

Issue: Group III Written Notice with termination (sleeping while on duty); Hearing Date: 11/10/10; Decision Issued: 11/15/10; Agency: DBHDS; AHO: William S. Davidson, Esq.; Case No. 9438; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9438

Hearing Date: November 10, 2010
Decision Issued: November 15, 2010

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on July 14, 2010 for:

Sleeping during work hours: On 6/28/10 at 0402 hours, Investigator A walked into the front desk area of Bldg. 59 and saw [Grievant] sitting at the desk with a towel over his head. Investigator A spoke to [Grievant] several times and called his name and got no response.¹

Pursuant to the Group III Written Notice, the Grievant was terminated on July 14, 2010.² On August 13, 2010, the Grievant timely filed a grievance to challenge the Agency's actions.³ On October 12, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On November 10, 2010, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Advocate for Agency
Grievant
Attorney for Grievant
Witnesses

ISSUE

1. Was the Grievant sleeping during work hours.?
2. Was the issuance of a Group III Written Notice a form of retaliation against the Grievant and was the Grievant treated unfairly?

¹ Agency Exhibit 1, Tab 1, Page 1

² Agency Exhibit 1, Tab 1, Page 1

³ Agency Exhibit 1, Tab 1, Page 3

3. Was there a misapplication of state policy under the Standards of Conduct in this matter?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in Tatum v. VA Dept of Agriculture & Consumer Servs., 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.⁴ However, proof must go beyond conjecture.⁵ In other words, there must be more than a possibility or a mere speculation.⁶

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 Agency provided the Hearing Officer with a notebook containing five (5) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1. During the course of the hearing and without objection, an attachment was added to the end of Agency Exhibit 1,

⁴ Ross Laboratories v. Barbour, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁵ Southall, Adm'r v. Reams, Inc., 198 Va. 545, 95 S.E. 2d 145 (1956)

⁶ Humphries v. N.N.S.B., Etc., Co., 183 Va. 466, 32 S.E. 2d 689 (1945)

Tab 5. This attachment set forth examples of offenses grouped by levels, under Policy 1.60. Further, during the course of the hearing and without objection, an additional attachment was also added to Agency Exhibit 1, Tab 5. This attachment set forth the attendance policy for Southside Virginia Training Center. During the course of the hearing, the Hearing Officer watched a video that was made by cameras on site at the Agency. An SD card containing that video also became a part of the Agency's evidence.

The Grievant provided the Hearing Officer with a notebook containing five (5) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Agency was experiencing a theft problem with laundry items. Accordingly, a separate and unrelated investigation was being made by Investigator A regarding this theft issue. Pursuant to his investigation, he came to work in the early morning hours of June 28, 2010 and came into an area where the Grievant was working around 4:02 a.m. The Grievant's job at that time was to be in control of an area that controlled the burglary and fire alarms for the entire Agency and was also a communication nexus for the Agency. When Investigator A entered the room where the Grievant was working, the videotape, which was played at the hearing, showed the Grievant slumped over in his chair with a towel over his head. The videotape shows Investigator A stopping momentarily approximately three (3) feet behind the Grievant and then Investigator A proceeds through a set of doors into another room. Investigator A's testimony was that when he first came into the room with the Grievant that he stated, "Good morning." While the videotape has no audio, there is absolutely no indication of movement from the Grievant as Investigator A enters the room, stops behind him and then proceeds out of the room. Approximately three (3) minutes later, Investigator A returned to the room where the Grievant was located and noticed that he was in the exact same position. Because of this and because he felt that the Grievant was asleep, later that day, he reported the Grievant to the Chief of the Department of Public Safety.

Pursuant to this report, the videotape for this particular room was pulled and was viewed by several individuals. At this hearing, the Hearing Officer observed this videotape segment from June 28, 2010 and notes that from 3:50 a.m. until nearly 4:04 a.m., the Grievant was slumped in a chair, with a towel over his head, and there was no movement at all by the Grievant. The videotape first shows the Grievant moving at nearly 4:04 a.m.

Investigator A wrote his report prior to having the ability to view this videotape. The videotape clearly shows that the Grievant did move in his chair at approximately 4:04 a.m. and then several more times during the minute of 4:04 a.m. and 4:05 a.m. He had returned to what appeared to be a sleeping position by 4:06 a.m.

Accordingly, the Hearing Officer finds that there is no conflict at all with regards to the Investigator's written report, wherein he stated that he entered the area with the Grievant and the Grievant was in one (1) position and at 4:06 a.m., he re-entered the area and the Grievant was in the same position. The videotape substantiates that pattern. Investigator A reviewed the videotape and introduced a comprehensive timeline that was placed at Tab 2 of Agency Exhibit 1.

The Grievant pointed out that the Agency also had another Investigator produce a

timeline and that there were differences between the two (2) timelines.⁷ The Hearing Officer finds that Investigator A's timeline is more favorable to the Grievant than the second timeline and, accordingly, is using Investigator A's timeline for his finding in this matter.

The Grievant testified and stated that at no time was he asleep while at work on the morning of June 28, 2010. The Grievant, in his testimony and written documentation requesting a grievance hearing, indicated that the general noise produced by the radios was such that he might not have been able to hear someone enter the room or speak to him. In his written statement, he noted, "Once I remembered, I cut the radio volume down. I got up and looked to see who was talking, but he was gone."⁸ At no time in viewing the videotape did the Hearing Officer see the Grievant get up from his chair to look for anyone. The Grievant did not ask the Hearing Officer to view any other portions of the tape than those that were presented by the Agency. In viewing the videotape, and in considering the demeanor and character of the Grievant's testimony, the Hearing Officer finds that it is certainly more probable than not that the Grievant was asleep.

The Hearing Officer heard testimony as to the importance of this particular position in that it controlled responses to fire alarms, burglar alarms, and was the center of communication at this Agency. Being asleep at this position jeopardized the safety of all of those for whom the Agency had responsibility.

In his written grievance form, the Grievant discussed retaliation for a previous Group I Written Notice that was withdrawn, the fact that he was being treated unfairly, and that this was a misapplication of state policy under the *Standards of Conduct*. The Grievant testified for perhaps five (5) or ten (10) minutes and offered no factual basis for how this charge of going to sleep was retaliation for a Group I Written Notice that was in fact withdrawn. The Grievant offered no testimony as to others that had fallen asleep on the job and were treated differently. The Grievant certainly offered no evidence as to why the issuance of a Group III Written Notice for falling asleep on the job was a misapplication of state policy under the *Standards of Conduct*.

MITIGATION

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..."⁹ 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been

⁷ Grievant Exhibit 1, Tab 2, Page 3

⁸ Agency Exhibit 1, Tab 1, Page 3

⁹ Va. Code § 2.2-3005

employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

The Grievant offered as mitigating grounds the fact that he had been an employee for at least six (6) years at this Agency and that his Employee Work Profile indicated that he was a good employee. Having found that the Grievant was asleep while working at a very sensitive position, the Hearing Officer finds that these two (2) offered grounds for mitigation are not sufficient to cause the Hearing Officer to mitigate the Agency's termination of the Grievant. The Hearing Officer has also considered all other grounds for mitigation that could be found in the documentary evidence offered by the Grievant and still can find no reason to mitigate the Agency's action.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof regarding this matter and upholds the Agency's position to terminate the Grievant.

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 Street, 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 Street, Suite 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 your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹⁰ 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.¹¹

[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]

William S. Davidson
Hearing Officer

¹⁰An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹¹Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.