



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11717**

Hearing Date: October 1, 2021  
Decision Issued: October 21, 2021

**PROCEDURAL HISTORY**

On June 21, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping during work hours.

On June 25, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On July 12, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 1, 2021, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Agency Party Designee  
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. 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 Community College System employed Grievant as a Trades Tech IV at one of its Colleges. Grievant was responsible for overseeing work orders and held a leadership role on the team. He had been employed by the College for approximately 15 years. Grievant had prior active disciplinary action. On January 21, 2021, Grievant received a Group II Written Notice with a ten workday suspension.

During the prior year, Grievant fell asleep during meetings. If the Supervisor saw Grievant "nodding off", the Supervisor would tell Grievant to stand up and get some water on his face. The Supervisor privately counseled Grievant after he fell asleep. The Supervisor told Grievant that Grievant had a problem and needed to get help. The Supervisor wrote in Grievant's October 2020 performance evaluation:

[Grievant] needs to stay alert when attending training and meetings. This is not a good look that it appears that he is falling asleep. I have asked [Grievant] to go to the doctor, not for my sake but for his.<sup>1</sup>

On May 3, 2021, at approximately 8:30 a.m., the Supervisor entered the building and then into a vehicle service work bay. A service van was parked in the bay awaiting

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<sup>1</sup> Agency Exhibit p. 52.

repairs. The Supervisor observed Grievant sitting in the van. The Supervisor walked closer to Grievant and heard Grievant snoring. This surprised the Supervisor so he moved closer to verify what he was hearing. The Supervisor observed Grievant asleep. The Supervisor called Grievant's first name, but Grievant did not respond. The Supervisor called Grievant's first name a second time and Grievant did not respond. The Supervisor did not want to startle Grievant by touching him so the Supervisor walked away from the van and called Grievant on his cell phone. Grievant awoke. The Supervisor said, "You need to get up now. What is wrong with you?" The Supervisor said, "I'm gonna deal with this one. You cannot continue to do stuff like this."

Grievant did not tell the Supervisor he was taking any medication that might cause sleepiness prior to the incident.

Grievant was removed from employment effective June 21, 2021

### **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."<sup>2</sup> 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."

"[S]leeping during work hours" is a Group III. On May 3, 2021, Grievant was at work and supposed to be working. He sat in a van and fell asleep. He remained asleep while the Supervisor called his name two times. The Supervisor had to call Grievant's cell phone to awaken Grievant. The College has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the College's decision to remove Grievant must be upheld.

Grievant argued that he suffered from sleep apnea and that this was widely known among his co-workers. Grievant presented evidence that he participated in sleep studies on October 21, 2016 and February 6, 2017. A physician's interpretation concluded that Grievant's severe obstructive sleep apnea was controlled with a CPAP machine. The evidence Grievant presented may explain why Grievant fell asleep on May 3, 2021, but it does not excuse his falling asleep. Grievant did not present evidence that his medical condition prevented him from remaining awake if he followed the Supervisor's prior instruction to stand up and put water on his face when he became sleepy. Grievant was advised by the Supervisor that falling asleep at work was unacceptable and that Grievant was responsible for identifying a means to avoid falling asleep at work.

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

Grievant asserted that the College failed to provide him with an adequate opportunity to respond to the disciplinary allegations. To the extent the College failed to provide him with due process, the hearing process cures these defects. Grievant could present any documents and arguments during the hearing process that he could have presented to the College during the Step Process.

*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 ....”<sup>3</sup> 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 argued that other employees were found asleep but were not removed from employment or were not removed immediately. Grievant’s evidence was not sufficient to show that the College singled-out Grievant for disciplinary action. Grievant did not present any credible evidence of examples of employees who had been warned not to fall asleep during work and then were not removed from employment after falling asleep a second time and being caught by management. In light of the standard set forth in the Rules, 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 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:

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<sup>3</sup> *Va. Code § 2.2-3005.*

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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