

Issue: Group III Written Notice with Termination (sleeping during work hours, threats/coercion, workplace harassment); Hearing Date: 03/11/16; Decision Issued: 03/31/16; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10766; 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: 10766**

Hearing Date: March 11, 2016

Decision Issued: March 31, 2016

#### **PROCEDURAL HISTORY**

On December 21, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace harassment, sleeping during work hours, and threats or coercion.

On January 15, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 8, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 11, 2016, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's 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 Virginia Department of Transportation employed Grievant as a Crew Leader at one of its residencies. He began working for the Agency on January 10, 2013. No evidence of prior active disciplinary action was introduced.

On Monday, November 30, 2015, Grievant was working as the Crew Leader for a work crew. Mr. G began working for the Agency in August 2015. Because he was a newer employee, the Supervisor assigned Mr. G to work with Grievant to benefit from Grievant's experience. Grievant and Mr. G got into a utility truck and began driving to their assigned area. Grievant was driving the truck. At approximately 10 a.m., Grievant drove the truck to a park and said "if you are ever plowing and you are sleepy this is what you want to do." Grievant then moved the truck near a pavilion and stopped the truck. The truck was positioned in an area where it would be difficult for others to see. Grievant told Mr. G that "this would be a good way to hide and sleep." Grievant moved his head back and to his left and positioned it against the window. Grievant began sleeping. Mr. G began looking at his cell phone and positioned his head against the window on his side of the truck. He fell asleep and remained asleep for approximately 15 minutes. When Mr. G woke up, he observed that Grievant remained motionless and asleep. Mr. G believed Grievant was asleep for over an hour.

On Tuesday, December 1, 2015, Mr. G did not work because of a medical appointment.

On Wednesday, December 2, 2015, the Supervisor conducted a morning meeting with the work crew including Grievant and Mr. G. The Supervisor mentioned that on rainy days employees can “cut out ditches” but not to be sleeping in the truck just because it is slow.

On Thursday, December 3, 2015, the weather was clear so Grievant and Mr. G went out into the field to patch roads. Mr. G heard the Supervisor’s comment on a prior day about not sleeping and was unsure whether someone had disclosed that they were sleeping. Grievant became concerned that someone had reported him sleeping. Grievant and Mr. G drove into a church parking lot. Mr. W and two other employees drove to the church parking lot and met Grievant and Mr. G. Grievant asked Mr. W if anyone “said something.” Mr. W said “what?” Grievant said, “What goes on out here stays here. If anyone says something about what I do, I will make sure they get fired.” Grievant then slammed his hands down on the tailgate of the truck. Grievant’s comments upset the other employees. The matter was reported to the Supervisor and the Agency began an investigation.

Mr. G was a probationary employee who could not receive a group notice. The Agency extended his probationary period because he admitted to sleeping during work hours.

### **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. “[T]reatening others” is a Group III offense. On November 30, 2015, Grievant drove a vehicle to a park, parked in an area where others could not easily observe the vehicle, and began sleeping. He remained asleep for over an hour and not during his assigned breaks. When Grievant believed other employees may have disclosed that he was sleeping, he threatened to have them fired. His threat was inappropriate and prohibited under the Standards of Conduct. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice.<sup>2</sup> Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

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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> The Agency did not establish work place harassment because it did not show that Grievant’s actions were “on the basis of an individual’s race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability” as required by DHRM Policy 2.30.

Grievant argued he was not sleeping. He claimed he had an ear ache and put his head backward to alleviate the pain from his ear. He claimed his eyes were closed but he was not asleep. Grievant argued he sent a text during that time period and, thus, was not sleeping. The Agency presented sufficient evidence to show that Grievant was sleeping. Mr. G's testimony was credible and Mr. G testified that Grievant remained with his eyes closed and motionless for more than a sufficient period of time for the Hearing Officer to conclude that Grievant was asleep. Indeed, Mr. G admitted to falling asleep which resulted in his probationary period being extended.

Grievant claimed he did not threaten any other employees. He was reiterating what the Supervisor had told the crew about not sleeping during work hours. The Agency presented credible evidence to show that he threatened to have other employees fired.

*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. 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 III Written Notice of disciplinary action with removal 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

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<sup>3</sup> Va. Code § 2.2-3005.

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>4</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>4</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.