

Issue: Group III Written Notice with termination (sleeping while on duty); Hearing Date: 06/25/03; Hearing Date: 06/26/03; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 5750; **Administrative Review: EDR Ruling Requested received 07/03/03; EDR Ruling dated 08/12/03; Outcome: HO ordered to modify decision clarifying reasoning behind fact-finding and its relevancy to issues [Ruling No. 2003-130]**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5750

Hearing Date: June 25, 2003
Decision Issued: June 26, 2003

PROCEDURAL HISTORY

On April 9, 2003 , Grievant was issued a Group III Written Notice of disciplinary action with removal for "sleeping on the job." On April 16, 2003, 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 June 9, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 25, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Agency Party Designee
Agency Representative

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for sleeping during work hours.

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 Virginia Department of Transportation employed Grievant as a Bridge Safety Inspector until his removal effective April 9, 2003. He had been working for the Agency for approximately five years. On November 1, 2002, Grievant received a Group III Written Notice for falsifying an official State document.¹

On Wednesday, February 26, 2003 at approximately 1:15 p.m., the Supervisor observed Grievant sleeping at his desk. On two earlier occasions, the Supervisor had observed Grievant sleeping during work hours. The Supervisor woke up Grievant and advise Grievant he should not be sleeping during working hours.

Grievant worked in a safety sensitive job. Falling asleep while conducting Bridge safety inspections could endanger Grievant and other Agency employees.

CONCLUSIONS OF 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).² 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.³ It is not necessary for the Agency to show that Grievant intended to fall asleep in order to establish a Group III

¹ Agency Exhibit 8.

² The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

³ DHRM § 1.60(V)(B)(3)(h).

offense for sleeping. Grievant was sleeping during work hours thereby justifying the issuance of a Group III Written Notice with removal.

Grievant contends that the disciplinary action taken against him should be mitigated because he fell asleep due to be medications he was taking to control a heart condition. Grievant contends that by adjusting his medications he can remain awake. The Supervisor began supervising Grievant approximately one year ago. The evidence showed that Grievant had been advised on two prior occasions not to fall asleep. The Supervisor testified that other Agency staff had observed Grievant sleeping several times over the course of his employment with the Agency. Grievant knew or should have known that he had a problem with remaining awake during work hours and should have sought a solution prior to the Agency having to take disciplinary action against him. No mitigating circumstances exist to justify reducing the disciplinary action taken against Grievant.

Grievant contends that the Agency was aware of his medical problem. The evidence, however, showed that the Agency became aware of Grievant's problem only after the Agency initiated disciplinary action against Grievant.

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 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.⁴

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5750-R

Clarification Decision Issued: October 31, 2003

CLARIFICATION DECISION

The EDR Director ordered⁵ the Hearing Officer to clarify his decision regarding this grievance. The EDR Director states:

The grievant asserts further that the hearing officer erred in concluding that management was unaware of the grievant's medical condition prior to the February 26, 2003 sleeping incident. On the issue, the hearing decision simply states:

Grievant contends that the Agency was aware of his medical problem. The evidence, however, showed that the Agency became aware of Grievant's problem only after the Agency initiated disciplinary action against the Grievant.⁶

We note that a hearing officer is not necessarily limited to considering only information that was available to the agency at the time it took action against the grievant. In fact, this Department deems it essential for a hearing officer to consider all relevant and material facts in making his determinations, regardless of when those facts were discovered by management. Here, the decision provides no explanation as to the relevancy or materiality of the above-cited fact finding. Thus, it is unclear from the hearing officer's decision whether he confined himself to only those facts available to the agency at the time it issued the discipline. [Footnote omitted] For this reason, the hearing officer is ordered to issue

⁵ See EDR Ruling #2003-130.

⁶ See Decision of Hearing Officer, Case Number 5750 issued June 26, 2003, page 4.

a modified decision clarifying the reasoning behind the above fact-finding, as well as its relevancy and materiality to the issues in this grievance. As always, the hearing officer is granted the sole authority to weigh the evidence and make all determinations on findings of fact.

Discussion. Grievance hearing decisions are decided based upon the evidence presented to the Hearing Officer. After Grievant was notified on March 7, 2003 that he would be disciplined, Grievant replied to the Agency that his medical condition excused his sleeping. The Agency investigated Grievant's claim by contacting his doctor. After considering comments from Grievant's doctor, the Supervisor wrote Grievant a memorandum on April 8, 2003 stating in relevant part:

On April 4, 2003, you submitted this information from [Grievant's doctor], who indicated you are fully capable of performing all aspects of your job and did not indicate any concern or consideration of your condition and/or medication.

After reviewing all information provided, I have taken into consideration your circumstances and mitigating factors and will not suspend or separate you in relation to this written notice. However, I do feel as though your behavior is in direct violation of the standards of conduct and since you have been counseled in the past regarding this issue, believe you understood the expectations and direction given. Therefore, I am issuing you a Group III written notice for sleeping on the job.

After considering all of the evidence presented at the hearing regardless of the date any documents were drafted, the Hearing Officer finds that (1) the above statement is the most credible assessment of Grievant's medical condition and its affect on his ability to perform his job, (2) the Agency properly mitigated the disciplinary action against Grievant, and (3) removing Grievant based on the accumulation of disciplinary action was supported by the evidence.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer