

Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 09/07/16; Decision Issued: 09/08/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10854; Outcome: Full Relief.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10854**

Hearing Date: September 7, 2016  
Decision Issued: September 8, 2016

#### **PROCEDURAL HISTORY**

On June 13, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for "falling asleep during your duty hours."

On July 6, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 2, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 7, 2016, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
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 employed Grievant as a Security Officer III at one of its facilities. He has been employed by the Agency for approximately 20 years without receiving any disciplinary action. He consistently received “Contributor” or “Exceeds Contributor” ratings on his performance evaluations.

The Facility has a “zero tolerance” for sleeping while on duty. Employees were informed of this standard during orientation and on an annual basis.

Grievant wore a uniform consisting of dark pants and a gray shirt with logos indicating Grievant worked for the Facility’s police department. Grievant worked in an office with two workstations. Approximately nine employees utilized the office during the day. Some employees took their breaks in the room.

Grievant’s shift ended at 3 p.m. He swiped out between 3 p.m. and 3:06 p.m. after he finished working. On at least one day and sometimes two days per week, Grievant would swipe out between 3 p.m. and 3:06 p.m. and then return to his desk. He remained in uniform.

On many Thursdays at approximately 4 to 4:30 p.m., Grievant taught music at a local church. After he finished his shift on those days, he would return to work and wait until approximately 3:45 p.m. He would sit at a desk in the office while in uniform. Once he left the Facility, he would change his shirt and go to the Church to teach. After he finished teaching, he would drive home. Grievant did not go from work to his home before teaching class because it was more convenient for him to travel directly from the Facility to the church.

Sometime between May 21, 2016 and June 13, 2016, Grievant was seated in a chair in the office. His seat was leaned back. His legs were crossed. He had his right hand across his midsection and his left hand towards his lower stomach. His head was positioned forward. His eyes were closed and he appeared asleep.

Someone took a picture of Grievant sleeping. This person was using a “pre-paid phone” or temporary cell phone. The person sent a picture of Grievant sleeping to the Chief via text message. The Chief did not recognize the telephone number from which the photo came. She called the telephone number several times over several days. At first she received no answer and then she began hearing a recorded message indicating the telephone number was unavailable. The Chief did an internet search to find the owner of the cell phone. She asked other employees if they recognized the cell phone number but none of the employees recognized the telephone number. The Chief was unable to determine who sent the photo, when it was taken, and at what time it was taken.

### **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>1</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 offense.<sup>2</sup> The Agency alleged Grievant was sleeping during his duty hours. The Agency has presented sufficient evidence to show that Grievant was sleeping. The picture depicts Grievant seated in a chair, leaning back with his hands on his midsection and stomach. His eyes were closed and his head was positioned as if he were sleeping. The Agency, however, has not established that he was sleeping during his duty hours. The specific time and date the picture was taken is unknown. Grievant routinely returned to his work area after his shift had ended. He waited there for approximately 40 minutes every Thursday and could have been caught sleeping during that time period. Based on the evidence presented, the Agency has not established that Grievant was sleeping “during his duty hours” and, thus, the disciplinary action must be reversed.

The Agency relied on Grievant’s admission during pre-disciplinary due process. He wrote a letter to “explain some circumstances surrounding my falling asleep at work on 6/13/2016.” Grievant explained that at the time he wrote the letter, he believed he

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<sup>1</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>2</sup> DHRM Policy 1.60.

had been caught sleeping on June 13, 2016. That was a day he knew he had not stayed at the Facility after his regular work schedule. After realizing that the date of the picture could not be determined, Grievant declined to admit to sleeping while on duty. Grievant has sufficiently explained the reason for his admission that the Hearing Officer will not considerate it determinative of the outcome of this case.

The Agency argued that Grievant admitted to taking medication that might cause drowsiness but failed to disclose that to the Agency and the Supervisor as required by policy. Although the Agency's assertion is true, the Agency did not take disciplinary action against Grievant for failing to properly disclose his prescribed drugs.

### **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 **rescinded**. The Agency is ordered to **reinstate** Grievant to his former position, or if occupied, to an objectively similar position. Grievant is awarded full **back pay**, from which interim earnings (including unemployment compensation) must be deducted. Grievant's full **benefits** and **seniority** are restored.

### **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 14<sup>th</sup> St., 12<sup>th</sup> 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 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 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.<sup>3</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>3</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.