

Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 03/12/15; Decision Issued: 03/13/15; Agency: W&M; AHO: Carl Wilson Schmidt, Esq.; Case No. 10548; Outcome: Full Relief; **Administrative Review:** **EDR Ruling Request received 03/27/15; EDR Ruling No. 2015-4127 issued 04/29/15; Outcome: Remanded to AHO; Hearing Reopened; Reopened Hearing Date 09/04/15; Remand Decision issued 10/02/15; Outcome: Original decision reversed (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: 10548

Hearing Date: March 12, 2015

Decision Issued: March 13, 2015

PROCEDURAL HISTORY

On January 5, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping during work hours.

On January 9, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 3, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 12, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
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 College of William and Mary employed Grievant as a Custodial Worker. She was responsible for cleaning some of the Agency's rooms and buildings. No evidence of prior active disciplinary action was introduced during the hearing.

On November 11, 2014, Grievant was working at Building B. At approximately 10:30 a.m., Grievant entered into a restroom in Building B.¹ She entered a stall in the restroom. Ms. H worked in Building B and entered the restroom. Ms. H believed that Grievant was sleeping inside the stall. A few minutes before noon, Grievant was in the restroom inside a stall. Ms. H believed that Grievant was sleeping again in the stall. Ms. H left the restroom and went to Ms. G's office. Ms. H told Ms. G she had observed Grievant sleeping and asked Ms. G to enter the restroom to confirm that the Grievant was sleeping. Ms. G entered the restroom, used the restroom, and then began to wash her hands. As Ms. G was washing her hands, Grievant left the stall. Ms. G said "Good morning" and Grievant responded "Good morning." Ms. G did not see Grievant sleeping or hear Grievant snoring.

Once Grievant was notified of the allegations against her, Grievant denied she was sleeping on November 11, 2014.

¹ Grievant denied being in Building B at 10:30 a.m. It is not necessary for the Hearing Officer to resolve this dispute because the Hearing Officer can assume the Agency's allegations of time to be true and it does not affect the outcome of this case.

CONCLUSIONS OF POLICY

The Agency has the burden to prove that Grievant was sleeping on November 1, 2014.² The Agency has not presented sufficient evidence to show that Grievant was asleep on November 11, 2014. The Agency's only eye witness of Grievant's sleeping was Ms. H. Ms. H did not testify during the hearing. An order was issued for Ms. H's appearance at the hearing. Ms. H was employed by the Agency and the Agency was in a position to instruct Ms. H to report to the hearing or face disciplinary action. According to the Agency, Ms. H refused to attend the hearing and refused to participate for reasons including (1) Ms. H was pregnant, (2) Ms. H and her doctor were concerned about stress, and (3) threats had been made against Ms. H about testifying against Grievant. The Agency presented a statement from Ms. H. If Ms. H had appeared at the hearing and testified credibly to the facts she alleged in the statement, there would have been sufficient evidence to support the issuance of a Group III Written Notice for sleeping during work hours. The absence of Ms. H's testimony renders the Agency's case unsustainable. Ms. H's statement is not sufficient, in itself, to support the allegations. This conclusion is especially true based on Ms. G's testimony. Ms. G described Ms. H as "very dramatic" and added "I don't believe half of what she says." The disciplinary action must be reversed.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **rescinded**. 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.

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

² Although the Agency presented evidence that Grievant failed to properly cleaned her assigned spaces, the Agency did not take disciplinary action for this reason.

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.³

[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

³ 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

DECISION OF HEARING OFFICER

In re:

Case No: 10548-R

Reconsideration Decision Issued: October 2, 2015

RECONSIDERATION DECISION

On April 29, 2015, the Office of Employment Dispute Resolution issued Ruling 2015-4127 remanding this case to the Hearing Officer. The Ruling stated:

If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.

This case presents a unique and unusual situation. Fortunately, cases in which there are serious allegations of witness tampering are rare, and therefore both parties and hearing officers lack experience in addressing these concerns. The College argues, in effect, that the hearing officer erred in moving forward with the hearing on March 12, 2015, given the pending issues regarding the alleged threats toward the grievant. While the rationale for the College's decision not to submit a formal request for continuance (however detailed it could have been at the time) prior to the hearing is not clear, we nevertheless agree that additional measures are and were needed to address the concerns raised by the College. In reaching this conclusion, we note that EDR and the hearing officer were made aware of the alleged threats in a general way prior to the hearing and steps could have been taken at that time to inquire about, address, or resolve the matter. Further, while the College bears some responsibility for apparently not requesting a continuance or adjournment at the time the hearing began or more fully laying out what the specifics of its concerns were, given the severity of the allegations presented by the College, it is unclear why the hearing officer did not make a greater effort at hearing to address and explore the reasons for the witness's absence.

Accordingly, EDR finds that given the unique facts and circumstances of this case, remand of the hearing decision is appropriate to allow additional exploration of the concerns raised by the College, as well as any arguments made or evidence submitted by the grievant in response. On remand, the hearing officer must open the record to allow the admission of evidence from the College regarding the alleged threats made against the witness, as well as evidence of the witness's medical condition at the time of the hearing and/or other reasons for her absence from the original hearing. The grievant will also have the opportunity to present evidence and argument on these matters. The hearing officer must consider whether the grievant or her representatives took any action to threaten the College's witness, and if so, what actions are necessary to address the conduct and its impact on the case. In addition, the hearing officer must consider whether either the witness's belief that threats had occurred and/or her medical condition justified her absence from hearing on March 12, 2015, and if so, reopen the hearing to allow the College another opportunity for her to testify through an appropriate means on a date and time agreeable to the parties. (Footnotes omitted).

The hearing was initially scheduled for March 6, 2015. Grievant moved to continue the hearing in order to ensure that Ms. H appeared in person. The Hearing Officer granted the motion and the matter was rescheduled for March 12, 2015. The Hearing Officer granted the motion in part because Ms. H's testimony would likely involve displaying what she observed and such testimony is better presented in person than by telephone. During the prehearing telephone conference requested by Grievant's representative, the College's representative, Mr. M suggested the College may have difficulty having Ms. H appear because she was not an employee in Grievant's department. The Hearing Officer advised Mr. M that the College could compel its employees to appear at grievance hearings because failure to follow a supervisor's instructions could result in disciplinary action.

Several days before the March 12, 2015 hearing, another employee spoke with Ms. H and expressed concern for Ms. H's wellbeing. This employee told Ms. H that Ms. H might be sued civilly by Grievant and that Grievant's daughter had a volatile personality and Grievant should be concerned about her health and wellbeing and should consider not appearing at the hearing. Ms. H trusted this person and became extremely concerned for her safety and the safety of her family. Grievant said she could not believe she was being threatened by Grievant's family. Another employee, Ms. W, overheard Ms. H's conversation and Ms. H's expression of concern. Ms. W said that Grievant was following her around campus and that Ms. H should take the matter seriously. Grievant was approximately seven months pregnant at the time of this conversation. Ms. W's comments confirmed Ms. H's fear and Ms. H concluded she should not testify in order to protect the safety of her unborn child and her family. She felt she did not know what Grievant or her family was capable of doing. Her fear resulted in [physical symptoms]

Several days before the scheduled March 12, 2015 hearing, the Chief Human Resource Officer, Mr. P, spoke with Ms. H. His intent at the beginning of his meeting with Ms. H was to instruct her to testify at the hearing. He asked her why she did not want to testify. Ms. H explained her fear for her safety and the safety of her family. She also explained she was 31 weeks pregnant and that the additional stress could create a serious health risk. Mr. P decided not to instruct Ms. H to testify at the hearing. It did not seem to be the right thing to do in Mr. P's opinion. It did not seem to be reasonable to force an employee to experience undue stress that might risk her pregnancy. He concluded he would rather lose at the hearing without Ms. H participating than jeopardized Ms. H's and her baby's health.

On March 10, 2015, the College's counsel contacted EDR to discuss whether to seek a continuance from the Hearing Officer. The College elected not to ask the Hearing Officer for a continuance because it believed there was little likelihood of success of any motion for a continuance and was concerned about providing information to Grievant about Ms. H's allegations. The College chose to proceed with the hearing as scheduled. As expected by the College, Ms. H did not appear at the hearing despite the Hearing Officer's order compelling her attendance.

The Hearing Officer's authority and actions in this case were in full compliance with the Grievance Procedure. The Hearing Officer ordered Ms. H to appear at the hearing scheduled for March 12, 2015. The Hearing Officer instructed the Agency's Representative that the College could compel Ms. H to appear at the scheduled hearing. The College elected not to force Ms. H to appear at the hearing. The College elected not to ask the Hearing Officer for a continuance. A Hearing Officer cannot assume a party should make a motion and then make a ruling on an issue not brought before the Hearing Officer. The College revealed at the hearing that Ms. H would not be present but did not seek a continuance or to present supplemental evidence. The College presented Ms. H's statement as evidence.

The EDR Ruling is unprecedented. It has the effect of giving the College a "second bite at the apple" (another hearing) despite the College's fault for failing to move for a continuance prior to or during the hearing. The Hearing Officer would not have made such a ruling. Nevertheless, the Hearing Officer is bound by the EDR Ruling and its terms.

Ms. H was never actually threatened by Grievant or any members of Grievant's family. The College has established that Grievant followed Ms. W after Grievant had been removed from employment. Ms. W perceived Grievant's action as an attempt at intimidation. Ms. W speculated that Grievant may have believed that Ms. W was behind Grievant's termination even though Ms. W had nothing to do with the disciplinary action. Although it is clear that Ms. H was never actually threatened by anyone if she appeared at the hearing, it is equally clear that Ms. H believed she and her family were at risk of physical harm if she testified. Based on the evidence presented, Ms. H's fear of physical harm was sufficient for the Hearing Officer to have granted a continuance had the request been properly brought to the Hearing Officer's attention prior to or during the

hearing. Accordingly, the Hearing Officer will consider the testimony of Ms. H presented on September 4, 2015.

In the morning on November 11, 2014, Grievant went into the Building where Ms. H worked. Grievant was assigned responsibility for cleaning the Building. Grievant entered the restroom and entered the handicapped stall. The stall had horizontal rails on the wall for handicapped support. She sat on the toilet without dropping her pants. She placed her right arm on the bar and leaned to her right. She placed her head on her right arm and closed her eyes. Her feet were turned outward. Grievant fell asleep. She began making snoring and low grunting sounds consistent with someone being asleep. She did not move as she slept. Ms. H was also in the restroom and observed Grievant sleeping for several seconds. Ms. H left the restroom and told a co-worker that their housekeeper was sleeping in the restroom. The co-worker went to the restroom. Grievant awoken and left the restroom.

Two or three hours later on November 11, 2014, Grievant returned to the restroom. She entered the handicapped stall. She had her pants up and sat on the toilet. Grievant leaned her head backwards and rested it against the wall behind her. Grievant fell asleep. Ms. H entered the restroom and noticed that someone was in the handicapped stall. Ms. H heard snoring and low grunting sounds consistent with someone asleep. Ms. H recognized that Grievant had returned to the restroom. Ms. H entered one of the empty stalls. Ms. H flushed the toilet and exited the stall. Grievant began moving. Ms. H assumed Grievant was sick and asked "Are you ok?" Grievant may have responded "yes" but Ms. H was unsure. Ms. H finished washing her hands and began walking out of the restroom. Grievant exited the stall without flushing the toilet. Grievant did not wash her hands before she exited the restroom.

"Sleeping during work hours" is a Group III offense.⁴ On November 11, 2014, Grievant fell asleep two times in the restroom of the Building. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that she was not sleeping in the stall on either occasion. Ms. H's testimony was sufficiently credible to support the conclusion that Grievant was asleep during work hours.

Grievant argued that she was not in the Building during the times the College alleged she was there. Ms. H observed Grievant in the building on two occasions. Her testimony was credible and reliable.

⁴ See, Attachment A, DHRM Policy 1.60.

RECONSIDERATION 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

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer