Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 01/26/15; Decision Issued: 02/04/15; Agency: DBDHS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10499; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 02/19/15; EDR Ruling No. 2015-4100 issued 03/05/15; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 02/19/15; DHRM Ruling issued 03/23/15; Outcome: AHO's decision affirmed; Judicial Appeal: Appealed to Dinwiddie Circuit Court 04/23/15); Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10499

Hearing Date: January 26, 2015
Decision Issued: February 4, 2015

PROCEDURAL HISTORY

Grievant was a forensic mental health technician ("FMHT") for the Department of Behavioral Health and Development Services ("the Agency"), serving Central State Hospital ("CSH"), and has been with the Agency for fifteen years. On September 24, 2014, the Grievant was issued a Group III Written Notice for being less than alert (sleeping during work hours) on August 26, 2014, contrary to established policy. Based on the accumulated discipline of two prior, active Group II Written Notices and one active Group I Written Notice, the Agency elected to terminate the Grievant.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On November 12, 2014, the Office of Employment Dispute Resolution, Department of Human Resource Management, ("EDR") appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for December 4, 2014, but the Grievant moved to continue the hearing for medical reasons. For good cause shown, the grievance hearing was continued to the first date available for both sides, January 26, 2015, on which date the grievance hearing was held, at the Agency's facility.

Both sides submitted documents for exhibits that were accepted into the grievance record, without objection, and they will be referred to as Agency's or Grievant's exhibits, respectively. The parties were allowed one week post-hearing to submit written argument and authorities, and both the Agency's and Grievant's post-hearing submissions are made a part of the hearing record. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Advocate for Grievant
Agency Representative
Advocate for Agency
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?

Through his grievance filings, the Grievant requested reversal of the Group III Written Notice and reinstatement to his position, asserting his discipline was improperly motivated.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW 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. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent 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 resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group III Offenses to include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws. Pursuant to the Agency's Employee Handbook, sleeping during work hours is a Group III offense. Agency Exh. 5.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offense

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

The Agency employed Grievant as an FMHT, with fifteen years tenure. The Grievant had two active Group II Written Notices and one Group I Written Notice, all pertaining to chronic tardiness. Agency Exh. 4. The current Group III Written Notice charged:

> Less than Alert (Sleeping during work hours): On 8/26/14, you were observed sitting in a chair in the hallway of ward 5 with your head against the wall, hand on your cheek, with eyes closed and mouth open. Upon extended observation, you did not move. This is considered to be less than alert (sleeping).

The Agency's registered nurse coordinator ("RNC") testified consistently with the charge in the Written Notice. The RNC testified that he personally made the observation of the Grievant as charged in the Written Notice. He testified that the Grievant's assignment in the maximum forensic security setting requires alertness at all times, for the safety and security of the inmate population and the staff, including the Grievant. The RNC testified that he observed the Grievant in this state for several seconds before speaking the Grievant's name and, thus,

getting his attention. The RNC testified that the Grievant's lack of alertness in the maximum-security ward was contrary to the Agency's expectations and created a safety risk. Other staff members were in the general vicinity of the incident. A security camera digital video of the incident was shown at the hearing The digital video is not conclusive, but it corroborates the RNC's testimony. The angle and distance of the camera rendered the video subject to interpretation. On cross-examination, the RNC testified that he asked the Grievant whether he was asleep and the Grievant responded "no" almost immediately.

The RNC testified that two other employees were recently terminated for sleeping or being less than alert. The RNC testified that he does not have the unilateral power to issue discipline, and that he consulted with the human relations department before discipline was issued to the Grievant.

The assistant chief nurse executive testified that a state of being less than alert, including sleeping, is considered a Group III offense. He testified that the Agency trains on the importance of alertness, and that mitigation is always considered for the level of discipline. He clarified that the nursing department does not mitigate because that is within the purview of the human relations department.

The regional human resources director testified that her department is involved in all aspects of discipline, and that supervision staff consults with the human relations department for discipline. She testified that a Group III Written Notice does not always lead to termination; that mitigating factors are considered, such as prior disciplinary record, length of tenure, and relative seriousness of offenses. She testified that a record of active written notices weigh against mitigation. She also testified that the written statements from other witnesses submitted by the Grievant were given minimal consideration.

A FMHT testified on the Grievant's behalf. She was sitting the hallway working a 1:1 assignment about 30 feet from the Grievant's station. She testified that she observed the interraction between the RNC and the Grievant, and she heard the Grievant respond immediately to the RNC's question and was not asleep. She testified that the RNC does not listen adequately to the staff, she was told by her supervisor that the RNC was "on the warpath," and that she believed the Grievant has not been treated fairly.

Another FMHT testified that the Grievant successfully represented him in a grievance. A safety and security technician testified that she signed a petition seeking to improve working conditions, and that the Grievant is a good person, and that there has been a practice at the Agency for an allegation of sleeping to require a second witness. A direct care associate testified that everything at the Agency is punitive, that clocking-in for work is difficult, and there is a hostile working environment. On cross-examination, the direct care associate testified that she is currently under investigation for verbal abuse, and she confirmed that the patients at the facility are the most dangerous patients in Virginia. Another safety and security technician testified that working conditions need to improve, there is understaffing, and that the patients are very aggressive. On cross-examination, she admitted she had been disciplined within the last six months.

In his grievance Form A, the Grievant wrote:

> I was wrongfully terminated for a false allegation made by a supervisor for being "Less than alert – Sleeping during work hours". Because of recent changes in long standing policies and unfair supervisory practices & an unfair investigation, I was not given due process and the proper right to defend myself. In performing my duties as President and Shop Steward of Local 160, VA Public Service Workers Union, I among other employees, have witnessed or been effected by these unfair working conditions and mgt. practices. These practices have undermined confidence & morale and created a hostile work environment for us, as others will attest to.

Agency Exh. 1. The Grievant also submitted a written statement in response to the Agency's due process, in which he denied sleeping or having his eyes closed. Agency Exh. 2. The Grievant's testimony was consistent with his written accounts. He testified that he was sitting and turned around to look at a calendar on the wall and had his head resting on his hand when the RNC walked up to him. The Grievant testified that the RNC is an authoritative person. The Grievant also submitted three employees' written statements. The author of one of these statements is an FMHT who testified for the Grievant, who said the Grievant was not asleep. The other two written statements do not add much, but one states the Grievant "had his head against the wall as though he wasn't alert; but when [the RNC] called his name he answered him immediately."

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. I find that the conduct as described in the Written Notice occurred, and that the offense is considered properly Group III—less than alert or sleeping during work hours. The Agency's evidence, particularly the testimony of the RNC, that the Grievant was postured in a less than alert position, with his head leaning against a wall, resting on his hand, with his eyes closed and mouth open, all for several seconds, is credible evidence. The Grievant and a witness both corroborate the Grievant's posture described by the RNC. The statements from the other witnesses indicate interaction with the Grievant moments before the RNC made his observation, but these interactions do not directly rebut the Agency's evidence of being less than alert, if even for a few moments. Sleep has many stages, and common knowledge tells us that persons may hear voices and arouse immediately to respond. Even if the Grievant was not fully asleep, the evidence preponderates in showing he was inattentive to the point of being less than alert, and he is required to remain alert while working. The population in the facility renders a severe safety risk when a staff member is acting in a less than alert manner.

The Agency is permitted to hold its employees to exacting compliance in such matters, and being less than alert, regardless of whether the Grievant was fully asleep, constitutes misconduct subject to disciplinary action. Being less than alert is tantamount to sleeping during work hours, neglect of duty, and, potentially, neglect of clients. Thus, I find the Agency has properly classified the offense as a Group III. While sleeping is specifically identified as an example of Group III offenses in the Employee Handbook, Agency Exh. 5, (*see, also*, Attachment A to DHRM Policy 1.60, Standards of Conduct), the Grievant argues that being "less than alert" is ill defined. The Employee Handbook does not enumerate being "less than alert" as a specific offense example, but the list of examples is non-exhaustive. Being alert and responsive is an obvious job requirement for any position, especially one directly involved with responsibility over dangerous patients.

If, assuming *arguendo*, policy were to distinguish between sleeping and being less than alert, with the latter classified as a less severe Group II instead of a Group III offense, the result here would be the same, *i.e.*, sufficient accumulation of written notices for termination.

Hostile Work Environment

Grievant contends that Agency created a hostile work environment. Harassment/hostile work environment refers to any unwelcome, verbal, written or physical conduct that denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability, that (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

To establish a claim for hostile work environment or harassment, Grievant must show that the Agency's conduct was (1) unwelcomed, (2) based upon a protected status or prior protected activity, (3) sufficiently severe or pervasive so as to alter his conditions of employment and to create an abusive or hostile work environment, and (4) imputable on some factual basis to the agency. *See generally White vs. BFI Waste Services, LLC*, 375 F.3d 288, 296-7 (4th Cir. 2004). Whether an environment is "hostile" or "abuse" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Harris v. Forklift Systems, Inc*., 510 U.S. 17, 23 (1993).

There is no evidence presented at hearing to find that the actions by Agency were based upon or were a pretext for discrimination based upon Grievant having membership in a protected class or based upon Grievant having engaged in a prior protected activity. There is insufficient evidence presented at hearing to find disparate treatment, harassment, or that a hostile work environment was created.

Retaliation

The Grievant asserts that the Agency's action is motivated by retaliation. For a claim of retaliation to succeed, the Grievant must show (1) he engaged in a protected activity; (2) he suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. If the Agency presents a nonretaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

The Grievant engaged in protected activity—being actively involved in the public employees' union and by representing other employees in their grievances. The Grievant asserts that the retaliation he has experienced stems from this protected activity. Further, he has suffered a materially adverse action due to the agency's discipline and termination. However, the Grievant does not satisfy the burden of proof of showing that the materially adverse action was taken because of his protected activity.

There is nothing to suggest that the Agency's handling of this discipline was in any way retaliatory beyond the Grievant's mere allegation. Grievant has not presented sufficient evidence to show that the Agency's discipline was motivated by improper factors. Rather, it appears that the determinations were based on the Grievant's actual conduct and accumulation of written notices, all of which was solely within the control of the Grievant.

Mitigation

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution." 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.

The agency has proved (i) the employee engaged in the behavior described in the written notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

On the issue of mitigation, EDR has ruled:

> Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the *Rules* "exceeds the limits of reasonableness" standard. This is a high standard to meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling #2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

> When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EDR Rulings 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

For circumstances considered, the Written Notice states:

> You currently have two (2) active Group II Written Notices and one (1) active Group I Written Notice for Excessive Tardiness. You were given the opportunity to provide mitigating circumstances for this offense; however, a review of your record and the information you provided during due process failed to provide sufficient reason to mitigate this action.

The Grievant argues that the discipline was based on improper motives by Agency management. To prevail on this point, the Grievant would have to prove that the factual allegation of inattentiveness was false, or that there was some hostile and/or discriminatory intent for the discipline. While agencies have wide latitude in exercising their option to mitigate the

discipline of removal under policy, hearing officers can mitigate only when the discipline exceeds the bounds of reasonableness, that is, when the discipline is unconscionably disproportionate, abusive, or totally unwarranted. Under policy, a Group III Written Notice normally results in termination. Even a lesser Group I or II Written Notice would support termination based on accumulation of active Written Notices. It is a rare case in such an instance where mitigation on the basis of prior service is warranted. Under EDR guidance, this does not mean that mitigation by a hearing officer should never occur—just that mitigation is reserved for exceptional circumstances. Exceptional circumstances do not exist here, and, accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action.

DECISION

For the reasons stated herein, the Agency's issuance of the Group III Written Notice with termination must be and 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.[1]

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

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