

Issue: Group III Written Notice with 30-day suspension (less than alert while on duty); Hearing Date: August 19, 2002; Decision Date: August 20, 2002; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esq.; Case No.: 5496



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5496

Hearing Date:	August 19, 2002
Decision Issued:	August 20, 2002

**APPEARANCES**

Grievant  
Human Resource Manager  
Legal Assistant Advocate for Agency  
Three witnesses for Agency

**ISSUES**

Did the grievant's actions on March 5, 2002 warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

## FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice and a 30-day suspension issued because she was less than alert while on duty.<sup>1</sup> Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup>

The Department of Mental Health, Mental Retardation and Substance Abuse Services (MHMRSAS) (Hereinafter referred to as “agency”) has employed the grievant for 23 years. She is a Forensic Mental Health Technician (MHT). The patients at this facility are mentally retarded, physically handicapped, mentally ill or some combination of these conditions.

Section 201-1 of MHMRSAS Departmental Instruction 201 on Reporting and Investigation Abuse and Neglect of Clients states, in pertinent part: “The Department has zero tolerance for acts of abuse or neglect.” Neglect is defined as:

Neglect means failure by an individual, program or facility responsible for providing services to provide nourishment, treatment, care, goods or services necessary to the health, safety or welfare of a person receiving care or treatment for mental illness, mental retardation or substance abuse.<sup>3</sup>

The policy further states that “It is expected that a facility director will terminate an employee found to have abused or neglected a client.”<sup>4</sup>

The agency recognizes that monitoring patients one-on-one can be tedious, particularly on the night shift. For that reason, staff assigned to one-on-one generally work no more than two continuous hours while on night shift in order to assure maximum safety and alertness.<sup>5</sup> Grievant’s supervisor frequently stresses the need to stay alert whenever staff is on a one-on-one assignment. In addition, staff is advised that they can deal with sleepiness by standing up, exercising, and if necessary, by asking the charge nurse for a temporary relief until they regain alertness.

Grievant was assigned to watch a patient one-on-one during a portion of the night shift (11:30 p.m. – 7:30 a.m.) on March 5, 2002. The Department of Juvenile Justice provides security at the facility. At about 3:50 a.m., a corrections

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<sup>1</sup> Exhibit 1. Written Notice, issued May 20, 2002. NOTE: The Written Notice in evidence was a Re-Issued Notice because a notation on the first Written Notice regarding an active Group I Notice (Section IV) was erroneous. Grievant does not have any active disciplinary actions.

<sup>2</sup> Exhibit 1. Grievance Form A, filed May 14, 2002.

<sup>3</sup> Exhibit 6. Section 201-3, Departmental Instruction 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, April 17, 2000.

<sup>4</sup> Exhibit 6. Section 201-8, *Ibid.*

<sup>5</sup> Exhibit 5. Facility Policy P-5, *1:1 Staff Assignments*, February 17, 2000.

lieutenant entered the ward and walked down grievant's hall. Grievant was sitting in an easy chair in the hall, facing the lieutenant. The lieutenant observed grievant sitting in her chair, with her head down on her chest, not looking at the patient in his room. As the lieutenant approached, another staff person further down the hall said something to grievant but the grievant did not respond. When she again said something, grievant raised her head. As the lieutenant walked past grievant, the lieutenant said hello and grievant said hello back. This encounter was recorded on the videotape surveillance camera.<sup>6</sup> The lieutenant viewed the security tape shortly after this encounter when she reported grievant and others. The lieutenant reported grievant for being less than alert. The grievant and lieutenant did not know each other and had not had any prior interaction.

On this night, the lieutenant reported five employees including grievant who were either sleeping or less than alert. The agency investigated all five cases. Following investigation, the cases were referred to the central office for evaluation. Following some additional investigation, the central office concluded that the allegations were founded. The facility director waited until all five investigations had been completed before deciding upon discipline in order to assure that discipline was consistent and appropriate for each employee. Three of those found to be sleeping or less than alert, including grievant, are classified employees. Each of the three was given a Group III Written Notice and suspended from work for a period of time. The remaining two employees were temporary employees; both were discharged from employment.

Grievant was on vacation during early May when the initial Written Notice was prepared. When she returned to work on May 18, 2002, someone erroneously told her that she was on suspension when, in fact, her suspension had been scheduled to start on May 20, 2002. Because of this error, and the incorrect information regarding prior active discipline on her Written Notice, the Facility Director offered to reduce grievant's suspension to 15 days. Grievant refused this offer because she felt the discipline should be rescinded.<sup>7</sup>

### 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

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<sup>6</sup> The camera is at the end of a long hallway and the view of grievant's chair is from the back. The camera takes pictures every few seconds and it is therefore possible only to see a somewhat truncated version of the encounter described by the lieutenant. Therefore, the videotape was of somewhat limited value in assessing this incident.

<sup>7</sup> Exhibit 1. Second Step Resolution Response from facility director, June 27, 2002.

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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>8</sup>

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training<sup>9</sup> promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal [from employment].<sup>10</sup> One example of a Group III offense is sleeping during work hours.

The Standards of Conduct provides examples of the acts and behavior that constitute each level of offense. However, as the Standards further note:

The offenses set forth below are not all-inclusive, but are intended as examples of unacceptable behavior for which specific

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<sup>8</sup> § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

<sup>9</sup> Now known as the Department of Human Resource Management (DHRM).

<sup>10</sup> Exhibit 7. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

disciplinary actions may be warranted. Accordingly, any offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section.<sup>11</sup>

There can be no doubt that sleeping on the job is a serious offense and is appropriately categorized a Group III offense. In the case of health care technicians assigned to provide close one-on-one care of mentally ill patients, sleeping on the job is extremely serious because it involves the potential for injury or death of a patient. When a mental health technician is less than alert, the potential for injury or death of the patient increases. One can argue that sleeping involves snoring, or an inability to be aroused, or that some other criterion should be used. Similarly, one can debate various criteria for assessing whether an employee is "less than alert." However, when an employee is sitting in an easy chair, has her head down on her chest, with her eyes closed, it must be concluded that she is, at the least, less than alert.

In the instant case, the testimony of an unbiased witness establishes that the grievant had her head down on her chest. The lieutenant did not previously know who grievant was and had no reason not to truthfully report her observation. Grievant, on the other hand, has an obvious self-interest in denying that she was less than alert. The videotape, while not conclusive, tends to corroborate the lieutenant's observations. In the moments before the lieutenant enters the hall, grievant's head can be seen falling backward and forward in the manner of someone who is beginning to doze off.

Accordingly, the agency has demonstrated, by a preponderance of the evidence, that grievant was less than alert, if not sleeping, during work hours. Her offense is even more egregious because she was doing so while assigned to one-on-one care of a patient she knew to be aggressive and a self-mutilator.

Grievant has not shown that the lieutenant singled her out for reporting. The lieutenant had reported five people for being asleep or less than alert on the night of March 5, 2002. Grievant has not advanced any other credible reason to question the lieutenant's veracity or the accuracy of her observations. Therefore, the agency has demonstrated that grievant's failure to be alert on March 5, 2002 was a Group III offense.

Grievant states that she cannot recognize herself on tape. However, the lieutenant who walked down the hall had viewed the tape immediately following the encounter. She was therefore able to verify grievant's presence in the hall and identify her on the videotape. Grievant also contends that the lieutenant stopped and spoke with another MHT for 10-15 minutes. The videotape does not reflect that the lieutenant stopped with that MHT or any other staff.

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<sup>11</sup> Exhibit 7. Section V.A, *Ibid.*

The agency mitigated grievant's discipline, in part because she has 23 years of service. After careful consideration of the evidence, it is concluded that retaining grievant in state employment, rather than discharging her, represents a considerable reduction in the discipline she could have been given. The evidence is sufficient to support the discipline administered by the agency.

### DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and 30-day suspension issued to the grievant on May 20, 2002 are UPHELD. The Written Notice shall remain in grievant's personnel file for the length of time specified in Section VII.B.2.c of the Standards of Conduct.

### APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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>12</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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David J. Latham, Esq.  
Hearing Officer

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<sup>12</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.