

Issue: Group III Written Notice with termination (sleeping during work hours); Hearing  
Date: 04/04/03; Decision Issued: 04/07/03; Agency: DMHMRSAS; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 5678



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5678**

Hearing Date: April 4, 2003  
Decision Issued: April 7, 2003

**PROCEDURAL HISTORY**

On December 20, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*Employee was witnessed sleeping during work hours. She admitted to her Team Leader that she was sleeping but stated that she did not sleep "for very long."*

Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On March 11, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 4, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Advocate

Development Disability Specialist  
Team Leader

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for sleeping during work hours.

## **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 Mental Health Mental Retardation and Substance Abuse Services employed Grievant as a Development Disabilities Specialist I for approximately two years until her removal effective December 20, 2002. The purpose of her position included providing, “care/treatment, education/training, and supervision of individuals with mental retardation, autism, and other developmental disabilities, and to collect and record data and document services provided to these residents.”<sup>1</sup> Grievant’s supervisor, the Team Leader, described Grievant’s work performance as “outstanding.” She received overall performance ratings of “Contributor” in her 2001 and 2002 evaluations.<sup>2</sup> Grievant received a Group I Written Notice on November 18, 2002 for unsatisfactory attendance or excessive tardiness.<sup>3</sup>

On December 13, 2002, Grievant and another employee were working in a resident cottage. Grievant began her shift at 1:45 p.m. As the end of her shift approached, Grievant fell asleep. At approximately 9:45 p.m., Ms. DE arrived at the cottage and knocked on the door so that someone would let her inside. Grievant’s co-worker was tube-feeding a resident and could not go to the door to let Ms. DE inside. The co-worker yelled Grievant’s name at least three times. Grievant did not respond.

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<sup>1</sup> Agency Exhibit 5.

<sup>2</sup> Grievant Exhibit 1.

<sup>3</sup> Agency Exhibit 6.

After realizing Grievant was asleep and would not go to the door, the co-worker left her patient and opened the door for Ms. DE. Ms. DE walked to Grievant and called to her loudly. Ms. DE was concerned that Grievant may be unconscious. Grievant's shoulders were rising and falling and she was snoring lightly. A resident was hitting Grievant's leg, but Grievant did not awaken. Ms. DE left Grievant to check on the seven other residents in the cottage. They were all sleeping. At approximately 10:05 p.m., the telephone rang. The caller wanted to speak to Grievant so Ms. DE shook Grievant on the shoulder. Grievant woke up and spoke with the caller.

The Facility Director testified that nearly all employees who fall asleep during work hours are given Group III Written Notices and removed from employment.

### CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).<sup>4</sup> Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

"Sleeping during work hours" is a Group III offense.<sup>5</sup> Grievant was soundly asleep for at least 20 minutes. Her shift was scheduled to end at 10:15 p.m. and she was at her worksite. The Agency has met its burden of proof that Grievant was sleeping during work hours.

Grievant admits that she may have been asleep for a short period of time, but contends there are mitigating circumstances justifying a reduction in discipline. She contends she had asked the Team Leader to be relieved from work because she had a headache and did not feel well. She continued to work and fell asleep during her break. She adds that she is a good worker and reinstatement would be a benefit to the Commonwealth of Virginia.

Mitigating circumstances do not exist to support a reduction in the disciplinary action. Although Grievant may have taken a break towards the end of her shift, the Agency required her to remain in the cottage in the event her services were necessary.<sup>6</sup>

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<sup>4</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>5</sup> DHRM Policy 1.60(V)(B)(3)(h).

<sup>6</sup> Grievant contends requiring Grievant to remain in the cottage during her breaks is contrary to the Fair Labor Standards Act. Grievant did not cite any specific statutory violation. Whether the Agency complied with the FLSA is not an issue before the Hearing Officer.

She was expected to remain awake at all times.<sup>7</sup> The Team Leader testified that Grievant did not ask him to obtain a substitute for her because her illness.<sup>8</sup> The Agency has staff available to substitute for other staff who become ill while working. Grievant did not establish a connection between her having a headache and falling sleep.<sup>9</sup> Grievant's work performance was very good, but her length of service of two years is insufficient to justify a finding by the Hearing Officer that mitigating circumstances exist.

Grievant contends the Agency retaliated against her. No credible evidence of retaliation by the Agency was presented.

## 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 **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.

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<sup>7</sup> DHRM Policy 1.60(V)(B)(3)(h) refers to sleeping during work hours, namely the time from the beginning to the end of an employee's shift. Grievant's work hours include the time she takes a break even though she may not have been actually working.

<sup>8</sup> Grievant has the burden of presenting credible evidence justifying mitigation. The Team Leader testified with certainty that Grievant did not ask him to find a substitute for her.

<sup>9</sup> It is equally likely that a painful headache would keep one awake as it is likely the headache would cause one to sleep.

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>10</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>10</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.