

Issue: Termination (Formal Performance Improvement Counseling – sleeping on the job); Hearing Date: 04/26/06; Decision Issued: 05/02/06; Agency: UVA Health System; AHO: Carl Wilson Schmidt; Case No. 8318; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8318

Hearing Date: April 26, 2006
Decision Issued: May 2, 2006

PROCEDURAL HISTORY

On February 22, 2006, Grievant was issued a Formal Performance Improvement Counseling Form of disciplinary action with removal for sleeping during work hours on January 20, 2006 and January 23, 2006.

On February 27, 2006, 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 March 30, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 26, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Formal Performance Improvement Counseling Form?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy?
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. 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 University of Virginia Medical Center employed Grievant as an Interoperative Electrodiagnostic Technician. His job summary read:

Responsible for performing patient assessment, preparation and monitoring for electrodiagnostic surgical procedures using independent professional judgment. Operates, maintains and troubleshoots associated medical devices/equipment. Member of the health-care team functioning in the operating room, Epilepsy Monitoring Unit or EEG Unit along with various ICU settings (NNICU & PICU).¹

Grievant is highly regarded for his technical expertise.² No evidence of prior disciplinary action against Grievant was introduced during the hearing.

¹ Agency Exhibit 9.

² One of Grievant's references wrote, "[Grievant] is a conscientious, highly-skilled technician who constantly exhibits a positive attitude and engaging personality. My observations of [Grievant] demonstrate that he is the 'go to person' for neuro-monitoring at this Institution." See Grievant Exhibit 5.

On November 21, 2005, Grievant received a performance appraisal. His supervisor wrote, "[Grievant] has been observed to be asleep when he has been responsible for monitoring cases on several occasions." In response, Grievant wrote "my sleeping during cases will not happen again."³

On January 20, 2006, an anesthesiologist and Grievant were working in a hospital operating room participating in a surgery. The anesthesiologist had to leave unexpectedly. Dr. P was working in another part of the hospital when he learned that the anesthesiologist had to leave unexpectedly and another employee was to serve in his place. Dr. P walked to the operating room to gain assurance that the surgery was continuing without difficulty. Dr. P looked towards the corner of the room and observed Grievant seated at his workstation. Grievant's body posture was relaxed. Grievant was sitting back in his chair with the chair tilted backwards. His eyes were closed and his chin was angled upwards. Although Grievant was wearing a surgical mask, Dr. P could see that Grievant's mouth was open. Grievant was breathing calmly. After watching Grievant for several minutes, Dr. P concluded Grievant was sleeping. Dr. P was standing approximately eight feet from Grievant when he observed Grievant sleeping.

On January 23, 2006, Dr. C and Grievant were working in a hospital operating room participating in surgery. Dr. C observed Grievant sleeping at his workstation. Dr. C paged Dr. P so that Dr. P could come to the operating room and observe Grievant sleeping. Dr. P walked upstairs to the operating room and entered. While standing approximately six feet from Grievant, Dr. P watched Grievant for several minutes. Grievant was sitting in a relaxed position with his feet up and head back. His eyes were closed and mouth was open. Grievant was asleep. The Operating Room Nurse also observed Grievant sleeping.

CONCLUSIONS OF POLICY

University of Virginia Medical Center Policy #701, *Employee Rights and Responsibilities*, sets forth the Agency's Standards of Conduct governing employee behavior. Employees engaging in serious misconduct may be removed from employment without prior counseling.

"Sleeping, or giving the appearance of sleeping, during working hours," is serious misconduct under the Agency's Standards of Conduct. Grievant was sleeping during work hours on January 20, 2006 and January 23, 2006. The Agency has presented sufficient evidence to support its issuance of disciplinary action against Grievant for serious misconduct. Grievant may be removed from employment without prior counseling because the Agency has established he engaged in serious misconduct.

³ Agency Exhibit 9. Grievant testified he fell asleep on one occasion because he had been working many hours of overtime.

Grievant contends he was not asleep on January 20, 2006 or January 23, 2006. He argues Dr. P's dislike of Grievant influenced Dr. P's conclusion that Grievant was asleep. Grievant's argument fails for two reasons. First, Dr. P's testimony was credible. Second, the Operating Room Nurse also observed Grievant asleep. She had no conflict with Grievant and no motive to misrepresent what she observed.

Grievant argues he could not have an asleep because when he is asleep he snores so loudly that anyone nearby would hear him. Since no one heard him snoring loudly he could not have an asleep, according to Grievant. This argument fails because, as Dr. P testified, there are several levels of asleep. Grievant was asleep but not at a level where he would snore loudly. In addition, the Operating Room Nurse testified she heard some snoring by Grievant, although the snoring did not become loud.

Grievant argues that neither the surgeon on January 20, 2006 nor the surgeon on January 23, 2006 observed Grievant sleeping. Neither surgeon complained about Grievant's work performance. Both surgeons considered Grievant to be highly skilled and a valuable member of a surgical team. Grievant's argument does not provide a basis to reverse the disciplinary action. Neither surgeon was in a position with a direct line of sight toward Grievant. Both had their backs towards Grievant. The surgeons were working on very complicated surgeries that required their full attention. Unless Grievant attempted to gain a surgeon's attention or the surgeon required a response from Grievant, the surgeons would not be aware of whether Grievant was awake or sleeping. Furthermore, it is not necessary for the Agency to establish that Grievant's sleeping affected his work performance.

Grievant contends that the Agency's objective was to remove him from employment to avoid incurring excessive overtime costs. In November 2005, the Agency began paying Grievant (and others in his position) overtime pay. Because Grievant worked many hours of overtime, his cost to the Agency increased significantly. The Agency's evidence refutes Grievant's argument. As Grievant's Department transitioned to paying him overtime, Department managers sought and received additional funding to pay Grievant's expected costs. The Agency did not remove Grievant from employment because of its additional overtime expenditures.

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 Employment Dispute Resolution..."⁴ Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business

⁴ *Va. Code § 2.2-3005.*

judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Formal Performance Improvement Counseling Form with removal is **upheld**.

APPEAL RIGHTS

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 all of your appeals to the other party and to the EDR Director. 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.⁵

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.