

**Issue: Group III with termination (sleeping during work hours); Hearing Date: 01/25/17; Decision Issued: 02/14/17; Agency: George Mason University; AHO: James M. Mansfield, Esq.; Case No. 10923; Outcome: No Relief - Agency Upheld; Administrative Review: Ruling Request received 02/24/17; EDR Ruling No. 2017-4516 issued 03/21/17; Outcome: No Relief - Agency Upheld.**

**COMMONWEALTH OF VIRGINIA**  
**DEPARTMENT OF HUMAN RESOURCE MANAGEMENT**  
**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In the matter of: Grievance Case No. 10923

Hearing Date: January 25, 2017  
Decision Issued: February 14, 2017

**PROCEDURAL HISTORY**

Grievant was the lead for a night crew of painters at George Mason University. On November 7, 2016 Grievant was charged with a Group III Written Notice for sleeping on the job on September 29, 2016. The Written Notice terminated Grievant's employment with an effective date of November 18, 2016.

Grievant challenged the Agency's action terminating his employment based on an allegation that Grievant was sleeping during work hours. A pre-hearing conference was scheduled and held and a hearing in the matter was conducted on January 25, 2017.

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constitutes misconduct?
3. Whether the Agency's discipline was consistent with law, policy and was properly characterized as a Group III offense subject of termination?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action?

**BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; and evidence that is more convincing than the opposing evidence.

Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.

### **HEARING**

The following appeared at hearing held at the Agency's Facility on January 25, 2017:

Grievant  
Agency Party Designee  
Witnesses  
Hearing Officer

The Agency's exhibits were admitted by agreement of the Parties with the exception of certain photographs of Grievant offered by Agency which were excluded based on lack of foundation and relevancy. Grievant's Letter dated November 14, 2016 together with a Letter from his doctor, were also received into evidence. Grievant offered no other exhibits, and other than his own testimony, presented no witness on his behalf.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each of the witnesses, the Hearing Officer makes the following findings of fact:

1. On September 29, 2016 Grievant fell asleep during work hours without an excuse or just cause.
2. The Agency called three witnesses who were part of Grievant's painting crew, all of whom were present on the night in question. All three testified and corroborated each other that Grievant fell asleep on the job, that he was not praying, and that he was not complaining of any medical problem.
3. Grievant himself testified that his health was not a factor on the night in question.
4. The Agency's witnesses were credible and the Grievant himself acknowledged that the testimony of at least one of the Agency's witnesses was true and correct.
5. The Agency's actions in finding a Group III offence were justified and supported by the evidence.
6. There was no evidence of mitigating circumstances, medical or otherwise, to excuse Grievant's behavior.

## CONCLUSIONS OF POLICY

Pursuant to the Agency's Policy Resolution 1.60: 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." 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."

Sleeping during work hours is a Group III offense. On September 29, 2016 Grievant was asleep during work hours. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice.

Grievant argues that he was not sleeping. He contends he was praying. Grievant argued that the disciplinary action was retaliatory in nature. No credible evidence was presented to support this claim. Indeed, the evidence showed that Grievant was disciplined because of his behavior and not because of any improper purpose.

## DECISION

For the reasons stated above, based upon consideration of all the evidence presented in this cause the Hearing Officer finds that the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action and termination 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 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 14<sup>th</sup> Street, 12<sup>th</sup> 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 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.

[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/ James M. Mansfield  
James M. Mansfield

*copies e-mailed to:* Grievant  
Agency Attorney  
EDR