

Issue: Group III Written Notice with termination (sleeping during work hours);
Hearing Date: 08/30/04; Decision Issued: 08/31/04; Agency: DMHMRSAS;
AHO: David J. Latham, Esq.; Case No. 825



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 825

Hearing Date: August 30, 2004
Decision Issued: August 31, 2004

APPEARANCES

Grievant
Representative for Agency
Three 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 grievance from a Group III Written Notice for sleeping during work hours.¹ As part of the disciplinary action, grievant was removed from state employment effective July 2, 2004. Following failure of the

¹ Exhibit 6. Written Notice, issued July 2, 2004.

parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.²

The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant as a health services care worker (Direct Service Associate) for 27 years. Grievant has one active prior disciplinary action – a Group II Written Notice for failing to be alert and attentive to a client.³

On June 28, 2004, grievant was working the night shift. Between 5:00 a.m. and 6:00 a.m. she was assigned to watch a single patient on a one-on-one basis. This particular patient has a history of self-abuse and must be observed 24 hours a day. Grievant sat in a chair just outside the door of the patient's room and was to stay alert at all times in case the patient attempted self-mutilation or other unauthorized behavior. At about 5:25 a.m., grievant's supervisor made a routine round and entered the hall where grievant was sitting. The hall has a detection device that sounds an alarm whenever anyone passes through the entrance. The alarm is intended to alert staff in case a patient attempts to leave the area without being noticed. The alarm sounded but grievant did not move at all. In a loud voice, the supervisor said "Hey girls, how are you doing?" Neither grievant nor a coworker sitting in a chair near the entrance responded.

The supervisor spoke with the employee who was sitting close to the entrance because she had her feet up on another chair and appeared drowsy. She then noticed grievant still sitting in a chair several feet down the hall. Grievant was motionless, with her arms folded across her chest and her head down on her chest. The supervisor walked over in front of grievant and observed that grievant was asleep. The supervisor put her hand on grievant's shoulder and shook it two or three times to rouse her. At this point, grievant awoke and looked up at the supervisor. An aide came out of one of the rooms and the supervisor asked why she had not awakened the two employees. The aide said she had already done so once. The supervisor told grievant and her coworker to get up and walk around to get refreshed. As the supervisor left the area, grievant said to her coworker, "Well, I guess this will be our jobs."

The agency recognizes that sitting with patients one-on-one, especially during the night shift is tedious and boring. Generally, staff are required to sit with patients only for one hour at a time and are then rotated with other staff to different assignments. Employees are required to notify their supervisor if they feel drowsy, need a bathroom break, or for any other reason cannot be fully alert while watching the patient. Grievant never notified her supervisor or anyone else

² Exhibit 7 *Grievance Form A*, filed July 6, 2004.

³ Exhibit 9. Group II Written Notice, Issued August 28, 2002. Grievant appeared to be asleep on this occasion but she averred that she had taken medication which required her to keep her eyes closed for five minutes after administration.

that she was taking any medication, had any conditions requiring medication, or that she felt less than alert.

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 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. In all other actions, such as claims of retaliation, the grievant must present her evidence first and prove her claim by a preponderance of the evidence.⁴

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 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

⁴ § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

action. Section V.B.3 of the *Standards of Conduct* policy provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.⁵ Sleeping during work hours is one example of a Group III offense.

The supervisor testified clearly, concisely, and credibly that she found grievant asleep during work hours. Grievant acknowledges that she had her arms folded, head on her chest, and her eyes closed. Grievant did not dispute that she remained motionless when the alarm sounded, and that she did not stir when the supervisor talked with her coworker. Grievant also admits that she made a statement after the supervisor found her sleeping to the effect that being found asleep would mean losing their jobs.

Grievant contends that she heard the alarm sound and that she heard the supervisor talking with her coworker. However, grievant has not explained why she did not sit up and act alert when she purportedly heard the supervisor talking with the drowsy coworker. Grievant had previously been disciplined for appearing to be asleep and knew that sleeping is prohibited. If she was awake to hear the conversation, the logical thing to do would be to sit up and act alert so that the supervisor would not see her sleeping. Grievant failed to do so. Grievant testified that she does not recall the supervisor shaking her shoulder but does not deny outright that it happened.

Grievant has not offered any motive for the supervisor to falsify her testimony. There is no evidence to question the credibility of the supervisor. The supervisor testified that grievant had been a good worker and that there have not been any other problems with grievant. Grievant asserts that she felt dizzy several minutes before the supervisor entered the room. Grievant said she closed her eyes and put her head down until the dizziness passed. However, grievant did not tell her supervisor about this at the time the supervisor woke her. Rather, she said to her coworker that this would mean the loss of their jobs. Such a statement made at the time of the incident is strongly suggestive of a *mea culpa*.

Grievant had mentioned that she had diabetes but she had never told anyone that she was taking medication for the condition. Subsequent to the disciplinary action, grievant produced a note from her physician indicating that she has diabetes, hypertension, and hyperlipidemia. Grievant had been taking a hypertensive medication and two medications for her high blood sugar prior to June 28, 2004 but did not inform anyone at the agency. After the sleeping incident, grievant's physician prescribed a cholesterol-reducing medication.

Grievant has a prior similar offense. In August 2002, she had appeared to be asleep. Grievant contended that she had placed medication in her eyes several minutes earlier and was supposed to keep her eyes closed for five

⁵ Exhibit 5. Section V.B.3, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

minutes after administration. Grievant was disciplined for that offense. Based on that discipline and the counseling that accompanied it, grievant knew that the agency does not permit sleeping during work hours. Therefore, she was particularly knowledgeable about the agency's policy and the consequences of violating that policy.

The purpose of the prohibition against sleeping during work hours is obvious – employees are paid to work, not sleep. In grievant's case, her work assignment was to carefully watch a self-abusive patient in order to prevent any harm coming to the patient. Grievant admitting closing her eyes and having her head down on her chest for a period of time. She was therefore unable to watch the patient; her negligence could have resulted in harm to the patient. After carefully considering all evidence and testimony, it is concluded that the agency has shown, by a preponderance of evidence, that grievant was sleeping during work hours. In a similar incident two years ago, the agency gave grievant the opportunity to remain employed because it was not totally convinced that she had been sleeping. However, in this case the agency concluded that grievant was asleep. The evidence is sufficient to conclude that the agency made a fair and reasonable decision to remove grievant from employment rather than risk having a recurrence of this behavior.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and the removal of grievant from state employment on July 2, 2004 are 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.⁶ 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.⁷

[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

⁶ 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).

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.