

Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 06/12/19; Decision Issued: 07/02/19; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 11333; Outcome: No Relief – Agency Upheld;
Administrative Review Ruling requested 07/16/19; EDR Ruling No. 2020-4957 issued 08/05/19; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11333

Hearing Date: June 12, 2019

Decision Issued: July 2, 2019

PROCEDURAL HISTORY

On February 8, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping during work hours.

On February 28, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 18, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 2, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Virginia Department of Transportation employed Grievant as a Transportation Operator II at one of its facilities. He began working for the Agency in 2017. His customary work shift was from 7 a.m. to 3:30 p.m. except when he was called to assist with snow removal. Grievant received an overall rating of Contributor on his 2018 performance evaluation.

The Agency has a system to enable it to locate and track the movement of its trucks.

On December 10, 2018, Grievant was assigned Truck 18. He went to the Store parking lot. Mr. W was operating a tractor to clear snow from Store's parking lot. Mr. W called the Supervisor at 6:35 a.m. and told Supervisor that an Agency truck was in the Store parking lot preventing Mr. W from pushing snow off the parking lot. Mr. W said that the Agency truck's spreader was running and throwing salt and sand on the building and in the parking lot. Mr. W told the Supervisor that Mr. W tried to awaken the driver but was unsuccessful.

At 6:37 a.m., the Supervisor called Grievant but Grievant did not answer his phone. At 6:40 a.m., the Supervisor called the Manager and asked the Manager to check on Grievant at the Store while the Manager was on his way to work.

At approximately 6:45 a.m., the Manager arrived at the Store parking lot. The Manager approached Grievant's truck and observed Grievant slumped forward in his seat with his head on the dashboard. The salt/abrasive spreader was running and approximately 400 or 500 pounds of salt¹ was in a pile in the parking lot. The pile was approximately 2.5 feet high and 9 feet wide. The Manager beat on the truck door and yanked on the door handle. The Manager began reaching into his tool box to get a hammer to knock out the window because the Manager thought Grievant might be having a medical emergency. Before the Manager could break the window, Grievant started moving around in the truck and opened the door.

On December 11, 2018, Grievant was assigned Truck 18. He drove the truck to a Lumber Yard. He was tired and had not had a break. He got out of the vehicle and walked around in an attempt to be more alert. He got back into the vehicle and "passed out."

On December 11, 2018 at approximately 7:30 a.m., the Supervisor was reviewing SWAS to determine where Agency's trucks were located. He noticed that Truck 18 had been in the same location for a while. The Supervisor called Grievant at 8:04 AM. Grievant said he was almost back at the Lot. Grievant arrived at the Lot at approximately 8:20 a.m. and then left the Facility.

On December 14, 2018, a Citizen called the area headquarters and spoke with the Manager about a truck at the Lumber Yard that was running and keeping her awake. The Citizen said the truck was running from 6 a.m. to 8 a.m. making her dogs bark and keeping her awake. The Manager contacted another employee to check on the location of Truck 18. The employee confirmed that Grievant's truck was idle from approximately 5:57 a.m. until approximately 7:55 a.m.

Grievant had several health issues including a condition of sleep disturbance. He did not have sleep apnea. He was returned to work full duty on November 26, 2018.

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."² 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."

¹ Grievant described this as 4 or 5 gallons of sand.

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

"[S]leeping during work hours" is a Group III offense.³ On December 10, 2018, Grievant was operating an Agency truck and supposed to be working. He fell asleep and remained asleep even though Mr. W and the Manager attempted to wake him. On December 11, 2018, Grievant drove his truck to the Lumber Yard parking lot and "passed out." Grievant was asleep while he was supposed to be working. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for sleeping during work hours. 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 the District Safety Manager told employees to pull over and nap if they feel tired and unsafe to drive. The District Safety Manager denied saying employees could pull over and asleep. The Hearing Officer does not believe Grievant was authorized to sleep during work hours.

Grievant argued the Agency failed to offer him an accommodation for his sleep disturbance. Insufficient evidence was presented to show that Grievant had a disability requiring the Agency to accommodate him. In any event, permitting an employee to sleep during work hours, would not be a reasonable accommodation expected of an agency.

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"⁴ 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.

Grievant contends the disciplinary action should be mitigated because the Agency inconsistently disciplined its employees. Grievant presented evidence of other employees who received disciplinary action for sleeping but were not removed from employment. To the extent this is a mitigating factor, the Agency has presented aggravating factors that justify not reducing Grievant's disciplinary action. Grievant was caught sleeping on December 10, 2018 and knew that his behavior was unacceptable. He failed to understand the significance of his mistake on December 10, 2018 and repeated that behavior on December 11, 2018. The Agency argued that Grievant's

³ See, Attachment A, DHRM Policy 1.60.

⁴ *Va. Code § 2.2-3005.*

failure to recognize his behavior on December 10, 2018 was problematic was an aggravating factor sufficient to avoid reduction of the disciplinary action. The Hearing Officer is persuaded by the Agency's argument and will not mitigate the disciplinary action in this case.

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 request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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]

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

[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