

Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 10/07/14; Decision Issued: 10/08/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10451; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10451

Hearing Date: October 7, 2014

Decision Issued: October 8, 2014

PROCEDURAL HISTORY

On July 15, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping/inattentive during work hours.

On August 4, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 28, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 7, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's 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 Corrections employed Grievant as a Corrections Officer at one of its Facilities. He had been employed by the Agency since November 2007.

Grievant had prior active disciplinary action. He received a Group III Written Notice with a forty hour suspension on July 19, 2013 for sleeping in Tower 4.

Tower 4 is located outside of two fences securing the Facility. The inside fence has sensors that indicate when someone touches the fence. When a fence is touched, an alarm is activated in the towers surrounding the Facility. Periodically, Mr. K tested the fence by touching the fence and communicating with the command center to determine if the alarm was activated.

On June 18, 2014, Grievant was working in Tower 4. Mr. K and the Captain were walking inside the fence and testing its alarm system. They left the inside of the fence and began walking towards Tower 4. The Captain had a white piece of paper. She began waving it back and forth over her head as she approached the Tower 4. Grievant did not respond to the Captain. Grievant was seated and his head was facing forward. The Captain and Mr. K were too far away to see Grievant's eyes to determine if he was asleep. They watched Grievant while the Captain continued to wave to Grievant. Grievant did not acknowledge the Captain or Mr. K. After three or four minutes, Grievant raised his arms above his head as he leaned back to stretch. He then observed the Captain and Mr. K and acknowledged them.

Grievant wrote an incident report stating he “said a short personal prayer to myself lasting no longer than three minutes. When I finished I acknowledged [the Captain] who was waving to me.”¹

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”² Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

Grievant’s Post Order provided, in part:

Never allow yourself to sleep while on this post. You must remain alert at all times. Always promptly respond to light or hand signals from supervisors when they pass your post to indicate you are alert.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁵ On June 18, 2014, Grievant was working in Tower 4. He did not respond to the Captain’s signal because he was not alert. He acted contrary to his Post Order requiring him to remain alert and respond to a supervisor’s signals. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Upon the accumulation of a Group III Written Notice and another Written Notice, an agency may remove an employee. Grievant has accumulated a Group III Written Notice and a Group II Written Notice thereby justifying the Agency’s decision to remove him from employment.

Grievant argued that he suffered from an illness that made him drowsy. He did not present any evidence and there is no basis upon which the Hearing Officer can determine the impact of Grievant’s medical condition on the events of June 18, 2014.

¹ Agency Exhibit 8.

² Virginia Department of Corrections Operating Procedure 135.1(V)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

Sleeping is a Group III offense under the Agency's Standards of Conduct. The Agency did not establish that Grievant was sleeping. The Agency has established that Grievant was inattentive thereby acting contrary to his Post Order. Grievant's behavior is best described as a failure to follow policy which is a Group II offense not a Group III offense.

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"⁶ 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further 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 is **reduced** to a Group II Written Notice.

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.

⁶ *Va. Code § 2.2-3005.*

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.⁷

[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

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.