

Issue: Group II Written Notice (sleeping during work hours); Hearing Date:
01/20/04; Decision Issued: 01/21/04; Agency: DMHMRSAS; AHO: David J.
Latham, Esq.; Case No. 505



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 505

Hearing Date: January 20, 2004
Decision Issued: January 21, 2004

APPEARANCES

Grievant
One witness for Grievant
Representative for Agency
Four witnesses for Agency

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 a timely appeal from a Group II Written Notice issued for attempting to sleep during working hours.¹ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.² The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed the grievant as a mentally retarded services specialist (MRSS) for 16 years.³

On Sunday, August 10, 2003, grievant was working on the day shift from 6:30 a.m. to 2:30 p.m. At about 11:00 a.m. grievant and another MRSS went to the break room for their allowed 15-minute break.⁴ Grievant advised her coworker that she was tired and felt sick. The coworker suggested to grievant that she go to her car and take a short nap. Grievant responded that she would prefer to stay in the building to take a nap because it was cooler than her car. The coworker left the break room after three to five minutes. Grievant then left the break room and went to a client's room where she attempted to take a nap. Grievant did not ask anyone to wake her at the end of her 15-minute break.

At about 11:30 a.m., one of grievant's coworkers reported to the team leader (supervisor) that the grievant was sleeping in a client's room. The team leader went to the client's room and found grievant lying in the prone position on the bed. Her hands were under her head, she was facing the wall, and appeared to be asleep.⁵ The light in the room was turned off. The supervisor asked grievant what she was doing and told her she was not allowed to be sleeping. Grievant raised her head, turned to look at the supervisor, and said she was tired. The grievant's eyes appeared red as if she had been sleeping. Grievant got up, went to the restroom, and then returned to work.

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 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

¹ Exhibit 4. Written Notice, issued August 22, 2003.

² Exhibit 6. Grievance Form A, filed September 1, 2003.

³ Since issuance of this disciplinary action, grievant allegedly committed another offense that resulted in a second disciplinary action notice. Grievant was removed from employment on December 19, 2003 because of the accumulation of disciplinary actions. The latter disciplinary action was not adjudicated during this hearing and had no bearing on the decision in this case.

⁴ Exhibit 1. Coworker's incident report, August 14, 2003.

⁵ Exhibit 3. Team leader's incident report.

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.⁶

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) 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. The *Standards of Conduct* Policy No. 1.60 provides that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.⁷ The policy also provides that the offenses listed in the Standards of Conduct are only *examples* of unacceptable behavior; the list is not all-inclusive.⁸

The underlying facts are undisputed. Grievant acknowledges that she went to a client's room, lay down on the bed, and attempted to sleep. She was discovered in this position some 30 minutes after the start of her break and 15 minutes after her break had officially ended. The supervisor disciplined grievant because she appeared to be asleep, and because she had not notified the supervisor where she was. Therefore, the agency has demonstrated by a

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

⁷ Exhibit 5. Section V.B.2, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

⁸ Exhibit 5. Section V.A., *ibid.* states: "The offenses set forth below are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense that, in the judgment 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."

preponderance of evidence that grievant committed an offense subject to discipline under the Standards of Conduct.

Grievant offered the testimony of a witness who claimed that a male employee had been found sleeping and had received two days suspension from work. Grievant suggested that she was treated differently because she concluded that the male employee was not disciplined. Neither party presented evidence to establish exactly what discipline was given to the male employee. However, the hearing officer takes administrative notice that, in order for any employee to be suspended from work, he must have received either a Group II or a Group III Written Notice. The Standards of Conduct provide that the disciplinary action for only Group II and Group III offenses may include suspensions without pay.⁹ Those who receive only counseling or a Group I offense may not be suspended. Accordingly, if the male employee was suspended for two days, he must have received either a Group II or Group III Written Notice. Therefore, the grievant was not treated more adversely than the male employee. In fact, grievant was not suspended at all, and thus she received less discipline than the male employee.

Grievant alleges that her team leader recommended discipline in retaliation for grievant having criticized the team leader three years ago. Grievant did not provide any corroborative evidence or testimony to support the allegation. Moreover, the undisputed evidence established that the decision to discipline was first discussed with, and then approved by, the Human Resource Director, the Director of Resident Services, and the Program Manager. Thus, even if the team leader had retaliation in mind, she did not make the ultimate decision to issue discipline. In fact, testimony revealed that the team leader had argued in favor of reducing the discipline to a Group II Written Notice when Human Resources suggested that it should be a Group III. Accordingly, grievant has not offered any circumstances that would mitigate her offense.

The remaining issue is what the appropriate level of discipline should be. Grievant argues that because the *appearance of sleeping* is not listed among the examples in the Standards of Conduct, she should not be disciplined. This argument is not persuasive. As discussed above, the list of offenses found in the Standards of Conduct are only *examples* of offenses. The evidence herein is preponderant that grievant exceeded the 15-minute break, failed to tell her supervisor where she was, attempted to go to sleep, and appeared to be asleep when she was found lying on a patient's bed. For all practical purposes, she might as well have been asleep because she was lying down, trying to sleep, was not alert, and was not caring for patients. This meets the definition of a Group II offense, i.e., it is an offense that should warrant removal from employment if repeated. At the time grievant was found on the bed, her break had ended and she was being paid to care for patients. Thus, the practical effect of what grievant was doing was precisely the same as if she had been asleep.

⁹ Exhibit 5. Section VII.D. *Ibid.*

Given these circumstances, the agency could have given grievant a Group III Written Notice. However, it elected to reduce the level of discipline because grievant had been a good employee until that time. The hearing officer can find no reason to alter the agency's action.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice for lying on a patient bed and appearing to be asleep issued on August 22, 2003 is hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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.¹⁰ 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.¹¹

[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

¹⁰ 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).

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.