

Issue: Group II Written Notice with Suspension (sleeping during work hours); Hearing Date: 02/08/16; Decision Issued: 02/16/16; Agency: DMAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10736; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10736

Hearing Date: February 8, 2016
Decision Issued: February 16, 2016

PROCEDURAL HISTORY

On October 13, 2015, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for sleeping during work hours.

On October 21, 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 he requested a hearing. On December 28, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 8, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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 Medical Assistance Services employs Grievant as a Senior Economist/Plan Analyst. Grievant had prior active disciplinary action. On June 28, 2013, Grievant received a Group II Written Notice for sleeping during work hours. Attached to the Written Notice was memorandum stating that "[s]leeping at work at any time is not acceptable and will not be tolerated."¹

On September 25, 2015 at approximately 2 or 3 p.m., Grievant was in his office seated in his chair. Ms. B was walking around the floor to see who was in the office given that a lot of employees were not at work because of a local sporting event. She approached Grievant's office. His door was "cracked open". She pushed through the door and observed Grievant seated in his chair with his head facing downward and his chin close to his chest. She watched him for approximately five seconds. Grievant did not move or acknowledge Ms. B. Grievant was not reading. Grievant was asleep.

On October 1, 2015 at approximately 1:30 p.m., Grievant was in his office seated in his chair. The door to his office was open approximately six inches. Ms. H walked down the hallway and looked into Grievant's office. She stopped and looked inside for approximately fifteen seconds. She observed Grievant with his head facing down and his chin close to his chest. She believed he was asleep. Ms. H walked to Ms. B's office and said that Grievant was asleep and suggested Ms. B walk around to Grievant's office and take a picture of Grievant. Ms. B left her office and walked to Grievant's office.

¹ Agency Exhibit 8.

She looked inside and observed him seated in his chair with his head facing downward. He did not move. Ms. B used the camera on her cell phone to take a picture of Grievant. As Ms. B took the picture, the phone made a sound. Grievant did not awaken from the sound. The picture showed Grievant asleep. He was not working or reading any papers at that time. Grievant was asleep.

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.”

“[S]leeping during work hours is a Group III offense.”³ On September 25, 2015 and October 1, 2015, Grievant was asleep in his office during work hours. He was not sleeping during a lunch or other break. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. The Agency mitigated the discipline to a Group II Written Notice with a five workday suspension. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant’s five workday suspension must be upheld.

Grievant argued that he was not sleeping. He contends he was praying and, thus, did not move and did not respond to interruptions. The evidence showed that Grievant was asleep. Prior to the hearing, Grievant was given several opportunities to explain why the disciplinary action should not be taken against him. In his November 12, 2015 response, Grievant wrote, “I was not sleeping but reading.” Grievant’s first assertion that he was praying was presented to the Hearing Officer during the hearing. Grievant’s claim that he was praying is not believable.

Grievant argued that the disciplinary action was based on a discriminatory intent against him because of his race and gender. No credible evidence was presented to support this claim. Indeed, the evidence showed that Grievant’s was disciplined because of his behavior and not because of his race or gender or for any other improper purpose.

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

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.

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 the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with a five workday suspension 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 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.

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

⁴ Va. Code § 2.2-3005.

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.