

Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 01/07/11; Decision Issued: 01/10/11; Agency: DBHDS; AHO: William S. Davidson, Esq.; Case No. 9478; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9478

Hearing Dates: January 7, 2011
Decision Issued: January 10, 2011

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on August 8, 2010 for:

Violation of DHRM Policy 1.60. Standards of Conduct- *Sleeping During work hours.*

On 10/4/10 the following occurred:

- You were seen sleeping at work while on post
- You were seen fraternizing with a resident
- You failed to perform scheduled wellness safety checks

Your actions constitute a failure to follow supervisor's instructions as well as jeopardized the safety and well being of residents and staff. ¹

The Group III Written Notice did not indicate that the Grievant was terminated. A separate letter dated October 8, 2010 was sent to the Grievant by the Human Resource Director of the Agency. That letter stated in part as follows:

You are hereby notified of your termination from employment at the Virginia Center for Behavioral Rehabilitation for being in violation of the Standards of Conduct, Group III, *Sleeping during work hours.*

In view of the serious nature of this offense, I have directed that the termination of your employment be effective **October 8, 2010**... ²

On October 11, 2010, the Grievant timely filed a grievance to challenge the Agency's actions. ³ On December 13, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On January 7, 2011 a hearing was held at the Agency's location.

¹ Agency Exhibit 1, Tab H, Page 3

² Agency Exhibit 1, Tab H, Page 1

³ Agency Exhibit 1, Tab G, Page 2

APPEARANCES

Advocate for Agency
Grievant
Witnesses

ISSUE

1. Was the Group III Written Notice null and void upon issuance?
2. Did the Grievant violate Standards of Conduct by sleeping during work hours?

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

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)

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 eight (8) tabbed sections, labeled A through H and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a folder containing nine (9) tabbed sections, and that folder was accepted in its entirety as Grievant Exhibit 1.

On October 6, 2010, the Grievant was issued a Group III Written Notice with an offense date of October 4, 2010. Pursuant to this Written Notice, the Grievant was terminated on October 6, 2010.⁷ On October 11, 2010, the Grievant timely filed a grievance to challenge the issuance of this Group III Written Notice.⁸ On November 8, 2010, the Agency rescinded this Group III Written Notice at the Second Resolution Step. As a part of that rescision, the Grievant rescinded her grievance of that matter. The relevance of this is that the Grievant was terminated from employment with this Agency on or about October 6, 2010.

The Grievant was issued the Group III Written Notice that is before this Hearing Officer on October 8, 2010, which is two (2) days after the Grievant had been previously terminated from employment with this Agency.⁹ This Written Notice was issued by the Human Resource Director for this Agency. The Written Notice failed to indicate any level of punishment, as Section 3 of the Written Notice was left entirely blank. The Human Resource Director delivered with this Written Notice a letter, dated October 6, 2010, wherein, he stated in part as follows:

You are hereby notified of your termination from employment at the Virginia Center for Behavioral Rehabilitation for being in violation of the Standards of Conduct, Group III, *Sleeping during work hours*.

In view of the serious nature of this offense, I have directed that the

⁷ Grievant Exhibit 1, Tab 2, Page 1

⁸ Grievant Exhibit 1, Tab 8, Page 1

⁹ Agency Exhibit 1, Tab H, Page 3

termination of your employment be effective **October 8, 2010**...¹⁰

It would appear that the Human Resource Director was attempting to terminate an employee on October 8, 2010 who had previously been terminated on October 6, 2010. The Grievant timely filed a grievance of the second termination on October 11, 2010.

In Ruling 2009-2141, issued on October 20, 2008, the Director of EDR stated as follows:

The grievant is a former employee of VCCS. On October 11, 2007, the grievant informed the agency that he would be entering a drug abuse treatment program. After receiving this information, the agency advised the grievant that he could not return to work. The grievant subsequently applied for and received short-term disability benefits. He later transitioned to a long-term disability, at which time the agency terminated his employment.

The grievant grieved his removal, and on July 17, 2008, the hearing officer directed the agency to reinstate the grievant to his previous position. As of August 27, 2008, the agency had not reinstated the grievant to that position due to its pending appeal of the hearing decision. On that date, however, the agency issued the grievant a Group III Written Notice "with termination." The grievant initiated a grievance challenging this disciplinary action on September 4, 2008. Although § 4.1 (a) of the *Grievance Procedure Manual* provides that formal written discipline automatically qualifies for a hearing, the agency head denied the grievant's request that his September 4th grievance be qualified. The grievant has appealed the agency's determination to this Department.

To have access to the grievance procedure, a state employee must: (1) not be listed as exempt from the Virginia Personnel Act under § 2.2-2905 of the Code of Virginia; (2) have been non-probationary at the time the event that formed the basis of the dispute occurred; (3) *and* have been employed at the time the grievance was initiated (unless the action grieved is a termination or involuntary separation, in which case the employee may initiate a grievance within 30 days of the termination or separation). These access requirements may not be waived or modified by the parties.

The grievant was not employed by the agency or the Commonwealth at the time he received the Group III Written Notice or at the time his grievance was initiated. As a consequence, he would have access to the grievance procedure only if the Group III directly resulted in his termination or involuntary separation .

¹⁰ Agency Exhibit 1, Tab H, Page 1

This is not the case, however. Because the Group III Written Notice was issued after the grievant's termination by the agency, and before any reinstatement, it did not result in his termination or involuntary separation. Moreover, we have previously been advised by the Department of Human Resource Management (DHRM), the agency charged with developing and interpreting policies affecting state employees, that DHRM Policy 1.60, **"Standards of Conduct," does not apply to former employees, and therefore a Written Notice should not be issued to an individual no longer employed by the state. As a result, it would appear that the Group III was null and void upon its issuance and had no effect on the grievant's status.** Accordingly, this Department concludes that the grievant did not have access to the grievance procedure when he initiated his September 4, 2008 grievance. (Emphasis added) ¹¹

It is clear in this matter that, at the time of the issuance of the second Group III Written Notice, the Grievant was no longer an employee of this Agency. As such, the grievance procedure available to State employees was not available to the Grievant and, pursuant to prior rulings of DHRM, Policy 1.60 did not apply. The second Group III Written Notice, issued on October 8, 2010, was null and void upon its issuance.

In an attempt to prevent the need for a new hearing in the event that either EDR or DHRM should determine that the Hearing Officer has misinterpreted the prior Ruling of the Director of EDR, the Hearing Officer heard evidence in this matter. Because the Written Notice that was before this Hearing Officer indicated no terms of punishment whatsoever, and because the attached letter from the Human Resource Director indicated that the termination was because of "Sleeping during work hours," the Hearing Officer limited the introduction of evidence by the Agency to the issue of whether or not the Grievant was sleeping during work hours.

The Agency presented two (2) witnesses who testified regarding this matter. The first witness was the Unit Manager for the shift that the Grievant was working on or about October 4, 2010. This witness had access to cameras that allowed him to see the entirety of the Agency's complex. He testified that, sometime after 2:00 a .m. on October 4, 2010, he noticed the Grievant with her eyes closed. He was in a separate building and was making this observation by use of the closed circuit cameras. He testified that he observed the Grievant for 60 to 90 seconds, he then panned the cameras around the complex, and when he returned she was standing with her eyes open and was observed making her rounds.

The second Agency witness made the same observation while looking at the same bank of cameras. The second witness was called to the cameras by the first witness. The second witness testified that she saw the Grievant with her eyes closed for approximately one (1) minute. The first Agency witness did not testify that the Grievant was asleep. He testified that she did not appear alert. Regarding the issue of "Sleeping during work hours," the totality of the Agency's evidence was that two (2) people, looking at a camera image, saw the Grievant with

¹¹ Ruling 2009-2141, dated October 20, 2008

her eyes closed for between 60 and 90 seconds. When the camera came back on her after panning the complex, her eyes were no longer closed and she was performing her duties.

Both of the Agency witnesses testified that they did not deem it necessary to go to the Grievant's location at that time to inquire as to why her eyes were closed. Both of these witnesses testified that you must be awake and alert because the patients could injure themselves. Neither witness seemed to see the irony that, if they were concerned that the Grievant was sleeping, they did not go to check on the safety of the patients.

While the Hearing Officer has ruled that the Grievant did not have access to the grievance policy regarding this Written Notice and that this Written Notice was null and void at its issuance, if the Hearing Officer is in error in that ruling, then his finding would be that the Agency has not sustained its burden of proof in this matter to prove that the Grievant was "Sleeping during work hours."

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..."¹² 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 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.

DECISION

For reasons stated herein, the Hearing Officer finds that the Group III Written Notice was null and void at its issuance. In the alternative, the Hearing Officer finds that the Agency has not borne its burden of proof regarding this matter. The Hearing Officer orders that the disciplinary action be rescinded; that the Grievant be reinstated to her former position or, if occupied, to an objectively similar position; that the Grievant be paid full back pay from the date of her termination to the date of her reinstatement; and that all of the Grievant's benefits and seniority be restored.

APPEAL RIGHTS

¹²Va. Code § 2.2-3005

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.¹³ 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.¹⁴

[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

¹³An 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).

¹⁴Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.