

Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 01/07/16; Decision Issued: 01/27/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10697; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10697

Hearing Date: January 7, 2016
Decision Issued: January 27, 2016

PROCEDURAL HISTORY

On July 6, 2015, Grievant was issued a Group III Written Notice of disciplinary action with a ten workday suspension for sleeping on the job.

On August 1, 2015, 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 October 12, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 7, 2016, 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 employs Grievant as a DSA II at one of its facilities. Grievant's job duties included providing direct care to the Facility's residents. He has been employed by the Agency for approximately three years. No evidence of prior active disciplinary action was introduced during the hearing.

On June 29, 2015, Grievant was providing care to two residents. Grievant was seated in a chair next to a table and chair. He was wearing a baseball cap. A resident was seated in a wheelchair next to Grievant. Grievant's feet were flat on the floor. He was leaning forward in the chair with his head above his knees. His head was positioned to look forward and downward but his chin was not tilted as far downward as possible. His left elbow rested on the top of his left thigh. He rested his right forearm on the top of the chair. His hands were close together with his left index finger touching a finger on his right hand.

Ms. H entered the Building where Grievant was working. She was conducting an inventory of the Facility's computers. She entered the room where Grievant was seated. No other employees were in the room. She observed Grievant slouched with his head down. She approached Grievant and stood three to four feet from him to the front of his left shoulder. She did not speak to Grievant. She had her keys and papers with her that made some sounds but Grievant did not hear them. Grievant did not acknowledge Ms. H's presence. Ms. H did not observe Grievant moving. His head did not "bob" up and down. Ms. H observed Grievant for over a minute without him moving.

She stepped away from Grievant to take a picture of him from an angle that would not include all of the resident in the picture. The Agency investigated the matter and concluded Grievant was asleep.

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.”

Inadequate or unsatisfactory job performance is a Group I offense.² On June 29, 2015, Grievant was supposed to be providing services to and focusing on two residents. Instead, he was inattentive. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for inadequate or unsatisfactory job performance.

The Agency argued that Grievant was asleep. The Agency has not established that Grievant was asleep for two reasons. First, an employee who was asleep would not likely be able to support his body and head. Grievant was positioned forward in the chair. His chin had not dropped down as low as possible. Grievant’s head was not bobbing. Ms. H’s picture suggests Grievant was using the muscles of his body to support his upper body and to support his head. If he had been asleep, his chin would have dropped down farther and he would have fallen forward and downward. Second, Ms. H did not observe Grievant’s eyes. He was wearing a baseball cap and she was standing in front of him. She could not see whether his eyes were closed. A sleeping employee would have his eyes closed.

Grievant argued that he was awake and addressed Ms. H when she entered the room. The Agency has presented sufficient evidence to show that Grievant did not address Ms. H while she was in the room.

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 Human Resource Management”³ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any

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.*

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist 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 suspension is **reduced** to a Group I Written Notice. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension.

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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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