

Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 05/07/14; Decision Issued: 05/12/14; Agency: DARS; AHO: Lorin A. Costanzo, Esq.; Case No. 10321; 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. 10321

Hearing Date: May 7, 2014
Decision Issued: May 12, 2014

PROCEDURAL HISTORY

On February 11, 2014 Grievant was issued a Group III Written Notice with termination for sleeping during work hours (Written Notice Offense Code/Category "71"). The Group III Written Notice indicated on February 6, 2014 at approximately 8:35 A.M. Grievant was found by his supervisor and another manager to be sleeping in a fleet vehicle during working hours.¹

Grievant timely grieved issuance of the Group III Written Notice with termination. The grievance proceeded through the resolution steps and, when the outcome was not satisfactory to Grievant, he requested a hearing. The matter was qualified for a hearing and the undersigned was appointed hearing officer effective April 3, 2014 2012 by the Department of Human Resources Management, Office of Employment Dispute Resolution.

A pre-hearing telephone conference was held on April 3, 2014 at which, by agreement of the parties, the grievance hearing was scheduled to be held on May 7, 2014. Grievance hearing was held on May 7, 2014 with Grievant in attendance. At hearing, by agreement of the parties, the exhibits of the parties were admitted *en masse*.

APPEARANCES

Grievant
Agency's Advocate
Agency Party Designee
Witnesses: Director Transportation Svc
Service Manager

ISSUES

Whether the issuance of a Group III Written Notice with termination was warranted and appropriate under the circumstances?

BURDEN OF PROOF

¹ A. Ex. F.

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; evidence more convincing than the opposing evidence.

The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.²

FINDINGS OF FACT

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

Grievant was employed by Agency as an Equipment Service Repair Technician 1 (Work Title: Equipment Repair Technician Senior). Grievant's 12/5/13 Employee Work Profile ("EWP") indicates, as a core responsibility, his duties include the performance of general mechanical repair and preventive maintenance on automobiles, trucks, and other equipment. Grievant's EWP provides a valid Virginia Commercial Driver's License is a requirement for entry into his position.³

On February 6, 2014 at approximately 8:35 A.M., Grievant was sleeping while at work. Grievant was observed by his Supervisor laying in the front seat of a vehicle sleeping. Grievant's Supervisor then went to find his own Supervisor and both returned to where Grievant was. Both observed Grievant laying down across the front seats of a vehicle asleep.⁴ After taking a photograph of Grievant management called out to Grievant three times before Grievant responded.⁵

Grievant signed his Performance Evaluation November 4, 2013 which stated in writing he had been informed he was required to obtain a Commercial Driver's License ("CDL") by January 6th, 2014.⁶ Management instructed Grievant he needed to obtain a CDL on a number of occasions. Management met with Grievant on September 27, 2013 and instructed him at that meeting to obtain his CDL by January 2, 2014. However, Grievant had not obtained a CDL as of February 6, 2014.⁷

POLICY AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the

² Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

³ G. Ex. – 12/5/13 EWP.

⁴ Testimony.

⁵ A. Ex. A and Testimony.

⁶ A. Ex. E.

⁷ A. Ex. C.

resolution of employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001.

Standards of Conduct (Policy No. 1.60):

To establish procedures on the Standards of Conduct and Performance for employees of the Commonwealth and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resources Management has promulgated Policy No. 1.60, *Standards of Conduct*. The *Standards of Conduct* provide a set of rules governing the professional and personal conduct of employees and acceptable standards for work performance of employees. The *Standards of Conduct* serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct, and to provide appropriate corrective action.

DHRM Policy 1.60 - *Standards of Conduct* organizes offenses into three groups according to the severity of the behavior. 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 would warrant termination.

Sleeping during work is listed as an example of a Group III Offense in *Attachment A*. of Policy 1.60. The *Standards of Conduct* further provides that the examples of offenses set forth are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. The Standards of Conduct provides:

*Examples of offense, by group, are presented in Attachment A. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.*⁸

The *Standards of Conduct* provides the normal disciplinary action for a Group III Offense is Written Notice and discharge. In lieu of discharge, the agency may: (1) suspend without pay for up to 30 workdays, and/or (2) demote or transfer with disciplinary salary action.⁹

February 6, 2014:

Grievant was employed by Agency and at work at Agency Facility on February 6, 2014. While at work on 2/6/14 his Supervisor observed Grievant to be laying across the front seats of a vehicle and asleep. Grievant's Supervisor then went to find his own supervisor who was drafting an e-mail. After finishing the e-mail both returned to where Grievant was first observed asleep. Both observed Grievant to be asleep laying across the front seats of a vehicle in a fetal position with his hands between his thighs. Both testified Grievant was sleeping while at work 2/6/14. A photograph was taken of Grievant sleeping at work in the vehicle he was supposed to be working on.¹⁰ After taking the photograph management observed Grievant still to be sleeping. Management then twice called out Grievant's name telling him to get up. A third time,

⁸A. Ex. F.

⁹A. Tab B and D.

¹⁰A. Ex. A.

in a louder voice, management called out Grievant's name and told him to get up and that he can't be sleeping at work. It was only after the third attempt that Grievant responded.

In his written response Grievant contends that he was not asleep at work, he was working on a vehicle, and had stuck his hands between his thighs to warm them. Grievant's written response indicated:

... "I was not laying across the seat of a fleet vehicle sleeping but unhooking the hand control and other handicap equipment as instructed by my supervisor that morning. If I did nod out it was just that, not intently in any way and no worse than nodding when watching a training film or a manatory meeting".¹¹

Two members of management observed Grievant sleeping while at work. After three attempts calling out his name Grievant was roused and woke up. Grievant was not on a scheduled break when he was sleeping. Grievant's work break was scheduled for 10:00 to 10:15 A.M. that morning and then later at 12:00 to 12:45 P.M.

Testimony indicated the vehicle Grievant was laying in was located in a heated garage. Two members of management testified to observing Grievant sleeping at work. Management took a photograph and then had to call out three times before he responded. The photograph was admitted into evidence and shows Grievant to be laying in the vehicle in a fetal position across the vehicle's two front seats.¹²

The evidence indicates Grievant was sleeping at work on February 6, 2014.

Circumstances considered:

Management took into consideration aggravating and mitigating circumstances prior to determining the appropriate disciplinary action to be taken.

Management took into considered matters related to Grievant's obtaining a Commercial Driver's License ("CDL"). Grievant was instructed by management to obtain a CDL a number of times including during a meeting on September 27, 2013. Grievant's 2013 and prior EWP's stated a valid Virginia Commercial Driver's License is required for Grievant's position.¹³ Grievant signed his Performance Evaluation on 11/4/13 which confirmed, in writing, he had been informed of the requirement to obtain his CDL license by January 6th, 2014 "as training needed to fulfill his job requirements".¹⁴ However, as of February 6, 2014, Grievant had not secured a CDL.¹⁵ Management was also concerned that Grievant had stated to management he had a CDL learner's permit but when management checked with police it was reported no CDL permit had been issued Grievant.¹⁶

Additionally, management took into consideration matters which gave rise to four "Below Contributor" ratings Grievant received in his October 30, 2013 Performance Evaluation, namely:

¹¹ A. Ex. C.

¹² A. Ex. A.

¹³ G. Exhibits.

¹⁴ A. Ex. E.

¹⁵ A. Ex. C. and testimony.

¹⁶ Testimony.

- [**Grievant**] has had trouble this performance cycle completing his assignments in a timely manner resulting in complaints from some departments. This was discussed with [**Grievant**].
- [**Grievant**] has had several verbal confrontations with staff members from the Police Department as well as [...] staff.
- [**Grievant**] is having problems adapting to procedural changes established by management. He continues to questions decisions made by management for example the removal of computers from all [**named**] shops and the reorganization of his work area.
- [**Grievant**] has started a pattern of absences with little or no prior notice given. He has on occasions either reported his absence to his supervisor after his normal starting time or not at all. [**Grievant**] also needs to work on reporting to work on time.

Due Process:

The *Standards of Conduct* provide that prior to issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

The *Standards of Conduct* further provides that, as to a reasonable opportunity to respond after receiving notification, normally, a 24-hour period is sufficient. However, a reasonable opportunity to respond should not be solely based on the quantity of time provided but also the nature of the offense, which may or may not require time to refute or mitigate charges.

Agency provided Grievant with a due process letter February 6, 2014 which described the incident leading to Agency's concern and set forth allegations Grievant was found asleep in a fleet vehicle during work hours on 2/6/14 at approximately 8:35 am. The letter indicated Grievant's name was called several times and when Grievant roused, he stated he was not sleeping. The letter indicated this was a serious violation of the Standards of Conduct and subjected Grievant to termination. Grievant was afforded opportunity to respond in writing until 5:00 PM on February 7, 2014 and provide any mitigating circumstances to be considered in determining what, if any, disciplinary action was warranted.

The evidence indicates, prior to any disciplinary action, Grievant received a written notification of the offense, an explanation of the evidence in support of the charge, and was afforded a reasonable opportunity to respond. Grievant did, in fact, provide a response in writing to management.¹⁷

Mitigation:

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 the rules established by the Department of Human Resources Management ...".¹⁸ Under the *Rules for Conducting Grievance Hearings*, "a hearing officer must give deference to the agency's consideration and

¹⁷ A. Ex. C.

¹⁸ Va. Code § 2.2-3005.

assessment of any mitigating and aggravating circumstances". 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."

The Hearing Officer does not find that the agency's discipline exceeds the limits of reasonableness.

CONCLUSIONS

For the reasons stated above, based upon consideration of all the evidence presented at hearing, Agency has proven, by a preponderance of the evidence, that:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action and Agency's discipline does not exceed the limits of reasonableness.

DECISION

For the reasons stated above, the Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group III Written Notice with termination was warranted and appropriate under the circumstances and the Agency's issuance of a Group III Written Notice with termination is **UPHELD**.

APPEAL RIGHTS

As the *Grievance Procedure Manual (effective date: July 1, 2012)* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

A. Administrative Review:

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of DHRM. This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The Director's authority is limited to ordering the hearing officer to revise

the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).

B. Final Hearing Decisions:

A hearing officer's decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if Ordered by EDR or DHRM, the hearing officer has issued a revised decision.

C. Judicial Review of Final Hearing Decision:

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

Lorin A. Costanzo, Hearing Officer