

Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 12/03/14; Decision Issued: 12/22/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10493; 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: 10493

Hearing Date: December 3, 2014
Decision Issued: December 22, 2014

PROCEDURAL HISTORY

On October 6, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping during work hours.

On October 8, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 3, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 3, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Secretary at one of its facilities. Grievant had prior active disciplinary action. She received a Group I Written Notice on June 12, 2013, a Group III Written Notice on July 18, 2013, and a Group II Written Notice on December 10, 2013.

On September 3, 2014, Grievant was seated in a chair in the hearings office. The chair was in front of a desk facing a wall.

The Operations Manager had finished her rounds and passed by the hearings office. She looked into the office and observed someone leaning back in a chair. She did not recognize that person because a different employee usually worked in that office. The Operations Manager walked into the office and walked to Grievant's side. The Operations Manager was standing within a foot or two of Grievant and observed Grievant with her head back in the chair, eyes closed and mouth open. Grievant had a paper in her lap. Grievant did not respond to the Operation Manager's entry into the office because Grievant was asleep. The Operations Manager left the office and went to another location.

Approximately ten to 15 minutes after leaving the hearings office, the Operations Manager returned to see if Grievant remained asleep. The Operations Manager walked into the office. For approximately two minutes, the Operations Manager observed Grievant sleeping. The Operations Manager said "What are you doing?" Grievant jerked and awoken. Grievant turned around and looked at the Operations Manager.

The Operations Manager said, "I just wanted to make sure." Grievant replied, "Thanks for putting me out there." The Operations Manager left the hearing office.

The Warden considered whether to mitigate the disciplinary action but chose not to do so based on Grievant's prior active disciplinary action.

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."¹ 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."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

"[S]leeping during work hours" is a Group III offense.⁴ On September 3, 2014, Grievant was at work when she fell asleep. She was not on break. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action. 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 sleeping but rather was doing paperwork. The Agency presented credible testimony showing that Grievant was asleep. No credible evidence was presented to show that Grievant was awake when the Operations Manager observed Grievant.

Grievant argued that the Operations Manager should not have disclosed to other employees that she had observed Grievant sleeping. Although insufficient evidence was presented to support this allegation, if the Hearing Officer assumes its truth for the sake of argument, it would not affect the outcome of this case.

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"⁵ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

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

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

⁴ See Agency Exhibit 8.

⁵ Va. Code § 2.2-3005.

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 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 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.⁶

[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

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.