

Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 07/21/14; Decision Issued: 07/25/14; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10389; Outcome: Partial Relief; **Administrative Review:** **EDR Ruling Request received 08/07/14; EDR Ruling No. 2015-3971 issued 09/02/14; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 09/16/14; DHRM Ruling issued 09/30/14; Outcome: No ruling – request untimely; Attorney's Fee Addendum issued 10/01/14 awarding \$5,855.70.**



# ***COMMONWEALTH of VIRGINIA***

***Department of Human Resource Management***

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10389**

Hearing Date: July 21, 2014  
Decision Issued: July 25, 2014

### **PROCEDURAL HISTORY**

On April 15, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping during work hours.

On May 13, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 10, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 21, 2014, 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 Department of Social Services employed Grievant as a Web Application Development Analyst. He began working for the Agency on May 10, 2004. No evidence of prior active disciplinary action was introduced during the hearing.

At approximately 11 p.m. on April 8, 2014, Grievant was having difficulty sleeping so he took a non-prescription medication with a side effect of drowsiness.

On April 9, 2014 at approximately 3:30 p.m., Grievant was sitting in a chair at his desk. His desk was part of a work cube with low walls. The Supervisor observed Grievant with his head down sleeping. The Supervisor walked to another location of the office floor and asked Mr. R to come with him. On his way back, he was stopped by another employee who asked him a question and he answered that question. The Supervisor and Mr. R walked to Grievant's desk and stood in front of Grievant approximately three feet away. The Supervisor asked Mr. R if he thought Grievant appeared to be asleep. Mr. R said "yes." Their conversation did not awaken Grievant. The Supervisor leaned across the desk and took a picture of Grievant. The picture showed Grievant with his eyes closed and head tilted slightly forward. He did not move during the time the Supervisor and Mr. R observed him. After observing Grievant for several minutes, an employee working at the desk next to Grievant stood up and began to gather his belongings to leave. As that employee did so, Grievant woke up. Grievant had been asleep for several minutes.

Grievant's supervisor consulted with the Agency's human resource staff.

On April 10, 2014, the Supervisor sent Grievant home and told him he had 24 hours to respond to the Agency's written intention to take disciplinary action. Grievant responded in writing by explaining that he had taken a medication on April 9, 2014 and that he was not feeling well on the morning of April 9, 2014. He added, "[t]o avoid repeating this, I'm seeking professional medical help."<sup>1</sup> Grievant met with his physician who recommended a sleep study. Based on the results of the sleep study, Grievant learned that he suffered from sleep apnea. He began sleeping with a c-pap machine to improve his sleep.

Grievant admitted during the hearing that he has fallen asleep while at work in the past but it is not clear Agency managers were aware of that behavior because he was never counseled regarding sleeping.

### 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>2</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>3</sup> On April 9, 2014 at approximately 3:30 p.m. Grievant was asleep at his desk during his work hours. He was not on a break. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice subject to mitigating circumstances.

*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>4</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

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<sup>1</sup> Agency Exhibit 1.

<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

<sup>4</sup> *Va. Code § 2.2-3005.*

consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued that the Agency inconsistently disciplined its employees based on how the Agency treated Employee 123. Employee 123 worked in the same division as did Grievant but they had different supervisors. In March 2014, Employee 123 was observed sleeping while at work. On March 14, 2014, the Program Supervisor observed Employee 123 sitting at her desk with her eyes closed. The Program Supervisor sent Employee 123 an email advising her:

I have witnesses several times, the most recent being on Tuesday morning and again this morning that you are sitting at your desk with your eyes closed. \*\*\* You know this is unacceptable and this cannot continue.”

On March 19, 2014, the Program Supervisor sent Employee 123 a formal counseling memorandum stating, in part:

The other issue that has been identified as a problem is your concentration while at work. I have witnesses on numerous occasions you sitting at your desk with your eyes closed. I recently sent you an email about this issue on Friday March 14, 2014. I witnessed this happening while you were not on break on March 11, 2014 and on Thursday March 13, 2014. It was also reported to me on March 13, 2014 that this occurred on March 12, 2014 while I was out of the office .... This is unacceptable and will not be tolerated.<sup>5</sup>

On April 28, 2014, the Program Supervisor presented Employee 123 with a Notice of Intent to Issue Standards of Conduct Group III with removal. Employee 123 was asked to provide a response. Employee 123 responded that she had an “unstable family situation” and had been working with medical and counseling professions. She attached a note from her doctor indicating that she was being treated for depression and Grievant was taking medication that caused fatigue, drowsiness and lightheadedness. After considering Employee 123’s response, the Agency decided to issue to her on May 5, 2014 a Group III Written Notice with a ten workday suspension. On May 21, 2014, Employee 123 fell asleep again and was issued a Group III Written Notice with removal.

The Agency has not consistently disciplined its employees thereby justifying mitigation in this case. Grievant and Employee 123 were similarly situated. They worked in the same division of the Agency. The both fell asleep while at work in the spring of 2014 but were treated differently by the Agency. Employee 123 received an email and a written counseling advising her not to repeat her behavior. She fell asleep for what was at least the third time and received a Group III Written Notice with a ten work day suspension. Only after Employee 123 received a Group III with suspension and then fell asleep again did the Agency remove Employee 123 from employment. Grievant, however, was removed the first time he was observed by a manager sleeping

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<sup>5</sup> Grievant Exhibit 4.

during work hours. He received no prior warnings. This inconsistent treatment is sufficient for the Hearing Officer to mitigate the disciplinary action from a Group III with removal to a Group III Written Notice with a ten work day suspension.

The Agency argued that Grievant and Employee 123 were not similarly situated. For example, Grievant denied being asleep and did not express remorse for being asleep. Employee 123, however, admitted to being asleep, expressed sorrow for being asleep and promised to refrain from repeating her behavior. Employee 123 was taking prescription medication and suffering from an illness while Grievant was taking over-the-counter medication and had yet to be diagnosed with sleep apnea. The differences identified by the Agency, however, are not sufficiently material to show that Grievant and Employee 123 were not similarly situated. In light of the standard set forth in the Rules, the Hearing Officer finds mitigating circumstances exist to reduce the disciplinary action.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, “In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust.” Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

## 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 **reduced** to a Group III Written Notice with a ten work day suspension. The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The Agency may account for a ten work day suspension when determining back pay.

## 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>6</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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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**ADDENDUM TO DECISION OF HEARING OFFICER**

In re:

**Case No: 10389-A**

Addendum Issued: October 1, 2014

**DISCUSSION**

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.<sup>7</sup> For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.<sup>8</sup>

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's attorney presented a petition with a statement for services showing the provision of 44.7 hours of service. The hourly rate for attorney reimbursement is \$131. The petition is in order and will be granted. The reimbursement of \$14.51 for online legal research is denied.

**AWARD**

Grievant is awarded attorneys' fees in the amount of \$5,855.70.

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<sup>7</sup> Va. Code § 2.2-3005.1(A).

<sup>8</sup> § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.  
Case No. 10389



## APPEAL RIGHTS

If neither party petitions the DHRM Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the DHRM Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer