COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11584

Hearing Date: October 26, 2020
Decision Issued: October 28, 2020

PROCEDURAL HISTORY

On July 9, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping during working hours.

On July 31, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On August 17, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 26, 2020, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Representatives
Agency Party Designee
Agency's 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 Department of Corrections employed Grievant as a Commercial Driver at one of its facilities. He worked as a commercial truck driver for approximately five years. Grievant had prior active disciplinary action. Grievant received a Group II Written Notice on March 26, 2019. Grievant received a Group II Written Notice on July 9, 2020.

Grievant suffered an injury preventing from performing his duties as a Commercial Driver. Grievant was released to return to work with restrictions to perform light duty work. He was taking medication which caused drowsiness. On April 6, 2020, his prescription was changed to medication that did not make him drowsy.

As part of his light duty work, Grievant worked at a security desk at the Building entrance. His shift began at 5:30 a.m. and ended at 2 p.m. He was responsible for observing employees sign-in as they entered the Building, taking their temperatures, and asking them several health screening questions. He did not have other employees working near him.

On June 11, 2020, the Facility Head approached the security desk and observed Grievant sleeping. His eyes were closed and his head was back as he sat in his chair which was pushed away from the desk. The Facility Head said Grievant's first name several times, but he did not respond. She banged on the desk in front of Grievant as she called his name. Grievant awoke in response to the noise. The Facility Head told

Grievant that "this is unacceptable." She told him if he was caught asleep again there would be disciplinary action issued to him.

On June 16, 2020 at approximately 8:30 a.m., Ms. O approached the security desk to sign-in. Grievant was seated in a chair. His chair was pushed back from the security desk. He was leaning back in the chair with his eyes closed. Ms. O observed Grievant sleeping. Ms. O walked to the desk and stood there for several seconds. She lightly hit her hand on the desk and Grievant awoke.

On June 17, 2020 at approximately 10:30 a.m., Ms. M approached Grievant at the security desk. She observed him with his head down to the side and his eyes closed. Ms. M was startled by what she saw. Grievant was asleep. Ms. M called Grievant by his first name several times, but Grievant did not awaken. She raised her voice as she repeated his name. After a few minutes, Ms. M knocked on the table and Grievant awoke.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force." Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[1]

"Sleeping during working hours" is a Group III offense.[2] On June 11, 2020, Grievant was warned that his behavior was "unacceptable." He fell asleep again on June 16, 2020 and June 17, 2020 thereby justifying the Agency's decision to issue Grievant 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 he was allowed a 15 minute break "to rest my eyes" and that he was not asleep. If Grievant simply had been resting his eyes, he would have responded immediately when his name was called by the Facility Head, Ms. O, and Ms. M. Grievant was not simply resting his eyes.

Grievant suffers from severe sleep apnea. He described his snoring as "super loud." He argued that if he was asleep, he would have been snoring. Ms. M and Ms. O

[1] See, Virginia Department of Corrections Operating Procedure 135.1.

[2] See, Virginia Department of Corrections Operating Procedure 135.1.

did not hear Grievant snoring. Grievant asserted he could not have been sleeping because he was not snoring.

There are different levels of sleep. Although Grievant may not have been soundly asleep, his behavior showed that he was asleep. His eyes were closed, his head was slumped, and he did not respond when his name was called repeatedly. The conclusions of the Facility Head, Ms. O, and Ms. M were supported by the evidence. In any event, the Facility Head's counseling on June 11, 2020 amounted to an instruction that he could not remain at this desk with his eyes closed and not be responsive to someone speaking to him. Grievant repeated that prohibited behavior on June 16, 2020 and June 17, 2020.

Grievant argued he suffered from sleep apnea which is a disability under the Americans with Disability Act. He asserted he was denied the opportunity to seek reasonable accommodation. Grievant's argument does not affect the outcome of this case. An agency's failure to provide reasonable accommodation[3] does not prevent the Agency from taking disciplinary action. In addition, permitting Grievant to sleep while working at a security post likely would not be a reasonable accommodation for a disability.

Grievant argued he was entitled to take breaks and that he was resting his eyes during his breaks. This argument appears to be a rationalization of Grievant's behavior. Grievant did not tell, the Facility Head, Ms. O, or Ms. M that he was on break when they confronted him. Breaks are typically authorized by a supervisor. There is no reason to believe any supervisor authorized Grievant to take breaks other than to use the restroom or to have lunch.

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.

[3] It is not clear that the Agency was aware of Grievant's need for accommodation.

[4] Va. Code § 2.2-3005.

Grievant argued that the Agency inconsistently applied disciplinary action. On June 14, 2017, Mr. S received a Group I Written Notice for sleeping during work hours. The Agency mitigated the offense to a Group I Written Notice because of his overall performance and it was his first occurrence. On October 17, 2017, Mr. H received a written counseling for sleeping on the job. He initially received a Group I Written Notice but submitted a document from his physician explaining that his medical condition may have led him to fall asleep or pass out. The Agency determined that Mr. H had not been given an Employee Health Screening document so it decided to issue him a written counseling. Grievant also had not been given an Employee Health Screening document.

The Hearing Officer cannot conclude that the Agency inconsistently applied disciplinary action.[5] The Hearing Officer does not believe the Agency singled-out Grievant for disciplinary action. Grievant was asleep on June 11, 2020. This was his first occurrence of sleeping and the Warden gave him a verbal counseling instead of issuing a Written Notice. Grievant was treated less severely than Mr. S who received a Group I Written Notice for his first occurrence. Only after Grievant fell asleep two more times did the Agency take disciplinary action. The corrective action taken against Mr. S and Mr. H was issued by a former supervisor and not by the current Facility Head. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant alleged the Agency retaliated against him for filing a grievance and other protected activity. He described himself as being "looked at as a whistleblower." Grievant contacted OSHA in March 2020. He informed the Facility Head that he believed the Facility was acting contrary to law. The Facility Head investigated the matter and believed the Agency was acting in accordance with law.

Grievant did not establish that the Agency retaliated against him. The Facility Head denied retaliating against Grievant because of his protected activities. The Facility Head's denial was credible. If the Facility Head wanted to retaliate against Grievant, she could have taken disciplinary action Grievant the first time she observed him sleeping. Instead, she gave him a warning. Grievant engaged in protected activity. Grievant suffered an adverse employment action because he received disciplinary action. Grievant has not established a causal connection between his protected action and the adverse employment action.

Grievant argued he was not given sufficient time to obtain documents to present to the Agency as part of the Agency's due process. The Hearing Officer can assume for the sake of argument that the Grievant's assertion is true and the outcome of this case is not changed. Defects in procedure due process by the Agency are cured by the

[5] Grievant also asserted that he was treated differently because of his race. Mr. S and Mr. H are of a different race than Grievant. No credible evidence was presented to show that the Agency's disciplinary action against Grievant was based on his race.

hearing process. Grievant had the opportunity to present to the Hearing Officer any documents or evidence that the Agency failed to accept.

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

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].

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

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer