

Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 06/19/14; Decision Issued: 06/20/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No.10355; 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: 10355**

Hearing Date: June 19, 2014

Decision Issued: June 20, 2014

#### **PROCEDURAL HISTORY**

On March 24, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping.

On March 29, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 29, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 19, 2014, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
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 employed Grievant as a DSA II at one of its facilities. Grievant was responsible for providing services to individuals at the Facility. She had prior active disciplinary action consisting of a Group I Written Notice for unsatisfactory attendance, Group II Written Notice for failure to comply with policy and a Group II Written Notice for failure to work emergency overtime.

On March 8, 2014, Grievant was sitting in a chair near one end of the day hall. She was seated with her head tilted back to the side and with her eyes closed. She appeared to be sleeping. The Supervisor entered the day hall through the doorway at the other end of the day hall. The Supervisor first encountered Mr. P who was seated in a chair doing some paperwork. Mr. P observed the Supervisor entering the room so he turned to make sure other staff were attending to their duties. Mr. P observed Grievant with her eyes closed. He yelled Grievant’s first name loudly enough to startle the Supervisor and several other employees working in the day hall. The Supervisor did not know why Mr. P was yelling. She continued walking into the room and observed Grievant with her eyes closed. Mr. P’s yelling had not awoken Grievant. The Supervisor began speaking to Grievant saying repeatedly and loudly, “I know [Grievant] is not asleep; I know [Grievant] is not asleep!” Grievant did not awaken as the Supervisor spoke and continued to walk towards Grievant. As the Supervisor reached towards Grievant to touch Grievant, Grievant woke up. Grievant “jumped a little” and had a “deer in the headlights” look. The Supervisor said, “You were asleep!” Grievant responded that she was not asleep.

Grievant later told the Supervisor she was taking medication that made her drowsy. Grievant had not disclosed to the Agency that she was taking any medication.

## 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.”<sup>1</sup> 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.<sup>2</sup> On March 8, 2014, Grievant was supposed to be performing work duties in the day hall. Instead, she fell asleep while seated in a chair. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that she was not asleep. The evidence showed that Grievant had her eyes closed with her head tilted to the side. She did not hear Mr. P yell her name. She did not hear the Supervisor repeatedly speak to her as the Supervisor walked towards Grievant. Grievant did not hear these words because she was asleep.

Grievant argued that she was not asleep because she had just spoken with another employee. The evidence is clear that regardless of whether Grievant had spoken with another employee prior to falling asleep, she was asleep at the time the Supervisor observed her.

*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 ....”<sup>3</sup> 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.

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<sup>1</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

<sup>3</sup> *Va. Code § 2.2-3005.*

Grievant told the Supervisor she was taking medication that caused drowsiness. She wrote in her grievance that she was taking medication that “causes drowsiness and extreme tiredness.” During the hearing, Grievant argued that the medication she took made her feel “hyper” and, thus, she was not asleep. Grievant’s inconsistent assertions render her claim for mitigation unpersuasive. In light of the standard set forth in the Rules, 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 removal 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> St., 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> St., 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.<sup>4</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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