

Issue: Group III Written Notice (sleeping during work hours); Hearing Date: 05/12/04;
Decision Issued: 05/13/04; Agency: DMHMRSAS; AHO: David J. Latham, Esq.;
Case No. 689



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 689

Hearing Date: May 12, 2004
Decision Issued: May 13, 2004

PROCEDURAL ISSUE

Grievant received three disciplinary actions and grieved all three on her grievance form. The facility director rescinded the Group I and Group II Written Notices during the second resolution step of the grievance process.¹ Accordingly, only the Group III Written Notice with termination of employment was qualified for hearing.

APPEARANCES

Grievant
Attorney for Grievant
Human Resource Director
Representative for Agency
Five witnesses for Agency

ISSUES

¹ Exhibit 4. Second resolution step response from facility director, March 16, 2004.

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 III Written Notice issued for sleeping during working hours.² As part of the disciplinary action, grievant was removed from state employment due to the accumulation of active disciplinary actions, and because a Group III offense normally warrants removal from employment. After failure of the parties 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 (hereinafter referred to as "agency") employed the grievant for 32 years. She was a registered nurse (RN) manager at the time of removal from employment. Grievant has one other active disciplinary action – a Group II Written Notice for sleeping during hours of work.⁴ As manager, grievant was responsible for 20 patients and the supervision of several nurses and health service care workers (HSCW).

On January 1, 2004, grievant worked a ten-hour shift (10:00 p.m. to 8:30 a.m.) During most of the shift, she sat in the nursing office in order to input data into a desktop computer. A licensed practical nurse (LPN) working the same shift was frequently in and out of the office during the night. She observed at various times that grievant was groggy, had her head down, and was only periodically slowly pecking at the keyboard during the early part of the shift. She noticed that grievant slurred her speech and kept closing her eyes. From time to time, the LPN spoke to grievant in an effort to rouse her. At around 5:00 a.m., she saw grievant with her head resting on her arm on the desk for about five to ten minutes. Grievant's eyes were closed and she was breathing heavily. The LPN called grievant by name but grievant failed to respond. The LPN spoke to another RN on the shift and reported to him that she was having a difficult time keeping grievant awake.⁵

The nursing office is surrounded by large glass windows making the interior easily visible to staff walking by in the hallway. Between 5:45 a.m. and 6:30 a.m., a HSCW passed the nursing station four times. On each occasion, she observed grievant sitting in the same position, with her head down on her chest, not moving, and apparently dozing or sleeping. She mentioned her observations to the LPN. A second

² Exhibit 2. Group III Written Notice, issued January 23, 2004.

³ Exhibit 4. Grievance Form A, filed March 3, 2004. NOTE: Although the Written Notice is dated January 23, 2004, the agency mailed the disciplinary action to grievant on January 28, 2004. Grievant averred that she received the document on February 5, 2004. The agency accepted the March 4, 2004 filing of the grievance as timely and proceeded through the resolution steps, thereby effectively waiving the 30-day filing requirement (§ 2.2 of the Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001).

⁴ Exhibit 2. Group II Written Notice, issued May 2, 2002.

⁵ Exhibit 1. Memorandum from male RN to Human Resource Director, January 17, 2004.

HSCW accompanied the first HSCW and brought to her attention that grievant appeared to be asleep.⁶

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.⁷

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 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence should normally warrant removal from employment.⁸ Sleeping during working hours is one example of a Group III offense.

⁶ The second HSCW has been on family medical disability leave since early January 2004 and was unavailable to testify at the hearing. The facility director references both HSCWs in his second-step resolution response memorandum.

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

⁸ Section V.B.3, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

The agency has demonstrated by a preponderance of evidence that grievant was sleeping during working hours. The credible testimony of an LPN who observed grievant throughout the shift and a HSCW who observed grievant on four occasions establish that grievant was sleeping during work hours. A second HSCW had also made the same observations as the first HSCW.

In her due-process response to the RN coordinator, grievant stated that she did not go to sleep. However, when asked under oath whether she was asleep, grievant said, "Not that I can *recall*." Thus, when asked to provide sworn testimony, grievant did not deny being asleep but only said she could not *recall* sleeping. Later in her testimony, grievant took the same position when she stated, "I could have dozed off but *I don't remember* it." Grievant's inability to recall the incident is not a denial that it happened.

The testimony of the LPN is credible. She has known grievant for most of her life, gets along well with her, and was reluctant to report grievant because she did want to cause her trouble.⁹ In fact, the LPN testified that during the earlier part of the shift, she had repeatedly spoken to grievant in an effort to try to keep grievant from falling asleep. The male RN corroborated this testimony when he testified that the LPN told him that she was having "a difficult time keeping [grievant] awake." Even after the LPN observed grievant lying motionless with her head on the desk, eyes closed and breathing heavily for several minutes she still wanted to protect grievant. She was reluctant to report grievant until a supervisor reminded her that it was her responsibility to report the matter.

Grievant attempted to discredit the LPN's testimony by pointing out a half-hour time difference between her written statement and an observation log. When the LPN wrote her statement, she said that grievant had laid her head on the desk "around 5:30 a.m." However, the observation log reflects that the LPN had relieved the male RN and was sitting with a patient from 5:15 – 5:45 a.m.¹⁰ In view of the fact that the LPN wrote the statement from memory, wrote it five days after the fact, and characterized the time as *around* 5:30 a.m., this difference in time is not significant enough to alter the substance of her overall testimony.

Grievant argues that because the appearance of sleeping is not the same as sleeping, she should not be disciplined. This argument is not persuasive. For all practical purposes, grievant was asleep because her head was down on her chest, her eyes appeared to be closed, she was motionless, not alert, and not performing her duties. At one point, she was observed lying with her head on her arm on the desk for up to ten minutes, eyes closed, motionless, and breathing heavily. Thus, the practical effect of what grievant was doing was precisely the same as if she had been asleep. Moreover, sleep means not only the suspension of consciousness but also, "a state

⁹ Exhibit 1. LPN's written statement, January 6, 2004.

¹⁰ Exhibit 5. Forensic Restraint & Special Observation log.

resembling sleep; as a state of torpid inactivity.”¹¹ The witness descriptions of grievant certainly fit within this definition. In addition, grievant admitted in her written response to the nurse coordinator that “I may nod off sometimes.” The term “nod off” means “to fall asleep.”¹² Grievant also acknowledged during the hearing that she could have “dozed off.” “Dozed off” means “to sleep lightly, to fall into a light sleep.”¹³ Thus, whether by witness observations, or by grievant’s own admissions, she was at the very least sleeping lightly.

If this was grievant’s first offense, her long years of service and otherwise satisfactory performance would constitute sufficiently mitigating circumstances that removal from employment would be an unduly harsh discipline. However, grievant had previously been disciplined for the very same offense – sleeping during work hours. Therefore, grievant was on notice that another such offense would result in termination of her employment. Accordingly, on the occasion of this second offense, it would be inappropriate to reduce the disciplinary action. If one were to rescind the removal from employment a second time, grievant might conclude that future incidents of sleeping would be overlooked solely because of her length of service and otherwise satisfactory performance.

Moreover, an aggravating circumstance exists in this case. Grievant was an RN Manager, responsible for the health, care, safety and well-being of 20 patients and, the supervision of several nurses and health-care employees. As the manager in such a position of responsibility, grievant is obligated to set an example for subordinates. Having been previously disciplined for the same offense, grievant was well aware of the gravity of her offense. Yet, she failed to set a good example for subordinates by failing to take whatever actions were necessary to avoid sleeping. By sleeping during work hours on a second occasion, grievant set the wrong example. For this reason also, reduction of discipline would be not only inappropriate and unjustified, but also would send the wrong message to other employees.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice for sleeping during hours of work and removal from employment issued on January 23, 2004 are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

¹¹ *Merriam-Webster’s Collegiate Dictionary*, Tenth Edition.

¹² *Ibid.*

¹³ *Ibid.*

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.¹⁴ 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.¹⁵

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).

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

[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