

Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 12/13/17; Decision Issued: 12/19/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11114; Outcome: No Relief – Agency Upheld;  
**Administrative Review: Ruling Request received 01/05/18; Outcome: Request denied - untimely.**



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11114**

Hearing Date: December 13, 2017  
Decision Issued: December 19, 2017

**PROCEDURAL HISTORY**

On September 30, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping during work hours.

On October 6, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 6, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On December 13, 2017, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
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 Behavioral Health and Developmental Services employed Grievant as a Safety Security and Treatment Technician at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked in a safety sensitive position. Agency policy required that he notify his supervisor before beginning work that he was taking medication that might interfere with the safe and efficient performance of his duties. Grievant did not notify any supervisor that he was taking medications that might affect his work performance on September 21, 2017.

On September 21, 2017, Grievant was working in the Facility's Behavioral Unit. He was required to complete checks every 15 minutes of residents placed in the Behavioral Unit. A camera recorded activity in the Behavioral Unit.

On September 21, 2017, an employee working in another part of the Facility watched a monitor displaying the images from the camera in the Behavioral Unit. The employee became concerned about Grievant's inattentiveness. He notified the Facility Director who looked at the monitor and observed Grievant motionless and inattentive. The Facility Director began walking towards the Behavioral Unit. When he reached the Behavioral Unit, an employee working in a control booth unlocked the door for the

Facility Director who then entered the Behavioral Unit. Grievant did not realize the Facility Director had entered the Behavioral Unit. The door to the Behavioral Unit closed and made a sound that Grievant would have heard if he was awake. Grievant did not respond to the sound of the door closing. The Facility Manager walked to Grievant and stood a few inches away from Grievant. If Grievant had been awake, he would have realized the Facility Director was standing next to him. The Facility Manager observed Grievant seated in a chair. Grievant was breathing but otherwise motionless. The Facility Manager concluded Grievant was asleep.

The Agency presented a video of Grievant on September 21, 2017 from approximately 8:12 a.m. until 8:16 a.m. The video showed Grievant seated with his hands in his jacket pockets. His head was tilted to the right. His right leg was extended and his left foot was under the front of the chair. At approximately 8:14 a.m., Grievant extended his left leg but otherwise remained motionless except for breathing. The video is consistent with someone who was asleep.

### **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>1</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 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>2</sup> On September 21, 2017, Grievant fell asleep while working. 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, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that the Agency failed to present sufficient credible evidence to show he was asleep on September 21, 2017. For example, the Facility Manger did not see Grievant’s eyes and initially testified he did not know whether Grievant was alert. The Facility Manger testified he stood within a few inches of Grievant and believed Grievant was asleep. The video of Grievant was consistent with someone who was asleep. The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice for sleeping during work hours.

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

<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

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>3</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 contends the disciplinary action should be mitigated. He was taking medication that caused severe drowsiness. To the extent this is a mitigating circumstance, an aggravating circumstance also exists. Departmental Instruction 502 provides:

Any employee in a safety sensitive position shall notify his supervisor before beginning work when he is taking any medication or drug (prescription or non-prescription) if the prescription or packaging indicates that it may interfere with the safe and efficient performance of duties ....

Grievant did not notify a supervisor prior the beginning of his shift on September 21, 2017 that he was taking medication that might affect his work performance. Grievant’s failure to do so is an aggravating circumstance countering the mitigating circumstance. Accordingly, there is no basis to reduce the disciplinary action under the Rules for Conducting Grievance Hearings.

## 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 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:

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<sup>3</sup> Va. Code § 2.2-3005.

Office of Equal Employment and 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 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.<sup>[1]</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.