

Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 07/06/11; Decision Issued: 07/07/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9623; Outcome: No Relief – Agency Upheld; **Judicial Review: Appealed to Williamsburg Circuit Court; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9623

Hearing Date: July 6, 2011

Decision Issued: July 7, 2011

PROCEDURAL HISTORY

On April 27, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping during work hours.

On May 5, 2011, 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 June 7, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 6, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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 Department of Behavioral Health and Developmental Services employed Grievant as a Security Officer III at one of its Facilities for approximately 10 years prior to his removal. Grievant had prior active disciplinary action. On April 20, 2011, Grievant received a Group III Written Notice for violating Departmental Instruction 502, Alcohol and Drug Program.

The Client was taken from the Facility to a local Hospital for treatment. Initially, the Client was in a one to one relationship meaning that one employee had to be within close proximity of the Client at all times to observe the Client. Because of the Client's behavior, the Agency determined it was necessary to have two employees observe the Client. It was also necessary to have a Security Officer with the Client while the Client was in the Hospital.

On April 10, 2011, Grievant began his shift at the Facility at 7 a.m. At approximately noon, Lieutenant H escorted the Client from the Facility to the local Hospital emergency room. Lieutenant M arrived at the Facility at approximately 2:45 p.m. Grievant told Lieutenant M that if the Client was admitted into the Hospital from the emergency room and Lieutenant M could not find anyone else to stay with the Client, Grievant would be willing to work at the Hospital for the midnight shift. Grievant left the Facility at 3 p.m. At approximately 4:15 p.m., Grievant received a call advising him that he was needed to report to work at the local Hospital. At 10:45 p.m. Grievant arrived at the Hospital and relieved Officer C. When the Client went to sleep, Grievant sat in a reclining chair with a book to read. In the early morning of April 11, 2011,

Grievant fell asleep. Another Agency employee, Ms. M, observed Grievant sleeping but did not awaken him. An employee of the Hospital observed Grievant sleeping but did not awaken him. She decided to report what she observed.

At approximately 4:45 a.m., the Hospital's Patient Care Supervisor received a call informing her that an officer was asleep. At approximately 5 a.m., the Patient Care Supervisor walked to the Client's room and observed Grievant asleep in the chair. She approached Grievant and looked at his name tag to determine his name. She called Grievant's name several times and Grievant opened his eyes. She told Grievant to get up, walk around, and drink some coffee. Grievant did so.

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."¹ 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."

"[S]leeping during work hours" is a Group III offense.² On April 11, 2011, Grievant was working at the Hospital to provide security with respect to a Client who was in a two to one relationship with Agency staff. Grievant fell asleep and remained asleep for several hours. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for sleeping during work hours. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's removal of Grievant must be upheld.

Grievant argued that he did not intend to fall asleep and he is not sure that he fell asleep. It is not necessary for the Agency to show that Grievant intended to fall asleep in order to support the Group III Written Notice for sleeping. The evidence is clear that Grievant fell asleep. He was observed sleeping by at least two people, one employed by the Agency and one employed by the Hospital. These employees were within close proximity of Grievant and observed him for a sufficient period of time to form an accurate assessment of his behavior.

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...."³ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

³ *Va. Code § 2.2-3005.*

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.

Grievant contends the disciplinary action should be mitigated. Grievant argued that this was an isolated incident in an otherwise excellent career with the Agency. The Chief of Police testified that Grievant had an outstanding reputation for truthfulness and that he was a good worker. She testified that Grievant was willing to work additional shifts when the Agency needed him. Other employees described Grievant as an excellent worker who was hard-working and dedicated to his job.

It is clear to the Hearing Officer that Grievant was a good and valuable employee to the Agency prior to April 11, 2011. It is also clear that the Agency could have taken a lesser disciplinary action to retain a good employee. The Hearing Officer, however, is not a Super Personnel Officer. Once the Agency meets its burden of proof to show that misconduct occurred and that the misconduct rises to a specific level of discipline, the Hearing Officer must give deference to the Agency's preference for discipline unless mitigating circumstances exist. Grievant's good work performance is a factor for the Hearing Officer to consider, but it does not constitute a sufficiently mitigating circumstances under the standards set forth in the EDR Director's *Rules for Conducting Grievance Hearings* to reduce the disciplinary action.

DECISION

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

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.⁴

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.