

Issue: Group III Written Notice with termination (sleeping during work hours); Hearing
Date: 09/07/04; Decision Issued: 09/08/04; Agency: DMHMRSAS; AHO: Carl
Wilson Schmidt, Esq.; Case No. 842



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 842

Hearing Date: September 7, 2004
Decision Issued: September 8, 2004

PROCEDURAL HISTORY

On July 2, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal for "Supervisor observed you sleeping on duty." On July 13, 2004, 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 August 11, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 7, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Witnesses

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 Direct Service Associate II at one of its facilities. Grievant’s responsibilities included providing direct care to clients who reside at the Facility and require continuous mental health care. Grievant had been employed by the Agency for over one year without prior disciplinary action under the Standards of Conduct.

On June 28, 2004, Grievant was working the night shift at the Facility’s Housing Unit 7A. Several clients reside within the housing unit which also has a dayroom where clients and staff can engage in activities. At approximately 5:25 a.m., the Supervisor left her office and went to Unit 7A where Grievant and two other employees were working in the dayroom. The Supervisor had a large set of keys that generated sound as she walked. She also wore shoes that made a loud sound as she walked on the tile floor of the unit. As the Supervisor approached the living unit, Ms. F, another employee heard the Supervisor coming and stood up and walked to another part of the unit. As Ms. F was standing up, she called to a third employee, Ms. S, and said in a loud whisper “Ms. S, Ms. S” because Ms. F believed Ms. S and Grievant were in comfortable positions as the Supervisor approached.

While in the hall adjoining the living area, the Supervisor called out “How are you doing girls.” She always called out before approaching staff in order to avoid surprising them. The hall has a detection device that sounds a buzzer whenever anyone passes through the entrance. The buzzer serves to alert staff in case a client attempts to leave the area without being noticed. As the Supervisor passed through the detection device, the buzzer sounded but Grievant did not move. Once the Supervisor was inside the dayroom, the Supervisor observed Grievant and stopped suddenly. The Supervisor was “shocked” at what she observed. The Supervisor could see Grievant sitting in the chair with her feet propped upon on a rocking chair. The rocking chair was not moving. Grievant’s head was tilted forward with her chin towards her chest. Grievant’s eyes were closed and Grievant was asleep. The Supervisor moved in front of Grievant and spoke to Grievant. Grievant meekly responded and got up from her chair.

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).¹ 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).

Group III offenses include “[s]leeping during work hours.”² Grievant was asleep on June 28, 2004 at approximately 5:25 a.m. while she was working. The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice with removal.

Grievant contends she was awake. The Supervisor’s testimony that Grievant was asleep, however, was credible and persuasive.³ Grievant offered the testimony of Ms. F who said Grievant was awake. Ms. F’s testimony is not sufficient to rebut the Supervisor’s testimony. Most of the facts Ms. F testified to are consistent with the testimony of the Supervisor and support the Supervisor’s conclusion. In particular, Ms. F and the Supervisor testified that Grievant was in a comfortable position with her head down and did not react when the Supervisor first called out and activated the buzzer. Grievant had been warned not to place her feet up on another chair and establish a comfortable position because doing so placed her at risk of sleeping. If Grievant had been awake she would have heard the Supervisor’s keys, shoes, words, and the buzzer sound. Grievant would have reacted the same way Ms. F did which was to prepare for the Supervisor’s entry into the living area. Grievant took no action until the Supervisor was in front of Grievant and attempting to speak to Grievant.

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**.

¹ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

² DHRM Policy 1.60(V)(B)(3)(h).

³ 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.

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 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. 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.⁴

[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].

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer