigate disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the Group III Written Notice.

Grievant argued that the Agency acted improperly when removing her from employment. She argued that she was spoken to in a harsh manner and the police were called to escort her from the property. To the extent, Grievant's perception is correct, it would not form a basis to alter the outcome of this case.

Grievant argued that the Agency harassed her. Agencies are prohibited from discriminating against employees based on race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability. No credible evidence was presented to show that Grievant was discriminated against because of a protected status.

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**. The Agency's issuance to the Grievant of a Group II Written Notice is **rescinded**.

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.

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.