

Issue: Group III Written Notice (sleeping on the job); Hearing Date: 12/20/11;
Decision Issued: 12/21/11; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9723; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9723

Hearing Date: December 20, 2011
Decision Issued: December 21, 2011

PROCEDURAL HISTORY

On August 8, 2011, Grievant was issued a Group III Written Notice of disciplinary action for sleeping during work hours.

On September 7, 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 November 30, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 20, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative

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 Social Services employed Grievant as a Program Administrative Specialist II. He began working for the Agency in 2001. The purpose of his position was to:

Administer the Child Protective Services Program by planning, managing, developing, implementing, and interpreting program regulations, policies, and procedures; oversees the CPS/APS Hotline, Provide supervision and direction to Hotline staff. Prepares statistical and program reports outlining program trends and needed actions.

Grievant supervised approximately five employees and was expected by Agency managers to serve as a role model for those employees. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On July 29, 2011 at approximately 2:30 p.m., the Supervisor entered Grievant's work area. She observed Grievant sitting in his chair with his head back and eyes closed. Grievant did not respond when the Supervisor came near him. The Supervisor spoke with another employee. They were close enough to Grievant that he should have heard them speaking. Grievant did not open his eyes or change his position for approximately five minutes. The Supervisor concluded that Grievant was asleep. During the hearing, Grievant admitted that he was sleeping that day while at work.

Grievant had previously informed the Supervisor that he had diabetes and high blood pressure. He had not informed her that he had sleep apnea. Grievant had not notified the Agency of any need for an accommodation. Agency managers considered Grievant's length of service and work history and decided not to remove Grievant from employment.

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 July 29, 2011, Grievant was asleep during work hours for approximately five minutes. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice.

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 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 because he has sleep apnea, diabetes, and high blood pressure. He argues that these factors influenced his propensity to sleep during work hours. If the Hearing Officer assumes for the sake of argument that Grievant's medical condition contributed to this falling asleep on July 29, 2011, Grievant's medical condition is not so severe as to justify mitigation of the disciplinary action against him. When an employee becomes sleepy, he or she is

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.

expected to take action to avoid sleeping while at work. For example, an employee can stand, move around, or speak with a supervisor regarding the employee's concern. When an employee suffers from a medical condition relating to the disciplinary event, the question is not whether the medical condition contributed to the basis for disciplinary action. The question is whether the medical condition was so severe as to render the employee unable to prevent the events giving rise to disciplinary action. In this case, Grievant's medical condition may have contributed to this falling asleep on July 29, 2011. However, no evidence was presented to show the Grievant was unable to control whether he fell asleep. Grievant took no action to inform his supervisor that he was sleepy or required a break. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.⁴

If the Hearing Officer considers the facts of this case with respect to the Americans with Disabilities Act, the outcome of this case does not change. Sleeping during work hours is not an accommodation that an agency is obligated to provide an employee. Grievant did not request or otherwise place the Agency on notice of his need for any accommodation. The Americans with Disabilities Act does not prevent employers from disciplining employees who violate employment rules such as sleeping during work hours.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III 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:

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

⁴ Grievant also argued that his length of service and work history were mitigating factors. Based on the EDR Standard for mitigation, Grievant's length of service and work history are not sufficient to reduce the level of discipline in this case.

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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.