

Issues: Group II Written Notice (failure to follow instructions/policy), Group III Written Notice (sleeping during work hours and unauthorized possession of State property), and Termination; Hearing Date: 08/29/07; Decision Issued: 08/30/07; Agency: DMHMRSAS; AHO: William S. Davidson, Esq.; Case No. 8665; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 8665

Hearing Date: August 29, 2007  
Decision Issued: August 30, 2007

**PROCEDURAL HISTORY**

On February 16, 2007, the Grievant was issued a Group II Written Notice for failure to follow Supervisor's instructions, perform assigned work, or otherwise comply with established written policy. On that same date, the Grievant was issued a Group III Written Notice for sleeping during work hours and taking unauthorized possession of the key to the administrative wing for personal use. Pursuant to these two (2) Written Notices, the Grievant was terminated from employment with the Department of Mental Health, Mental Retardation and Substance Abuse Services.

On April 5, 2007, the Grievant timely filed a Grievance to challenge the Agency's action. The outcome of the Second Resolution Step was not satisfactory to the Grievant and she requested a hearing. On July 31, 2007, the Department of Employment Dispute Resolution assigned this Appeal to a Hearing Officer. On August 29, 2007, a hearing was held at the Agency's location.

**APPEARANCES**

Grievant  
Attorney for Grievant  
Agency Representative  
Witnesses

**ISSUE**

1. Whether the Grievant engaged in the behavior described in the two (2) Written Notices that were issued to her on February 16, 2007?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy?

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 Mental Health, Mental Retardation and Substance Abuse Services employed the Grievant as a Safety and Security Technician. This position is responsible for “maintaining security, custody, and control over a patient population ranging from ages 18 to 64 at the Forensic Unit.”<sup>1</sup> She was removed from employment, effective February 16, 2007.

On January 25, 2007, the Grievant was assigned to Post 61B. Part of the description for this Post was to be at a double set of doors which divided a secure part of the building from an unsecure part of the building. She was to be posted on the secure side of the doors and during meals to see to it that no patient was able to exit the secure side when someone was entering or exiting those doors. The Grievant’s Supervisor testified that twice during that shift he found her not in the immediate proximity of those doors. The first time she was fifty (50) to sixty (60) feet away from those doors, and he admonished her to return to her Post. Subsequently, he found her a second time at thirty (30) to forty (40) feet away from her Post. This resulted in the Group II Written Notice.<sup>2</sup>

On January 28, 2007, the Grievant took a scheduled break. She proceeded to her automobile, retrieved a meal, and returned to the building. Rather than climbing a set of stairs to a room where she could eat her meal, she obtained a key to the break room in the administration wing and went there to use a microwave to heat her meal. During the heating process, the Grievant fell asleep in a chair. Approximately fifty-five (55) minutes after she commenced this break, the Grievant was located in the break room of the administrative wing and was awakened and returned to her Post. This action resulted in a Group III Written Notice for being asleep

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<sup>1</sup> Agency Exhibit 1, Tab 4

<sup>2</sup> Agency Exhibit 1, Tab 2

during work hours and also for taking unauthorized possession of the key to the administrative wing for personal use.<sup>3</sup>

On January 28, 2007, the Grievant signed a written statement acknowledging that she fell asleep while on duty.<sup>4</sup>

On July 10, 2006, The Grievant was issued a Group III Written Notice for violation of D.I. 502. The Grievant was subject to a random drug test conducted on June 20, 2006 and was “noncontact positive.” This resulted in a suspension until such time as the Grievant had participated in the Employee Assistance Program and her return to work was subject to a negative drug test for any controlled substance. The Grievant participated in the program and she was subsequently returned to work.<sup>5</sup> This Group III Written Notice was active at the time of the current offenses.

On November 8, 2005, the Grievant was issued a Group I Written Notice for use of obscene or abusive language.<sup>6</sup> This Written Notice was active at the time of the current offense.

The Grievant was issued five (5) Notice of Improvement Needed/Substandard Performance Reports between the dates of March 20, 2006 and November 21, 2006.<sup>7</sup> The Grievant testified that she had been under significant stress for a number of years. She testified that she had been under job stress since she came to work at this location in 2000 and that she had been under personal stress since December, 2005. She had recently been involved with a traffic case that ultimately resulted in her serving four (4) days in jail and all of this led to her being unable to sleep well for a period of time. The Grievant acknowledged that she went to sleep, but said that she did not do that on purpose. Further, the Grievant testified that her Supervisor only directed her to return to her Post 61B once not twice.

An issue was raised by the Grievant that the Written Notices that resulted in the current charges had incorrect language in the mitigating circumstances part of Section 4. Each of those indicated that the Grievant had two (2) active Group II Written Notices and one (1) active Group III Written Notice. In fact, the correct history was that the Grievant had one (1) active Group I Written Notice and one (1) active Group III Written Notice. An issue was raised by the Grievant regarding this inconsistency and she alleged that, had management been aware of the correct status of active Written Notices, she would not have been terminated. The head of Human Resources testified that she had produced these Written Notices and that she had made a typographical error. She further testified that, along with the Written Notices, an employee

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<sup>3</sup> Agency Exhibit 1, Tab 1

<sup>4</sup> Agency Exhibit 1, Tab 1, Page 9

<sup>5</sup> Grievant Exhibit 1, Tab 1, Page 1

<sup>6</sup> Agency Exhibit 1, Tab 6, Page 2

<sup>7</sup> Agency Exhibit 1, Tab 6, Pages 3-7

profile was sent to the Hospital Director who ultimately made the decision to terminate the Grievant. This additional profile had the correct level and number of active Written Notices.

### **MITIGATION**

*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 Employment Dispute Resolution...”<sup>8</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.

The Hearing Officer finds no basis for mitigation in this matter. The Grievant was disciplined properly. While there was a typographical error in the two (2) Written Notices for which this Grievance was taken, an active Group III Written Notice normally results in termination. An Active Group III Written Notice followed by another Group III Written Notice justifies termination under any event. The Hearing Officer is keenly aware that the Grievant is a long time state employee. However, longevity does not justify multiple Group III Written Notices, nor is it of enough consequence to result in mitigation in this matter.

### **DECISION**

For reasons stated herein, the Agency’s removal of the Grievant from employment 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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. 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

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<sup>8</sup>Va. Code § 2.2-3005

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> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to 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:

Director  
Department of Employment Dispute Resolution  
830 East Main Street, Suite 400  
Richmond, VA 23219

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 give a copy of your appeal to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>9</sup> 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>10</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]

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William S. Davidson  
Hearing Officer

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<sup>9</sup>An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>10</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.