

Issue: Group II Written Notice (sleeping during work hours); Hearing Date: 09/30/13;
Decision Issued: 10/01/13; Agency: DMAS; AHO: Cecil H. Creasey, Jr.; Case No.
10170; Outcome: No Relief – Agency Upheld; **Administrative Review**; **EDR Ruling**
Request received 10/11/13; EDR Ruling No. 2014-3734 issued 11/08/13;
Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10170

Hearing Date: September 30, 2013
Decision Issued: October 1, 2013

PROCEDURAL HISTORY

Grievant is a policy and planning specialist for the Department of Medical Assistance Services (“the Agency”), with at least 10 years of service. On June 28, 2013, the Grievant was charged with a Group II Written Notice for sleeping on the job on June 19, 2013. The Written Notice carried no suspension. The Grievant had a prior active Group II Written Notice for sleeping.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On September 3, 2013, the Office of Employment Dispute Resolution, Department of Human Resource Management, (“EDR”) appointed the Hearing Officer. A pre-hearing conference was held by telephone on September 10, 2013. The hearing ultimately was scheduled for the first date available between the parties and the hearing officer, September 30, 2013, on which date the grievance hearing was held, at the Agency’s offices.

The Agency submitted documents for exhibits that were, without objection from the Grievant, accepted into the grievance record, and they will be referred to as Agency’s Exhibits. The Grievant offered no additional exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Advocate for Grievant
Representative for Agency
Advocate for Agency
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?

Through his grievance filings, the Grievant requested rescission of the Group II Written Notice.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group II Offenses to include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that have a significant impact on business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. Agency Exh. 5.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy... "the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a policy and planning specialist, with at least 10 years of service. The Grievant has a prior, active Group II Written Notice issued August 31, 2011, for sleeping at work. Agency Exh. 4. The Agency's director testified that she observed the conduct giving rise to the Written Notice. On Wednesday, June 19, 2013, the director walked by the Grievant's office and observed him sleeping. She testified that she could actually observe the Grievant at an angle from which the Grievant could not see her. The director testified that she observed the Grievant's head slumped down and bobbing. She reported the incident to the Grievant's direct supervisor, who proceeded to investigate the matter and issued the Group II Written Notice.

The Grievant's supervisor, the manager, testified that he personally has observed the Grievant sleeping in his office on multiple occasions since the August 2011 Written Notice. He testified that he did not report the incidents for fear of the Grievant being terminated. When the director reported her observation to him, the manager felt it appropriate to issue the current Group II Written Notice.

The Grievant denied that he was asleep on June 19, 2013, as the director testified. He testified that he saw and heard the director speak to other staff members near his office. The director testified that she did not speak to any staff members until after she observed the Grievant sleeping. To explain his posture, the Grievant testified that he was actually listening to a phone message, but the director testified she clearly observed the claimant sleeping and not listening to a phone message.

During the grievance steps, the Grievant focused on inappropriate monitoring of his conduct, a hostile environment, and discrimination—not on denial of sleeping. The Grievant expressed at the hearing that he was being unfairly treated.

The Agency's human resources director testified that the Standards of Conduct are consistently applied, that all employees are given the handbook and trained on the policies. She further testified that the Agency does not tolerate sleeping at work.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Based on the evidence presented, I find that the director's testimony was credible and met the burden of proving that the Grievant was sleeping at work on June 19, 2013. The supervisor's credible testimony regarding his undisciplined observations of the Grievant sleeping further corroborates the conduct. This incident, under the facts presented, was not an isolated event. The offense, unless circumstances warrant mitigation, satisfies the Group II level of discipline.

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." A second Group II Written Notice normally warrants job termination. Here, the repeat nature of the offense especially could have supported more severe discipline, but the Agency issued neither suspension nor termination.

While the hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if, and only if, it exceeds the limits of reasonableness. There is no authority that requires an Agency to exhaust all possible lesser sanctions or, alternatively, show that the discipline levied was its only option. Even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293,299 (4th Cir. 1988). Finally, I find insufficient evidence of discrimination, hostile work environment, or any improper motive for the discipline.

Accordingly, I find no mitigating circumstances that render the Agency's action outside the bounds of reasonableness.

DECISION

For the reasons stated herein, the Agency's issuance of the Group II Written Notice must be and 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
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.¹

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer

¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.