

Issues: Group II Written Notice (failure to report to work without proper notification), Group III Written Notice with suspension (sleeping during work hours), misapplication of State hiring policies, retaliation for engaging in a protected activity; Hearing Date: 03/07/05; Decision Issued: 03/22/05; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 7982, 7983, 8009; **Administrative Review: EDR Ruling Request received 04/08/05; Outcome: Request untimely, request denied; Administrative Review: DHRM Ruling Request received 04/08/05; Outcome: Request untimely, request denied.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7982 / 7983 / 8009

Hearing Date: March 7, 2005
Decision Issued: March 22, 2005

PROCEDURAL HISTORY

On August 26, 2004, Grievant was issued a Group II Written Notice of disciplinary action for "Failure to report to work as scheduled without proper notification to supervisor." He also received a Group III Written Notice with suspension for sleeping during work hours. Grievant applied for the position of Technical Services Administrator. Another person was selected for the position.

Grievant timely filed three grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and he requested hearings. The EDR Director issued Ruling Number 2004-923 and Ruling Number 2004-940 to consolidate and qualify these grievances. On February 15, 2005, the Department of Employment Dispute Resolution assigned this consolidated appeal to the Hearing Officer. On March 7, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee

ISSUES

1. Whether Grievant should receive a Group II Written Notice of disciplinary action for failure to report to work without proper notification.
2. Whether Grievant should receive a Group III Written Notice with suspension for sleeping during work hours.
3. Whether the Agency misapplied State hiring policies.
4. Whether the Agency has retaliated against Grievant for engaging in a protected activity.

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 burden of proof is on Grievant to show by a preponderance of the evidence that the Agency acted contrary to policy and engaged in retaliation. 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 Health employs Grievant as a Field Services Engineer. He reports to the Division Director. Grievant has been working for the Agency for approximately 18 years without prior disciplinary action taken against him. Grievant is well-respected for his technical expertise.

In order to take leave, an employee working in Grievant’s division must notify the Division Director prior to taking leave. Submitting a leave slip to the Division Director is one method of giving notification of planned leave. If the Division Director does not want the employee to take leave, he would notify the employee. Otherwise, the employee could take leave.¹

¹ No evidence was presented showing the Division Director closely scrutinized employee leave requests or frequently disallowed requested leave.

Grievant planned to take annual leave for a two week period beginning June 25, 2004 through July 9, 2004.² Grievant filled out the necessary leave form on June 24, 2004 and put it in the Division Director's inbox on his desk. The Division Director discovered the leave form at 4:30 p.m. on June 24, 2004. Prior to this, Grievant had not given the Division Director any notification of his intended leave.³ The Division Director signed Grievant's leave slip on June 25, 2004 thereby approving Grievant's leave.⁴ On June 24, 2004, Grievant sent emails to field office staff with whom he regularly interacted to inform them that he would be away from the office until July 12, 2004 and instructed them to contact other employees in Technical Services if they needed assistance.⁵

The Division uses a display calendar for employees to record their absences from the office. On June 25, 2004, Grievant called a co-worker and asked her to write on the display calendar that Grievant would be out of the office for a two week period. She did so thereby permitting others in the office to know that Grievant was on leave.

Over the past several years, Grievant's co-workers have observed him asleep in his office. One co-worker testified it was not uncommon to see Grievant take a morning and an afternoon nap at his desk. Grievant's prior supervisor spoke with Grievant numerous times about the importance of getting up and moving around in order to avoid becoming sleepy. On January 8, 2004, Grievant received a due process memorandum from an Agency manager informing him:

I received several reports from others who observed you and I have personally observed you sleeping on the job on several occasions between April 2003 – January 9, 2004. This is a Group III offense under the Standards of Conduct.⁶

Grievant prefers to work seated with his feet up on the desk. He often must read lengthy documents and sits comfortably while doing so. On July 29, 2004 at approximately 9 a.m., Grievant closed his eyes and fell asleep as he sat with his feet on his desk. At least three employees observed him sleeping.

² Grievant customarily took two week vacations without objection by the Agency.

³ A co-worker, Ms. KS, mentioned to the Division Director that Grievant intended to take leave. She did not inform the Division Director of the dates of Grievant's planned leave. The Division Director assumed Grievant's plans may not have been finalized and that he would notify the Division Director once he was ready to take leave.

⁴ Agency Exhibit 3.

⁵ Approximately 3 days prior to taking leave, Grievant expressed his desire to take leave to Ms. KS. Ms. KS did not know when Grievant would begin his leave. This suggests Grievant either did not tell Ms. KS when he would begin leave or that he had not decided when to start his leave.

⁶ Agency Exhibit 5.

Grievant applied for the position of Technical Services Administrator. He was selected for an interview before a panel of three employees. Following the interviews conducted on January 30, 2005, the panel selected another candidate. Grievant disagreed with that decision and filed a grievance.

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).⁷ 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).

Annual Leave

“Inadequate or unsatisfactory work performance” is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

By submitting his leave slip to Division Director on June 24, 2004, Grievant notified his supervisor of his planned leave. Grievant waited until the last minute to notify his supervisor of his intended leave. A two week vacation is rarely unplanned. Grievant should have submitted his leave slip to the Division Director sooner than the day before beginning his leave. By failing to do so, Grievant’s work performance was unsatisfactory thereby justifying the issuance of a Group I Written Notice.

The Agency contends Grievant failed to report to work as scheduled without proper notification to supervisor. Grievant did not fail to report to work as scheduled. He was on approved annual leave beginning June 25, 2004. He was not obligated to report to work during his leave period. The “proper” method of giving the Division Director notice of intended leave was to submit a leave slip.⁸ Grievant used this method

⁷ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁸ On April 5, 2003, Grievant’s prior supervisor sent Grievant and two other employees an email stating, “If you need to take a day off, change flex days, go out in the field, etc. get concurrence from your supervisor **in advance**.” Although the email requires “concurrence” the Agency’s practice did not require any formal acknowledgement by a supervisor before an employee could take leave. For example, the Division Director did not announce to an employee seeking leave “your leave is approved” or permit an employee to take leave only after the Division Director had signed the employee’s leave slip and returned it to the employee.

to inform the Division Director of his planned leave.⁹ Grievant submitted his leave slip prior to taking leave. Grievant gave his supervisor proper notice of his intended leave. The Division Director knew on June 24, 2004 that Grievant would not be coming to work beginning June 25, 2004. Grievant's poor behavior was that he did not allow enough time between submitting his leave slip and the beginning of his annual leave. The Division Director was denied the opportunity to evaluate whether to reject Grievant's planned leave based on the division's business needs. Grievant's behavior rises only to the level of a Group I offense.

Sleeping

"Sleeping during work hours" is a Group III offense.¹⁰ On July 29, 2004, Grievant fell asleep during work hours while in his office. The Agency has presented sufficient evidence to uphold its issuance of a Group III Written Notice.¹¹

Grievant contends that he should not be disciplined for sleeping because he was taking medication with a side effect of causing sleepiness. Grievant has worked with his medical provider and adjusted the medication. Although taking medication may explain why Grievant felt sleepy, it does not excuse his behavior. The Agency has given Grievant more than adequate notice that it will not permit him to sleep during working hours.¹²

Agency managers intended to discipline Grievant by giving him a five workday suspension.¹³ After deciding the number of days to suspend Grievant, the Agency managers spoke with Capitol Police who said that it would be advisable for the suspension to take place immediately after the Agency presented Grievant with the Written Notice. Rather than revising the beginning and ending dates on the Written Notice, the Agency made the beginning date one day earlier. The result was a six day suspension. An unintended consequence of having the suspension end on September 3, 2004 was that Grievant did not receive compensation for a paid holiday on September 6, 2004. An employee may only be suspended for the purpose of disciplinary action and not for the purpose of addressing security concerns.

⁹ The Agency's leave taking process does not appear complex. Grievant takes annual leave as he wishes but must notify his supervisor of the leave and must properly account for the leave to ensure that he does not take more leave than he has accrued.

¹⁰ DHRM Policy 1.60(V)(B)(3)(h).

¹¹ Grievant contends he was not sleeping but had merely "dozed off." The Hearing Officer finds no distinction under the Standards of Conduct between sleeping and dozing off.

¹² Grievant was advised to move around when he became sleepy. Instead, Grievant continued to sit with his feet on his desk in position that would likely make him relaxed and prone to becoming sleepy.

¹³ The Agency obtained a waiver from the Department of Human Resource Management permitting a suspension of less than a full week (Monday through Friday) period.

Accordingly, Grievant's suspension must be reduced to five workdays beginning immediately following the issuance of the Written Notice.

Hiring Policy

Grievant applied for the position of Technical Services Administrator but was not the successful candidate. In order for Grievant to prevail, he must establish that the Agency failed to comply with DHRM Policy 2.10, *Hiring*. No credible evidence was presented showing the Agency failed to comply with this policy.¹⁴ Grievant conceded he has not met his burden of proof regarding this issue. Accordingly, the Agency has not misapplied the *Hiring* policy.

Retaliation

Grievant contends the Agency has retaliated against him for engaging a protected activity. Although Grievant has engaged in protected activity such as filing a grievance, no credible evidence was presented establishing that the Agency took disciplinary action against Grievant because of his prior protected activities. The Agency did not retaliate against Grievant.¹⁵

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to report to work as scheduled without proper notification is **reduced** to a Group I Written Notice. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with six workday suspension for sleeping during work hours is **reduced** to a Group III Written Notice with a five workday suspension beginning on August 27, 2004. The Agency is ordered to provide the Grievant with **back pay** for the period of suspension exceeding five workdays less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue.¹⁶ Grievant's request for relief regarding DHRM's *Hiring* Policy is **denied**.

APPEAL RIGHTS

¹⁴ Grievant's alleged one of the panel members was involved in taking disciplinary action against him. DHRM Policy 2.10 does not preclude a panel member to be someone who has knowledge of an applicant's disciplinary history.

¹⁵ In addition, Grievant has not established that he was subject to a hostile work environment.

¹⁶ Grievant should receive back pay for any unpaid holidays that become paid holidays as the result of this decision.

You may file an administrative review request within **15 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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 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 15-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.¹⁷

[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].

¹⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer