

Issue: Group III Written Notice with termination (sleeping on the job); Hearing Date: 06/02/11; Decision Issued: 06/02/11; Agency: VDOT; AHO: Frank G. Aschmann, Esq.; Case No. 9601; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA**  
**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**

**DIVISION OF HEARINGS**  
**DECISION OF HEARING OFFICER**

In the matter of: Case No. 9601

Hearing Date: June 2, 2011  
Decision Issued: June 2, 2011

**PROCEDURAL ISSUE**

No procedural issues raised.

**APPEARANCES**

Grievant  
Agency Presenter  
Agency Representative  
Agency Witnesses

**ISSUE**

Did the Grievant violate Agency policy by sleeping during work hours on December 1, 2010, such as to warrant the issuance of a Group III Written Notice and employment termination?

**FINDINGS OF FACT**

The Grievant was employed by the Agency as a Program Administration Specialist I. The Grievant was evaluated as a "contributor" and considered a good worker by his supervisor. On July 27, 2010, the Grievant was observed sleeping at his desk during work hours. As a result, the Grievant was issued a Group I Written Notice on August 10, 2010. A Group III Written Notice was contemplated but the Grievant's supervisor issued the Group I Written Notice in order to retain a good worker and because the Grievant had advised he had taken medication for back pain which made him drowsy. The Grievant's supervisor counseled the Grievant as to the serious nature of this offense. A written warning was issued in the Group I Written Notice that a further violation might result in employment termination.

On December 1, 2010, the Grievant was observed by several employees sleeping at his desk during work hours. One employee complained to the Grievant's supervisor. The Grievant's supervisor spoke with the Grievant and subsequently issued the Group III Written Notice which is the subject of this hearing. The Grievant's employment was terminated on December 9, 2010.

The Grievant does not dispute sleeping at his desk during work hours but contends his action was not "willful misconduct." At the time of the incident the Grievant offered no

mitigating factors and as a result the agency terminated his employment. Subsequently, the Grievant was diagnosed with sleep apnea and is currently receiving treatment for this condition.

### APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards of Conduct serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. The Agency uses these policies for its Standards of Conduct.

The Standards of Conduct list as a Group III violation an employee sleeping during work hours. Group III violations usually result in employment termination unless mitigating factors are presented. The Grievant did not present any mitigating factors at the time of the incident and the agency acted appropriately in terminating his employment at that time. The Grievant had received progressive discipline having been previously warned about the serious nature of the offense. The offense caused a problem in the office because it upset other employees and required intervention by the administration. Additionally, there was a loss of work time from the Grievant while he was sleeping during work hours.

The Grievant's contention that his action did not constitute "willful misconduct" is misplaced in this proceeding. In rejecting the Grievant's claim for unemployment benefits, that agency identified his termination as a result of willful misconduct. That term may not be appropriate in this instance, however, unemployment benefits are governed by different standards and have a separate system for appeals. The Standards of Conduct in Policy 1.60 contain acts of

negligence and failure to perform in addition to willful acts. The agency did not charge the Grievant with “willful misconduct” but simply cites the fact that he was asleep during work hours. Even if the Grievant fell asleep by accident or through negligence rather than intentionally seeking to take a nap on duty it is a violation of the Standards of Conduct. The Standards of Conduct make it the responsibility of the employee to comply with its policy requirements. Sleeping during work hours is a violation of policy which the Grievant committed at least two times. The Grievant failed to address his problem with sleeping at work in a timely manner after being warned to do so. The agency was justified in terminating his employment.

## DECISION

The disciplinary action of the Agency is affirmed.

## APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**ADMINISTRATIVE REVIEW:** This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director’s authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, VA 23219 or faxed to (804) 371-7401.
3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director’s authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804) 786-0100.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. (Note: the 15-day period, in which the appeal must occur,

begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a final hearing decision, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

**JUDICIAL REVIEW OF FINAL HEARING DECISION:** Within thirty days of a final decision, a party may appeal on the grounds that the determination is contrary to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Frank G. Aschmann  
Hearing Officer