

Issues: Group III Written Notice with termination (sleeping during work hours) and Group II Written Notice with termination (failure to report to work without notifying supervisor); Hearing Date: 04/15/03; Decision Issued: 04/17/03; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No.: 5679/5680



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 5679/5680

Hearing Date: April 15, 2003
Decision Issued: April 17, 2003

PROCEDURAL ISSUE

The agency requested that two grievances filed by grievant be consolidated into one hearing. The Director of the Department of Employment Dispute Resolution (EDR) reviewed the request and subsequently issued a ruling granting the consolidation request.¹

APPEARANCES

Grievant
Representative for Grievant
One witness for Grievant
Human Resource Manager
Representative for Agency
Four witnesses for Agency

¹ *Compliance Ruling of Director*, Number 2003-059, issued April 7, 2003.

ISSUES

Did the grievant's actions 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 timely grievances from a Group III Written Notice issued for sleeping during work hours, and a Group II Written Notice issued for failure to report to work as scheduled without proper notice to supervisor.² The grievant's employment was terminated as part of these two disciplinary actions. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³

The Department of Mental Health, Mental Retardation and Substance Abuse Services (MHMRSAS) (Hereinafter referred to as "agency") has employed the grievant for 18 years as a human services care worker (HSCW). Grievant has had a chronic problem with both tardiness and attendance.

In January 2001, grievant began taking medication (Xanax and Paxil) for depression and anxiety secondary to marital difficulties. In September 2002, her physician increased the dosage and this resulted in increased drowsiness.⁴ Grievant has worked the midnight shift (11:00 p.m. to 7:30 a.m.) for all of her career with the agency. In early 2002, grievant's supervisor counseled her about sleeping on duty and warned her that disciplinary action could be taken if the problem continued.⁵ In addition, the registered nurse coordinator had spoken to grievant on several occasions when she noticed her beginning to nod off or become drowsy. The supervisor also offered grievant the option to switch from midnight shift to either the day or evening shift. Grievant did not pursue this offer. One of grievant's coworkers had also observed grievant dozing off on several occasions prior to November 23, 2002.

² Agency Exhibit D. Written Notices, issued December 12, 2002. NOTE: Agency Exhibits B & C are the original, handwritten notices. In preparation for this hearing, the agency belatedly recognized that it had failed to include the effective date of removal on the written notices. Agency Exhibit D corrected this oversight. During the grievance resolution process, the agency rescinded a third written notice referred to in both the attached correspondence and the second-step resolution response (Agency Exhibit A).

³ Grievance Forms A, filed January 10, 2003.

⁴ Grievant Exhibit 1. Grievant's physician states that the dosage of Xanax he prescribed could cause drowsiness.

⁵ Agency Exhibit K. Documented Counseling form, February 8, 2002.

On the night of November 22-23, 2002, grievant was assigned to monitor a self-destructive patient one-on-one.⁶ This patient suffers from depression and had attempted to take her own life and to self-mutilate on multiple occasions. Policy requires that a staff person sit near and constantly observe the patient in order to prevent the patient from harming herself. On November 24, 2002, the registered nurse coordinator received a handwritten note from the patient complaining that a staff member assigned to observe her one-on-one repeatedly fell asleep, snored, and woke her up.⁷ From the description provided by the patient, grievant was identified as the staff person in question. The coworker referred to in the preceding paragraph observed grievant dozing with her head on the back of the chair during the morning of November 23rd. A registered nurse who had worked the midnight shift on November 22-23, 2002 also had witnessed grievant sitting, with her head resting on the back of her chair (facing the ceiling) and her eyes closed. The nurse twice called grievant by name but grievant did not respond. Only when the nurse tapped grievant on her shoulder did she awaken.

Grievant's supervisor had counseled her on multiple occasions about her tardiness.⁸ After each counseling, grievant would improve for a period of time and then gradually revert to her prior pattern of tardiness. Grievant was given a written warning about her tardiness.⁹ Grievant lives with her 23-year-old daughter who also works a night shift job. Grievant usually sleeps during the day from 9:00 a.m. to about 4:00 or 5:00 p.m. She uses two alarm clocks to assure that she wakes up. If she sleeps through the alarms, her daughter wakes her. Grievant was scheduled to work on the night of November 25, 2002. During that day, she had problems with her husband and did not sleep until early evening. Even though her alarm clocks functioned and her daughter woke her before 11:00 p.m., grievant fell asleep each time and did not awaken until 6:30 a.m. the following morning. She did not report to work or notify her supervisor until 6:30 a.m. – one hour before the end of her shift. She called and advised her supervisor that she had just awakened.

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

⁶ There was confusion about whether grievant was found asleep during the early morning of November 23, or November 24, 2002. A preponderance of evidence suggests that grievant was found sleeping on the morning of November 23, 2002. The Written Notice lists the date of occurrence as November 24, 2002 but this appears to have been an error.

⁷ Agency Exhibit B. Handwritten note from patient, November 24, 2002.

⁸ Agency Exhibit H. Grievant's performance evaluation, October 6, 2000. See also Agency Exhibit J. Grievant's performance evaluation, October 22, 2002.

⁹ Agency Exhibit K. Written Warning form, November 14, 2002.

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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹⁰

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 Human Resource Management 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 Human Resource Management 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].¹¹ An example of a Group III offense is sleeping during work hours. Group II offenses are found in Section V.B.2 and include acts and behavior which are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment. One example is failure to report to work as scheduled without prior proper notice to supervisor. These same offenses are listed in the agency's Employee Handbook.¹²

¹⁰ § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

¹¹ DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

¹² Agency Exhibit L. DMHMRSAS Employee Handbook, October 2002.

The agency has demonstrated, by a preponderance of evidence, that grievant was sleeping during work hours in the early morning of November 23, 2002. Grievant's denial is outweighed by the testimony of a registered nurse who found her sleeping, and by corroborative hearsay evidence from the patient grievant was supposed to be observing. As to the second offense, grievant did not dispute that she failed to report for work without prior notice to supervision on November 25, 2002. Grievant acknowledges that she has had a chronic problem with both tardiness and attendance. Grievant also acknowledges that she was offered the possibility of switching to a different shift but she did not pursue this any further. Grievant understood that her tardiness was a problem but attributed her problem to marital difficulties that resulted in discord and depression. Accordingly, grievant committed two offenses, each of which is subject to discipline under the Standards of Conduct. The burden of persuasion now shifts to grievant to demonstrate any mitigating circumstances.

Grievant points to the special observation flow sheet as evidence that the patient slept during the entire time grievant was assigned to monitor her. The flow sheet reflects that grievant was assigned to monitor the patient from 12:45 a.m. to 3:00 a.m., 5:45 a.m. to 6:00 a.m., and 6:15 a.m. to 7:15 a.m. The record reflects only that the patient was lying asleep in her bed on each quarter hour when the observations were recorded.¹³ It is entirely possible, and in fact likely, that the patient awoke, heard grievant snoring and saw her sleeping, and then fell back asleep within a few minutes. This could easily have occurred at any time between the quarter-hour intervals when grievant recorded observations on the flow sheet. Thus, the fact that grievant did not observe the patient in a waking state does not prove that the patient was not awake during the 15 minutes between grievant's notations on the flow sheet.

Grievant complained in the past that the registered nurse who found her sleeping had spoken rudely to her. The nurse denied speaking rudely to grievant at any time. At the time of grievant's allegation, the agency investigated and found it to be without merit. Grievant did not provide any evidence or other witnesses to corroborate her inference that the nurse was biased against her.

Grievant and her witness offered testimony that it is not uncommon for employees on the midnight shift to nod off. The term "nodding off" was described as the head dropping forward onto the chest and then instantly recovering. This occurs most often in the dayroom when other staff are in the area. Nodding off is differentiated from falling asleep because the lapse in attentiveness is only momentary when nodding off, while falling asleep can last for several minutes or more. Grievant's offense was deemed particularly egregious because she knew that the patient she was supposed to be observing had a documented history of self-mutilation and suicide attempts.

¹³ Grievant Exhibit 2. Special Observation Flow Sheet, November 23, 2002.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice for sleeping during work hours, the Group II Written Notice for failure to report to work as scheduled without proper notice to supervision, and the termination of grievant's employment are hereby 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.¹⁴ You must file a notice of appeal with the clerk of the circuit

¹⁴ An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁵

[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]

David J. Latham, Esq.
Hearing Officer

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.