

Issue: Group III Written Notice (sleeping during work hours); Hearing Date 08/19/15;
Decision Issued: 08/20/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No.10647; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10647

Hearing Date: August 19, 2015
Decision Issued: August 20, 2015

PROCEDURAL HISTORY

On April 8, 2015, Grievant was issued a Group III Written Notice of disciplinary action for sleeping during work hours.

On April 23, 2015, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On July 22, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 19, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant Representative
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 employs Grievant as a Security Officer III at one of its facilities. The purpose of her position was to "provide safe and effective individualized treatment in a recovery focused environment."¹ She has been employed by the Agency for approximately 12 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Patient was involuntarily committed to the Facility. He had a history of trying to leave the Facility without permission or authorization. The Agency refers to this as elopement. The Patient's tendency for elopement created a security risk for the Patient and other staff.

On March 29, 2015, the Patient was in the Facility and accidentally took too many medications. He was transported from the Facility to a local treatment Hospital. Grievant was sent to the Hospital to observe the Patient at all times to ensure he did not create a security risk by elopement. She was expected to remain alert and awake while she was at the Hospital.

On March 30, 2015, in the early morning, Grievant was observing the Patient. Lights in the room were turned down and the television was playing. Two Hospital employees believed that Grievant had fallen asleep. One witness reported that she observed Grievant laying back in a recliner with her feet up on her left side looking

¹ Agency Exhibit E.

toward the door with her eyes closed. The second witness reported that she observed Grievant sleeping on multiple occasions that morning.

The Agency presented Grievant with its allegations that she was sleeping on March 30, 2015. During the Step Process, Grievant denied sleeping while working. She admitted resting her head on the palm of her hand and closing her eyes. She said she “rested her eyes.” Grievant said that if anyone had spoken to her, she would have responded. She also stated that she sent several texts to her supervisor and had conversations with Hospital employees.

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.”

“[U]nsatisfactory work performance” is a Group I offense.³ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

On March 30, 2015, Grievant was obligated to remain alert and focused on the Patient. She rested her head on her hand and closed her eyes for a sufficient amount of time that other employees noticed her behavior. Grievant’s work performance was unsatisfactory to the Agency because she was not observing the Patient while she had her eyes closed. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory job performance.

The Agency alleged that Grievant was sleeping. The Agency did not request witness orders for the two Hospital employees who observed Grievant sleeping. The Agency only presented statements from the two Hospital employees. Grievant did not testify at the hearing. Grievant’s account of the incident was revealed during the Step Process. Grievant stated during the Step Process that she was not asleep. The evidence before the Hearing Officer is equally likely to be true. Because none of these key witnesses testified, the Hearing Officer cannot make a credibility determination to resolve the inconsistencies between Grievant’s assertion she was not sleeping and the two witnesses who claimed Grievant was sleeping. Without the ability to assess

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

³ See Attachment A, DHRM Policy 1.60.

witness credibility, the Hearing Officer can only conclude that Grievant may have been asleep on March 30, 2015. To sustain a Group III offense, the Agency must show by a preponderance of the evidence that Grievant was asleep. The Agency has not met this burden of proof. The Group III Written Notice cannot be upheld.

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. 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 I 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.

⁴ 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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.