

Issue: Group I Written Notice (Unsatisfactory Performance); Hearing Date: 08/12/10;
Decision Issued: 08/16/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 9362; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9362

Hearing Date: August 12, 2010
Decision Issued: August 16, 2010

PROCEDURAL HISTORY

On April 1, 2010, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On April 27, 2010, 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 July 7, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time period for this appeal due to the unavailability of the parties. On August 12, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate

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 Department of Behavioral Health and Developmental Services employs Grievant as a Trades Technician III at one of its facilities. The purpose of this position is:

Performs Plumbing/Steam fitting maintenance, trouble-shooting, repair and/or renovation of buildings, facilities. Inspect[s], installs, repairs, and replaces pipes, fittings, and plumbing fixtures to maintain the heating, water, gas, and plumbing systems of the facilities Also repairs underground piping systems, building equipment, and controls.¹

Grievant has been employed by the Agency for approximately 2 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

In July 2009, the Supervisor observed Grievant during work hours sitting with his eyes closed for at least 30 seconds as if he was asleep. The Supervisor counseled Grievant and told Grievant to be more cautious about sitting on the job site with his eyes closed.

On March 23, 2010, Grievant's shift began at approximately 7 a.m. At approximately 7:15 a.m., Grievant entered the Office and got the keys for a pickup truck in order to take another employee to the Building. Grievant also took a two-way radio with him. Grievant dropped off the other employee and then returned to the Office and remained in the pickup truck. Grievant laid his head against the head rest. He placed

¹ Agency Exhibit 2.

the weight of his left side against the driver's side door. Grievant closed his eyes. Between 7:30 a.m. and 7:40 a.m., two attempts were made to contact Grievant over the two-way radio. Grievant did not respond. At approximately 7:50 a.m. the Supervisor observed Grievant sitting in the pickup truck. The Supervisor approached the pickup truck from the front driver's side. He observed Grievant for approximately 30 seconds to a minute.² The Supervisor observed that Grievant's head was resting on the head rest and that his eyes were closed. Although the Supervisor could not be certain that Grievant was sleeping, Grievant's demeanor was that of someone who appeared to be sleeping. The Supervisor approached the driver's side door and opened it. Opening the door startled Grievant. The Supervisor told Grievant to come with him to the Office. The Supervisor asked Grievant if he was asleep. Grievant responded that he was not asleep.

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."³ 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."

"Unsatisfactory work performance" is a Group I offense.⁴ Grievant's work performance on March 23, 2010 was unsatisfactory because (1) he did not respond to two radio calls and (2) he was observed for at least 30 seconds resting with his eyes closed contrary to prior counseling by his supervisor. Grievant was not attentive to the Supervisor's radio calls. Part of Grievant's work duties included responding to the Supervisor's attempts to contact him. Grievant had been counseled regarding being observed with his eyes closed during work hours and knew or should have known not to be observed during work hours with his eyes closed. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant denies that he was asleep on March 23, 2010. Sleeping during work hours is a Group III offense. The Supervisor testified that he did not know for certain that Grievant was asleep and, thus, the Agency would not be able to meet its burden of proof with respect to a Group III offense for sleeping during work hours. If the Hearing Officer assumes for the sake of argument that Grievant was not asleep, the outcome of this case does not change because the Agency did not charge Grievant with a Group III offense for sleeping. It is not necessary for the Agency to establish that Grievant was asleep in order to establish a Group I offense. It is sufficient if the Agency can establish

² If Grievant had had his eyes open, he would have been able to see the Supervisor.

³ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁴ See Attachment A, DHRM Policy 1.60.

that Grievant was inattentive. An inattentive employee is one who is not doing his work duties. The Agency has established that Grievant that Grievant's work performance was unsatisfactory.

Grievant argued that he did not have his two-way radio with him while he was in the pickup truck. This argument fails. Grievant wrote a statement on March 29, 2010 in which he stated that he "[d]id get the two-way [radio]. I always get the [radio]."⁵ Grievant's denial during the hearing of not having a radio was not credible.

Grievant argued that he did not have his head against the head rest of the pickup truck. This argument is untenable. In Grievant's statement he wrote, "I lay my head on the head rest."⁶ Grievant's denial during the hearing of not having his head against the head rest was not credible.

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...."⁷ 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 I 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 Agency Exhibit 8.

⁶ Agency Exhibit 8.

⁷ *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
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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.