

Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 06/04/13; Decision Issued: 06/05/13; Agency: DGS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10082; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10082

Hearing Date: June 4, 2013

Decision Issued: June 5, 2013

PROCEDURAL HISTORY

On February 14, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping during work hours.

On March 15, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 30, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 4, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
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 General Services employed Grievant as an Inventory Analyst. The purpose of her position was to:

Provide oversight and review of the accuracy of the inventory data in the warehouse management system. Conduct cycle counts and investigates discrepancies between records and physical counts. Makes adjustments to WMS system where necessary. Provides administrative support and assist VDC customers by researching and resolving customer issues. Provides assistance to the warehouse staff and their responsibility to maintain the accuracy of the inventory.¹

Grievant had prior active disciplinary action. On January 9, 2012, Grievant received a Group II Written Notice with a three workday suspension for sleeping during work hours. The Written Notice provided, in part:

[Grievant] received a Counseling Memo on 10/20/2011 during which she was advised that sleeping on the job is a serious violation of the state's Standards of Conduct (SOC), DHRM Policy 1.60. She was counseled to correct the violation immediately. SOC documents this specific offense as

¹ Agency Exhibit 2.

a Group III for which an employee can be terminated. On 11/20/2012,² [Human Resource Generalist] also advised [Grievant] of the seriousness of this offense. Since the notices, at least 6 employees have witnessed [Grievant] sleeping on the job in November and more recently on the 13th, 15, 27, and 29 of December and the 3rd and 4th of January 2012.

We have reduced this Group III offense, with the action to terminate, to a Group II to allow [Grievant] a final opportunity to immediately correct the problem of sleeping during work hours. However, any future occurrence of this policy will result in a Group III Written Notice and immediate termination.³

Grievant received an overall rating of Contributor on her October 2012 annual performance evaluation.

Sometime before October 14, 2011, the Supervisor had told Grievant when Grievant felt sleepy she should go to the warehouse and perform one of the functions of her job that she could perform in the warehouse. The Supervisor told Grievant that moving around would stimulate her and keep her from feeling drowsy. Grievant agreed to do so but continued to fall asleep.

On October 20, 2011, the Supervisor gave Grievant a Notice of Employee Counseling/Improvement Needed stating:

This form documents that [Grievant] has been counseled today, October 20, 2011 on the issue described below. A re-occurrence will result in formal disciplinary action.

Description of specific deficiencies and improvements needed:

[Grievant] frequently falls asleep at her desk. There have been many incidents where her supervisor, VDC managers and co-workers have observed this behavior.

[Grievant] has been reminded that sleeping is not permissible while on the job and is a serious violation of the state's Standards of Conduct, DHRM Policy 1.60.⁴

Both Grievant and the Supervisor signed and dated the Notice of Employee Counseling/Improvement Needed.

² The Written Notice reflects the year as 2012, but the Hearing Officer will assume the agency meant November 20, 2011.

³ Agency Exhibit 1.

⁴ Agency Exhibit 5.

On November 11, 2011, Grievant's Medical Provider completed a Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act) regarding Grievant's sleep apnea. The Medical Provider indicated that Grievant's medical condition began in 2006 with a probable duration of her lifetime. The Medical Provider indicated "No" to the question "Is the employee unable to perform any of his/her job functions due to the condition." The Medical Provider answered "No" to the question of "Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions?" The Medical Provider wrote:

[Patient] has new CPAP mask and getting adjusted to it. Need some time for adjustment. Meanwhile [patient] may experience daytime fatigue and sleepiness.⁵

On November 22, 2011, the Human Resource Generalist sent Grievant an email stating:

Thank you for providing us with a copy of your Family and Medical Leave Certification.

According to [Medical Provider's] FML comments, your new mask may cause you to experience daytime fatigue and sleepiness. I am contacting you to see if there are alternative ways that we can support you as you adjust to your new CPAP mask.

I pose this question to you because your FML certification does not state that your condition affects your job functions nor requires you to be on leave. Your FML certification needs a doctor's notes documenting a patient's diagnosis from their visit to the doctor's office. The concern is the sleepiness during work.

Regardless of your medical condition, you are obligated to uphold the agreed to Standards of Conduct. The Standards of Conduct (SOC) policy does not permit sleeping during work hours. This is a very serious offense that comes with a Group III Written Notice and an employee can be terminated upon receiving a Group III and/or be suspended.

I make mention [of] the Standards of Conduct (SOC) because it is the standards of work performance and professional conduct governing all state employees regardless of their status.

Please let me know as soon as possible if you and [Medical care provider] have any suggestions for accommodations that we could provide to assist you with ensuring that you do not fall asleep during your required work hours.

⁵ Agency Exhibit 6.

I look forward to hearing from you.⁶

On November 29, 2011, the Human Resource Generalist sent Grievant a letter outlining her eligibility for and rights under the Family Medical Leave policy. Grievant was advised that after taking Family Medical Leave, she would be obligated to present a release from her physician prior to being reinstated to employment.

On January 10, 2012, and Grievant's Medical Provider submitted a Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act). The Medical Provider wrote:

[Patient] has new CPAP mask & still getting adjusted to new CPAP mask. Sleep apnea for mask adjustments & measurements. [Patient] may experience daytime fatigue & sleepiness & may be excused from work.⁷

On January 26, 2012, Grievant began receiving Short Term Disability benefits. On February 22, 2012, Grievant's Medical Provider wrote a note to certify that on February 15, 2012 she examined Grievant "and on the basis of my examination, this employee is able to return to full-time work and is able to perform the functions of his/her position with no restrictions, effective February 16, 2012."⁸

On December 6, 2012, the Supervisor sent Grievant an email stating:

Yesterday, [another employee] and I observed you sleeping at your desk. You struggled to raise your head but each time your head would quickly drop back down in a sleeping position. A warehouseman walk by you and you did not stir even when the door shut behind him. This went on for several minutes. I then walked by you and you still do not stir until I called out your name when I walked by your desk the second time.

As you know, this cannot be tolerated. I have suggested to you that you try to help avoid this issue by getting up and away from the comfort of your desk area and move around, go out to the warehouse, etc.

Unfortunately, the next time you're observed sleeping at your desk you will be terminated immediately.⁹

⁶ Agency Exhibit 7.

⁷ Agency Exhibit 9.

⁸ Agency Exhibit 10.

⁹ Agency Exhibit 11.

On February 14, 2013 at approximately 1:30 p.m., Grievant was seated in her chair at her workstation with her computer monitor in front of her. Grievant's head moved downward such that her chin was very close to her chest and she was facing downward. She fell asleep. She remained motionless while sleeping for approximately 1 to 5 minutes. She did not perform any work on her computer, and her computer monitor showed no activity while Grievant slept.

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."¹⁰ 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.¹¹ On February 13, 2013, Grievant was at her desk working. She fell asleep for over a minute. Grievant knew that falling asleep at work could result in her removal from employment. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice.

Grievant asserted there was some doubt regarding whether she was asleep on February 14, 2013. She presented evidence of coworkers who on prior occasions had observed Grievant with her head down but not asleep. In this case, the Agency presented two witnesses who had observed Grievant over prior years including times when Grievant was sleeping. Their testimony was credible that Grievant was asleep. They had sufficient experience observing Grievant's behavior to make an informed judgment that Grievant was sleeping. Grievant's behavior of placing her chin on her chest is consistent with being asleep. Grievant did not have papers on her lap that she could have been reading and her computer screen was inactive for over a minute. The Agency has presented sufficient evidence for the Hearing Officer to conclude that Grievant was asleep on February 14, 2013.

Grievant argued that she fell asleep during her lunch hour. Grievant presented evidence showing that on February 14, 2013 her lunch period began at 12:30 p.m. and ended at 1:15 p.m. She points out that the Agency's Written Notice refers to her being asleep at 1:10 p.m. Grievant did not testify during the hearing although she presented testimony of other witnesses. The only person who testified regarding the time Grievant was asleep was the Director of the Virginia Distribution Center. He testified he observed Grievant asleep on February 14, 2013 at approximately 1:30 p.m. The best

¹⁰ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

¹¹ See, Attachment A, DHRM Policy 1.60.

evidence before the Hearing Officer is that Grievant was asleep on February 14, 2013 at 1:30 p.m. Thus, Grievant was asleep after her lunch period had ended and during work hours.

Grievant argued that she suffered from sleep apnea and that caused her to sleep during work hours. She argued that her sleep apnea is a disability.

The Agency may remove Grievant even though she suffered from sleep apnea which is a disability protected under the Americans with Disabilities Act.¹² Sleeping during work hours is misconduct. Agencies are not obligated to permit employees to sleep as an accommodation to sleep apnea. In Jones v. American Postal Workers Union National, 192 F.3d 417, 429 (4th Cir. 1999), the Court held, “[t]he law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability.”

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”¹³ 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 of her medical condition. If the Hearing Officer assumes for the sake of argument that Grievant’s medical condition is a mitigating circumstance, there exist sufficient aggravating circumstances to counter the mitigating circumstances. The Agency advised Grievant several times that sleeping during work hours was not acceptable behavior and encouraged her to address the problem with her medical provider. Agency managers informed Grievant that if she felt sleepy, she could take action such as remaining active. She was told she could perform duties in the warehouse that would enable her to remain active and awake. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

¹² See, Orne v. Christie, 2013 U.S. Dist. LEXIS 2209 (E.D. Va. Jan. 7, 2013).

¹³ *Va. Code § 2.2-3005*.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary with removal 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 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.¹⁴

[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

¹⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.