Issues: Group II Written Notice (sleeping during work hours), and Suspension; Hearing Date: 06/13/07; Decision Issued: 06/14/07; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 8616; Outcome: Agency Upheld in Full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8616

Hearing Date: June 13, 2007
Decision Issued: June 14, 2007

PROCEDURAL HISTORY

On March 9, 2007, Grievant was issued a Group II Written Notice of disciplinary action with suspension for sleeping during work hours. On April 3, 2007, 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 she requested a hearing. On May 10, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 13, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee.
Agency Advocate

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 Department of Motor Vehicles employs Grievant as a Financial Services Specialist I. She had been employed by the Agency for approximately 10 years and other state agencies for approximately 15 years. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

On March 5, 2007 at approximately 10 a.m., the Supervisor walked into Grievant's office and observed Grievant sitting in a chair with her eyes closed. The Supervisor said, "excuse me" and Grievant opened her eyes. Grievant and the Supervisor briefly discussed some work items and then the Supervisor left. Approximately 10 minutes later the Supervisor returned to Grievant's office. The Supervisor observed Grievant with her head back in the chair and mouth slightly open and eyes closed. The Supervisor said, "excuse me", but Grievant did not move. The Supervisor spoke Grievant's name two times, but Grievant did not move or respond. The Supervisor left Grievant's office and walked to the Unit Director's office. The Supervisor asked the Unit Director to go to Grievant's office. The Unit Director walked to Grievant's office, while the Supervisor walked elsewhere. As the Unit Director approached Grievant's office, he said, "Good Morning". Grievant did not respond. He stepped inside Grievant's office and observed Grievant sitting in her chair with a relaxed posture. The Unit Director concluded Grievant was asleep. The Supervisor returned to Grievant's office and observed Grievant asleep. The Supervisor touched Grievant on the arm and Grievant finally awoke.

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. On March 5, 2007, Grievant was asleep in her office during the Agency's work hours. The Agency reduced the disciplinary action from a Group III Written Notice to a Group II Written Notice with suspension. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an employee may be suspended for up to 10 work days. Thus, Grievant's five workday suspension must be upheld.

Grievant contends she was not asleep but rather merely resting her eyes during her break. There are several facts supporting the conclusion that Grievant was asleep. First, Grievant admitted that her eyes were closed. This is consistent with the behavior of a person who is asleep. Second, the Supervisor's testimony that she observed Grievant sleeping was credible. It is unlikely that the Supervisor would have asked the Unit Director to go to Grievant's office unless the Supervisor believed Grievant was asleep. Third, the Unit Director's testimony that he observed Grievant asleep was credible.

Grievant argues that she was on her break and she was free to close her eyes if she wished. Nothing in the Agency's policies authorizes employees to sleep during their breaks. No evidence was presented suggesting other employees were permitted to sleep during their breaks. Grievant was asleep during work hours, and thus, disciplinary action was appropriate.

Grievant argued the Supervisor permitted two of Grievant's coworkers to take three breaks per day with those breaks often exceeding 15 minutes. The Supervisor testified that she was unaware of employees taking more or longer breaks than permitted. If the Hearing Officer assumes for the sake of argument that Grievant's two coworkers took three or more breaks per day and for more than 15 minutes at a time, the outcome of this case does not change. Grievant was not disciplined for the number of breaks she took or the length of the time she spent on a break. She was disciplined

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

for sleeping during the Agency's work hours. No evidence was presented showing other employees were sleeping during their breaks without being disciplined.

Grievant testified that she has fibromyalgia and that she has presented documentation to the Agency informing the Agency of her condition. Although some prescriptions may cause drowsiness in fibromyalgia patients, Grievant testified medication did not make her drowsy because she knew how to take the right amount of medication. Grievant's medical condition and medication did not cause Grievant to be asleep. There is no basis to mitigate the disciplinary action because of Grievant's medical condition.

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')." To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[2] (2) suffered a materially adverse action; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence raises a sufficient question as to whether the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.

Grievant contends the Supervisor retaliated against her by requiring her to complete and submit a request for outside employment. Grievant had been working a second job for several years without written authorization from the Agency. Grievant engaged in protected activity when she filed her grievance challenging the disciplinary action. She did not suffer a materially adverse action. State policy requires employees working second jobs to obtain written approval from their agencies. When the Supervisor asked Grievant to complete and submit a written request for outside employment, the Supervisor was requiring Grievant to comply with policy. Requiring an employee to comply with policy is not a materially adverse action because all employees are expected to comply with state policy. The Agency did not retaliate against Grievant.

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

[2] *See* Va. Code § 2.2-3004(A)(v*)*. Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

Resolution…."[3] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive. 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 Group II 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:

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

[3] *Va. Code § 2.2-3005.*

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

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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.