

Issue: Group II (sleeping during work); Hearing Date: 01/05/10; Decision Issued: 01/11/10; Agency: Tax; AHO: Carl Wilson Schmidt, Esq.; Case No. 9228; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9228

Hearing Date: January 5, 2010
Decision Issued: January 11, 2010

PROCEDURAL HISTORY

On July 30, 2009, Grievant was issued a Group II Written Notice of disciplinary action for sleeping during work hours.

On August 31, 2009, Grievant 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 December 1, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing date was continued due to the unavailability of the parties. On January 5, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

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 Taxation employs Grievant as an Error Resolver. The purpose of this position is:

To examine, analyze and resolve any type of tax form on error using the information given in the IRMS/CARS data system, or through communication with the taxpayer, attorneys and accountants. Completes the correction process according to agency policies, procedures and objectives.¹

Other than the facts giving rise to this disciplinary action, Grievant's work performance was satisfactory to the Agency.

On July 23, 2009, the Supervisor walked near Grievant's workspace and observed him with his head down and his eyes closed. She approached him to see if he was asleep. Grievant did not move and his eyes remained closed. The Supervisor stood at Grievant's desk for approximately 3 minutes to see if he would awaken but he did not. The Supervisor left Grievant's area and went into another area for a few minutes and returned to Grievant's area where she observed him continuing to sleep. The Supervisor went to the Manager and asked that she come with the Supervisor to

¹ Agency Exhibit 4.

Grievant's desk. The Supervisor and the Manager walked to Grievant's desk and observed him sleeping. After a few minutes, the Manager woke up Grievant.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”² Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Sleeping during work hours is a Group III offense.³ On July 23, 2009, the Supervisor and the Manager observed Grievant sleeping at his desk during work hours. Grievant admits he was asleep on that date. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. The Agency mitigated the disciplinary action to a Group II Written Notice. The disciplinary action must be upheld.

Grievant argues that he was denied due process. His claim, however, relates to an incident occurring in February 2009 when Grievant fell asleep while at work. Grievant fell asleep in February 2009 because he was taking medication which induced drowsiness. The Agency gave Grievant a written counseling because he fell asleep in February 2009. Grievant argues that he should not have received a counseling or warning following the February 2009 incident. If the Hearing Officer assumes for the sake of argument that Grievant should not have received a written counseling in February 2009, the outcome of this case does not change. On July 23, 2009, Grievant did not fall asleep because of any medication he was taking. He fell asleep because the Agency's computer system had stopped working and he was not able to perform his regular work duties. Under the Standards of Conduct, it is not necessary for the Agency to issue a Grievant a written counseling or warning prior to issuing disciplinary action for sleeping. Grievant was given adequate notice and opportunity to be heard regarding the Agency's allegation that he fell asleep on July 23, 2009.

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 *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any

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

³ See, Attachment A, DHRM Policy 1.60.

⁴ *Va. Code § 2.2-3005.*

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.

Grievant contends the disciplinary action should be mitigated because the Agency is "using a sledgehammer to squash a flea." He believes the Agency's discipline is "overkill". He argues that when the computer system was down on July 23, 2009, other employees were reading books or engaging in other non-work duties and thus were not acting differently from the way he was acting.

The Agency's discipline is consistent with the Standards of Conduct. It is not so excessive as to exceed the limits of reasonableness. Grievant is not being treated differently from how other employees were treated. Reading books when the computer system is not working is not a Group III offense under the Standards of Conduct. In contrast, the sleeping is a Group III offense. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Section IV of the Agency's Written Notice discusses accommodation for Grievant's taking of prescription medication. Any discussion about accommodation following the issuance of the Written Notice has no bearing on whether Grievant should be disciplined for sleeping on July 23, 2009. To the extent Grievant seeks accommodation⁵, insufficient evidence has been presented to establish that Grievant is a Qualified Individual with a Disability. Insufficient evidence has been presented to establish that sleeping during work hours would be a reasonable accommodation recognized under DHRM policy or the Americans with Disabilities Act.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action 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:

⁵ In addition, Grievant mentions medical disability and accommodation as part of his Grievance Form A.

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
600 East Main St. STE 301
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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.