

Issue: Group III Written Notice with suspension (sleeping during work hours); Hearing Date: 12/14/06; Decision Issued: 12/18/06; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8472; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8472

Hearing Date: December 14, 2006
Decision Issued: December 18, 2006

PROCEDURAL HISTORY

On September 20, 2006, Grievant was issued a Group III Written Notice of disciplinary action with a ten workday suspension for sleeping during work hours. On October 20, 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 November 16, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 12, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUE

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. 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 employs Grievant as a Bridge Tunnel Patroller at one of its Facilities. One of his duties includes being stationed in a control booth from which he can observe and open and close gates permitting vehicles to enter the Facility.

At approximately 8 p.m. on September 11, 2006, the Traffic Controller was watching the display of one of the close circuit cameras he operated and observed Grievant for a few seconds. Grievant was seated inside a control booth with windows. Grievant was not attentive so the Traffic Controller radioed Grievant and told Grievant to walk around the area. Grievant did so.

The Traffic Control Supervisor (TCS) overheard the comments the Traffic Controller made to Grievant over the radio. The Traffic Control Supervisor called the Traffic Controller and asked what was going on. The Traffic Controller told the TCS that Grievant appeared asleep. The TCS told the Traffic Controller not to wake up Grievant again and let Grievant get caught by someone else.

The Traffic Controller stepped away from his post to take a break. Another employee, Ms. O, began watching the cameras. Ms. O observed Grievant appear to be sleeping and told the Traffic Controller. She informed the Traffic Controller that a

vehicle arrived at the gate, but Grievant did not let the vehicle enter. The gate was approximately 30 feet from Grievant's booth and should have been visible to Grievant. Ms. O opened the gate and let the vehicle enter.

The Traffic Controller walked to Grievant's booth and stood a few feet away from Grievant on Grievant's left side. He observed Grievant with his head back with his face pointed upwards. Grievant's eyes were closed and he was breathing slowly. Grievant's mouth was slightly open. Grievant's arms were folded. The Traffic Controller used his cell phone and took a picture of Grievant. The phone had a flash but the flash did not wake up Grievant. The Traffic Controller moved from Grievant's left side to Grievant's front. While the Traffic Controller was moving, Grievant shifted his folded arms so that one folded on the inside was folded on the outside. The Traffic Controller took another picture of Grievant from the front. Grievant did not wake up or notice that his picture was being taken. The Traffic Controller observed Grievant sleeping for approximately seven minutes.

The TCS arrived at the gate operated by Grievant. He waited approximately 3 minutes until the gate was opened by a traffic controller who observed the TCS on the close circuit television. The TCS went to Grievant's control booth and observed Grievant with his head back and face pointing upwards. Grievant's eyes were closed and he was asleep. The TCS observed Grievant for approximately 3 minutes and Grievant did not awaken. The TCS knocked on Grievant's window and Grievant jumped up and looked to his right and then his left. The TCS said "down here." Grievant looked down and saw the TCS.

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).¹ 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.² Grievant fell asleep for several minutes while he was working on September 11, 2006. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an Agency may suspend an

¹ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

² DHRM Policy 1.60(V)(B)(3)(h).

employee for up to 30 workdays. Grievant was suspended for ten work days and, thus, his suspension must be upheld.

Grievant contends he was not sleeping. The evidence, however, shows Grievant was asleep. Because Grievant was asleep, he did not realize the Traffic Controller was standing next to him taking two pictures. Grievant did not realize the TCS was standing next to him for several minutes observing him. The evidence is overwhelming that Grievant was sleeping.

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....”³ 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 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.”

Grievant contends the disciplinary action should be mitigated because the TCS was targeting him for disciplinary action. Grievant argued the TCS was resistant to Grievant’s leave requests thereby showing the TCS intended to single out Grievant. Even if the Hearing Officer assumes for the sake of argument that the TCS had unnecessary concerns about Grievant, no evidence was presented showing the Traffic Controller had any reason to be untruthful in his testimony. The Traffic Controller’s testimony standing alone is sufficient to establish that Grievant was sleeping. In light of the standard set forth in the *Rules*, 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 Group III Written Notice of disciplinary action with suspension 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:

³ *Va. Code § 2.2-3005.*

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.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].

S/Carl Wilson Schmidt

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.