

Issue: Group III Written Notice (sleeping); Hearing Date: 08/19/02; Decision Date: 09/10/02; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5501



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5501**

Hearing Date: August 19, 2002  
Decision Issued: September 10, 2002

**PROCEDURAL HISTORY**

On May 20, 2002, Grievant was issued a Group III Written Notice of disciplinary action for:

*Sleeping/napping during an ID Team Meeting on April 25, 2002.*

On June 7, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On July 30, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 19, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Representative  
Facility Risk Manager  
Facility Director  
Assistant Program Manager

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action.

## **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. 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 Mental Health Mental Retardation and Substance Abuse Services employs Grievant as a Social Worker. She has been employed by the Agency for approximately 23 years.

Agency staff provide ongoing mental health services to patients residing at the Facility. These patients are referred to as clients. Clients receive services in accordance with a mental health treatment plan. An Interdisciplinary Team consisting of mental health specialists and staff participates in the development of an appropriate treatment plan for each client. Interdisciplinary teams meet periodically to assess each client's progress and needs.

The Client resides at the Agency's Facility. He suffered three serious injuries in a six-week period. Agency staff were concerned regarding how to properly care for the Client and a meeting of the Client's Interdisciplinary Team was called.

On April 25, 2002, Grievant attended an Interdisciplinary Team meeting concerning the Client. Numerous aspects of the Client's treatment were discussed during the meeting. Grievant's function as part of the team was to serve as a liaison between the team and the Client's family. She was to inform the family of the team's considerations and conclusions. During the meeting, Grievant's head nodded, her eyes closed, and she fell asleep for approximately 20 minutes.

Grievant suffers from fibromyalgia and low back pain with some degenerative joint disease in her spine.<sup>1</sup> She had been on chronic medications including MS Contin

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<sup>1</sup> Grievant also suffers from hypothyroidism. A letter from Grievant's doctor does not expressly state that hypothyroidism causes Grievant to be sleepy. See Grievant Exhibit 2. Grievant contends there is a

for years and has tolerated these very well. Occasionally, she gets tired due to her fibromyalgia. Falling asleep is a natural progression of her disease.<sup>2</sup>

Under the Facility's practice, when an employee falls asleep during work hours, if the employee is not supervising a client, the employee receives a Group III Written Notice with ten workday suspension. Grievant received a Group III Written Notice without suspension because the Agency chose to mitigate the discipline against her.

### **CONCLUSIONS OF LAW AND POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).<sup>3</sup> Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

"Sleeping during work hours" is a Group III offense.<sup>4</sup> It is not necessary for the Agency to show that Grievant intended to fall asleep in order to establish a Group III offense for sleeping. Grievant was sleeping during work hours thereby justifying the issuance of a Group III offense.

Grievant contends she was not completely asleep. Based on the evidence, presented the Hearing Officer finds that Grievant was soundly asleep.

Grievant contends the disciplinary action against her should be mitigated. Corrective action may be reduced based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an employee's long service with a history of otherwise satisfactory work performance.<sup>5</sup>

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connection between her thyroid hormone levels and whether she becomes sleepy. See Grievant Exhibit 4.

<sup>2</sup> Grievant Exhibit 1.

<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>4</sup> DHRM § 1.60(V)(B)(3)(h).

<sup>5</sup> DHRM § 1.60(VII)(C)(1).

The Agency contends the Hearing Officer lacks the authority to mitigate disciplinary action. This argument is unfounded.<sup>6</sup> Even though the Hearing Officer has

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<sup>6</sup> *Hearing Officer Powers and Duties.* Va. Code § 2.2-3005(C) states, “Hearing officers shall have the following duties and powers:

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6. For those issues qualified for a hearing, order appropriate remedies. Relief may include reinstatement, back pay, full reinstatement of fringe benefits and seniority rights, or any combination of these remedies; and
7. Take other actions as necessary or specified in the grievance procedure.

When mitigating circumstances exist, ordering the reduction of discipline is an appropriate remedy.

*Recent Legislative Expansion of Powers.* The General Assembly intended Hearing Officers to have broad enforceable powers regarding grievance hearings. In DEQ v. Wright, 256 Va. 236 (1998), the Supreme Court of Virginia refused to implement a hearing officer’s recommendation that the employee be reinstated to his former supervisory position. The Court reasoned that a hearing officer recommendation is not a “decision” within the meaning of Va. Code § 2.1-116.07(D) which permitted either party to a grievance to petition the Circuit Court for an order implementing the hearing officer’s decision. In 2000, the General Assembly deleted Subsection D of Va. Code 2.1-116.07 and added Va. Code § 2.1-116.07:1(C) stating:

Either party may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final decision **or recommendation** of a hearing officer. (Emphasis added).

There are few restrictions on what a Hearing Officer can recommend. By permitting courts to enforce a Hearing Officer’s recommendation, the General Assembly confirmed the broad authority given to Hearing Officers. If a Hearing Officer’s recommendations are enforceable in the courts, then surely a Hearing Officer’s order to mitigate would be enforceable.

*State Policy Authorizes Hearing Officers to Mitigate.* DHRM Policy 1.60 sets forth the *Standards of Conduct* governing employee behavior. Section IX(B) states, “A hearing officer may uphold, **modify**, or reverse disciplinary action taken by an agency so long as the [hearing officer’s] decision is consistent with written policy.” (Emphasis added). Mitigating discipline is a modification of discipline and is authorized by the *Standards of Conduct*.

The Director of the Department of Human Resource Management (DHRM) has “the final authority to establish and interpret personnel policies and procedures and shall have the authority to ensure full compliance with such policies.” Va. Code § 2.2-1201(13). A court may not interfere with an interpretation of personnel policies made by DHRM. Murray v. Stokes, 237 Va. 653, 657 (1989). DHRM has confirmed a Hearing Officer’s authority to mitigate in one of its annotations to the *Standards of Conduct*:

A panel correctly viewed the lack of counseling before the issuance of a Group II Written Notice as a mitigating factor justifying reduction of disciplinary action to a Group I Written Notice. (Department of Personnel and Training Interpretation, January 22, 1992.)

*EDR Director Authorizes Mitigation.* Under the direction and control of the Governor, the Director of the Department of Employment Dispute Resolution is required to: (1) establish a grievance procedure, (2) establish a process to select hearing officers, (3) train hearing officers, and (4) adopt rules for grievance hearings. In Compliance Ruling 2001-162 (citations omitted), the EDR Director discussed the role of the Hearing Officer as follows:

the authority to mitigate, mitigation is not appropriate in this case. Grievant had adequate notice of her obligation to remain awake during work hours, the Agency has consistently applied its disciplinary action against employees sleeping, and the Agency has not acted out of any improper motive. Although Grievant may have limited control over when she feels sleepy, that fact alone is not sufficient to mitigate the discipline against her.

Grievant contends she has a disability and is being discriminated against based on her disability. She contends she is entitled to reasonable accommodations that would enable her to avoid disciplinary action. Grievant believes having her co-workers awaken her is a reasonable accommodation.

Whether Grievant has a disability as defined by the Americans with Disabilities Act is a separate issue outside the scope of this disciplinary proceeding. Grievant first sought accommodation only after the disciplinary action was taken. The Agency is independently reviewing her disability request. If Grievant is dissatisfied with the Agency's actions regarding her request, she may wish to pursue a separate grievance or other means available to her. Within the context of this grievance hearing, however, Grievant's allegation of discrimination against her because of her disability is unsupported by the evidence.

Grievant's dilemma is understandable. She desires to be an excellent performer at her job, but because of her physical condition, she has limited control over when she becomes sleepy. The Agency has demonstrated that it cannot properly conduct its business with key employees sleeping. Grievant's services are essential to the Agency's operations.

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Hearing officers are authorized to make "findings of fact as to the material issues in the case" and to determine the grievance based "on the material issues and grounds in the record for those findings." Further, "[i]n cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the level of discipline administered was too severe, the hearing officer may reduce the discipline." Mitigating factors include, but are not limited to, "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity" and "an employee's long service or otherwise satisfactory work performance." Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

The EDR Director's Ruling confirms that a Hearing Officer has the authority to mitigate discipline.

*Virginia Supreme Court.* The Virginia Supreme Court has upheld wide discretion by hearing panels. In *Angle v. Overton*, 235 Va. 103 (1988), a hearing panel instructed the employer to restore a demoted employee to his former rank but with an administrative decrease in salary. Essentially, the panel mitigated the employer's discipline. The Virginia Supreme Court required implementation of the panel decision. *Id.* at 107.



## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **upheld**.

## APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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>7</sup>

[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]

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



