

Issue: Group III Written Notice with Termination (sleeping while on duty);  
Hearing Date: 01/25/11; Decision Issued: 02/17/11; Agency: DBHDS; AHO:  
Ternon Galloway Lee, Esq.; Case No. 9479; Outcome: No Relief – Agency  
Upheld.

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 9479**

**Hearing Date: January 25, 2011**

**Decision Issued: February 17, 2011**

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**SUMMARY OF DECISION**

The Agency has found the Grievant was asleep while on duty to sit with a client patient of the Agency at another medical facility and therefore violated Agency Policy. Thus, the Agency issued the Grievant a Group III Written Notice with termination. After finding the Grievant was given due process and the discipline was consistent with law and policy and within reasonable limits, the Hearing Officer upheld the discipline.

**PROCEDURAL HISTORY**

On November 4, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal. The Written Notice described the nature of the offense and evidence as follows:

On October 14, 2010 you violated Hospital Policy 050-57 and DI 201 which resulted in a substantial finding of neglect. You were sitting with a client at the medical center when you were observed sleeping by medical center staff. This violation of policy shows extremely poor judgment and unprofessional behavior.

On November 4, 2010, the Grievant timely filed a grievance to challenge the Agency's action. The Grievant was dissatisfied with the Resolution Step's outcome and requested a hearing. On December 13, 2010, the Department of Employment Dispute Resolution ("EDR") assigned a hearing officer to this appeal. The Hearing Officer held a pre-hearing conference ("PHC") on December 21, 2010, and subsequently issued a scheduling order.<sup>1</sup>

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<sup>1</sup> All orders issued by the Hearing Officer and mentioned herein were admitted as evidence in this matter.

The Hearing Officer initially scheduled the hearing for January 7, 2011, the first date available among the parties and the Hearing Officer. Prior to this hearing date, the Hearing Officer held a PHC on January 3, 2011, to hear arguments on the Grievant's motion to compel the Agency to produce certain documents. After hearing arguments on the motion, the Hearing Officer ordered the Agency to produce certain documents by the next day, January 4, 2011, and issued a written order to that effect. On January 5, 2011, the Hearing Officer held another PHC to address the Grievant's motion for a continuance and the parties' concerns regarding the exchange of exhibits and the production of documents by the Agency. After hearing arguments, the Hearing Officer found the Agency had failed to produce certain documents the Agency was ordered to provide to the Grievant and consequently the Grievant required additional preparation time. During the January 5, 2011 PHC and by order entered January 6, 2011, the Hearing Officer ordered the Agency to produce the documents by January 12, 2011, and continued the hearing to January 25, 2011, the next available date. The Agency complied with the order and the hearing was held at the Agency on January 25, 2011.

At the hearing both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The Hearing Officer also admitted Grievant Exhibits 1 through 8<sup>2</sup>, Agency Exhibits 1 through 16, and Hearing Officer Exhibits 1 through 19.

During the proceeding, the grievant was represented by her advocate ("Grievant's Representative") and the agency was represented by its advocate ("Agency's Representative").

### **APPEARANCES**

Representative for Agency  
Witnesses  
Representative for Grievant  
Grievant

### **ISSUE**

Was the Group III Written Notice with termination warranted and appropriate under the circumstances?

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<sup>2</sup> By agreement of the parties, prior to commencing the grievance hearing, the Hearing Officer held a PHC to hear arguments on (i) the Agency's objection to the admission of the Grievant's Exhibit 2, Agency's unannounced inspection dated June 24, 2010, and (ii) the Agency's objection to a witness. The Hearing Officer reminded the parties that the rules of evidence do not strictly apply to the hearing and she would determine how much weight to give to the exhibit. She then overruled the objection to exclude the exhibit. Further, the Hearing Officer determined the Agency's motion to exclude the Grievant's representative from testifying was moot because she was not being presented as a witness.

## **BURDEN OF PROOF**

In disciplinary actions, 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”) Section 5.8). A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. (GPM Section 9).

## **FINDINGS OF FACT**<sup>3</sup>

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

On November 4, 2010, the Agency issued the Grievant a Group III Written Notice (“Written Notice”) with termination.

The Written Notice described the nature of the offense as follows:

On October 14, 2010 you violated Hospital Policy 050-57 and DI 201 which resulted in a substantial finding of neglect. You were sitting with a client at the medical center when you were observed sleeping by medical center staff. This violation of policy shows extremely poor judgment and unprofessional behavior.

On October 14, 2010, a day the Grievant was scheduled to be off duty, she volunteered to work the 1100 to 0730 shift (“11:00 p.m. to 7:30 a.m. shift”) and sit as a job duty with one of the Agency’s patients at the medical center. The Grievant reported to work at the medical center sometime between 11:00 p.m. and 11:20 p.m.

Sometime before 1:30 a.m. on October 15, 2010, staff at medical center- Nurse JW - reported to the supervising nurse at the medical center (“Supervising Nurse LW”) that the Grievant had been asleep while on duty to sit with the patient. Further, Nurse JW reported that upon hearing movement in the patient’s room about 11:00 p.m., she entered it and observed the patient naked, soaked in urine, and attempting to climb out of bed while the Grievant was “relaxed” in the recliner with her coat over her arms.

Supervising Nurse LW requested that Nurse JW inform her if Nurse JW observed the Grievant sleeping again. Later Nurse JW informed her supervisor that the Grievant was asleep again. And so supervising Nurse LW proceeded to the patient’s room, entered it, and witnessed the Grievant asleep.

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<sup>3</sup> The Hearing Officer admitted as evidence all documents and letters presented as exhibits, to include all referenced herein.

Supervising Nurse LW reported the conduct to the Agency's coordinator MW and informed the coordinator that the Grievant would be discharged. In response, Coordinator MW agreed to send a replacement sitter to the medical center.

Next, accompanied by medical center Security Officer B, Nursing Supervisor LW entered the patient's room and both observed the Grievant asleep again. Nursing Supervisor LW made three attempts to awaken the Grievant before the Grievant was roused from sleep. When medical center Supervising Nurse LW instructed the Grievant to leave because she was sleeping, the Grievant stated words to the effect "Please don't do this, I won't sleep again." Supervising Nurse LW informed the Grievant it was too late and a replacement was on her way.

The Grievant returned to the Agency approximately 2:15 a.m. on October 15, 2010. Later that morning her immediate supervisor, Nurse TC, terminated the Grievant for "sleeping on duty and patient neglect." The Grievant's immediate supervisor also issued a Group III Written Notice that day; however, the Grievant did not receive it until October 18, 2010.

Prior to the October 15, 2010 termination, the Agency failed to conduct an investigation and afford the Grievant certain work force protections under its own policy, Departmental Instruction 201 (RTS)03 Reporting and Investigating Abuse and Neglect of Individuals Receiving Services in Department Facilities ("DI 201").<sup>4</sup> Neither did it place the Grievant on pre-disciplinary leave with pay pending the outcome of an investigation on the alleged misconduct.

The Agency concedes it failed to provide the Grievant due process prior to her October 15, 2010 termination. Consequently, by letter dated October 21, 2010, the Agency withdrew the Grievant's Group III Written Notice that it issued on October 15, 2010. It also reinstated the Grievant's benefits and pay. By the same letter, the Agency placed the Grievant on pre-disciplinary leave effective October 15, 2010, pending the outcome of an investigation under Agency policy DI 201. The letter also informed the Grievant that if the investigation revealed the Grievant's actions showed neglect, Grievant may be issued a Group III written notice under the Standards of Conduct and terminated from her employment.

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<sup>4</sup> DI 201 requires the Agency to, among other things, initiate an impartial investigation within 24 hours when it is alleged an individual residing at the facility (in this case the Agency) has been abused or neglected. Also, the investigation must proceed beyond the initial stage and through the regular investigative process if warranted. Moreover, the investigation report must be completed within five working days of assignment to an investigator. Further, when an allegation of neglect has been reported, the identified employee must be afforded the workforce protections set forth in DI 201 - 5 which include, but are not limited to, the following:

1. Informing the employee that an allegation of neglect/abuse has been made...that a timely and impartial investigation will be conducted;
2. Informing the employee of the timeframe for completing the investigation;
3. Giving the employee an opportunity to present information on his/her behalf to the investigator;
4. Providing the employee an opportunity to present information on his/her behalf to the person responsible for taking disciplinary action and at any related administrative hearing.

By letter dated October 22, 2010, Management again informed Grievant that an allegation of neglect had been made against her, and Grievant was placed on pre-disciplinary leave effective October 15, 2010. The letter continued by informing the Grievant that preliminary review of the matter indicated reason to suspect neglect existed. This letter also informed the Grievant that investigating the matter would include interviewing the Grievant.

The investigation began on or about October 22, 2010. Investigator RT interviewed the patient, staff from the medical center, and staff from the Agency, to include Investigator RT conducting an interview with the Grievant on October 26, 2010. The investigation concluded on October 27, 2010, with a finding that substantiated the neglect claim.

By letter dated November 3, 2010, and received by the Grievant the same date, management informed the Grievant of the substantiated finding and its intent to issue a Group III written notice and terminate the Grievant. The letter also informed Grievant that she had upon receipt of the letter 24 hours to respond in writing to management's proposed action. Grievant received the letter on November 3, 2010, and was terminated as noted previously on November 4, 2010.

Prior to her termination, the Grievant had been employed by the Agency for 12 years.

Grievant's 2009-2010 work profile [job description] identifies her position as a Direct Service Associate II ("DSA II"). As a DSA II, one of the Grievant's core responsibilities was to implement direct patient care by, among other responsibilities, (i) assisting in maintaining a safe, clean, and therapeutic environment for the patient and (ii) complying with hospital department and unit policies and procedures. Another core responsibility of Grievant was to observe and report patient care data to include, but not limited to, observing and reporting changes in assigned patient's physical condition and behaviors. Further, the physical demands of the Grievant's job included, among others, occasional sitting for sustained periods of time.

Under the Agency's Standard Operating Procedure for sitters for residents at the medical center, a sitter's responsibilities include, among others, communicating to the assigned medical center staff observations about the resident's/patient's behavior and requesting assistance when needed to meet the patient's or resident's needs.

The Grievant's assigned patient from the Agency was an involuntarily admitted 84 year old mentally ill patient from the Agency's geriatric unit. Medical records report patient's diagnosis is Schizoaffective Disorder, Bipolar type. Medical notes of record also indicate the patient has a history of falling due to an unsteady gait and describe her as delusional, displaying inappropriate behavior, and unable to care for herself.

## **DETERMINATIONS 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/her 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).

*Va. Code Section 2.2-3000 (A)* 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 resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under Section 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. *Grievance Procedure Manual*, Section 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to Section 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. 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 III offenses include acts of misconduct of such a severe nature that, a first occurrence normally should warrant termination.

Policies of the Agency indicate patient neglect and sleeping while on duty are serious offenses. Under DI 201, the Agency has a duty to provide a safe and secure

environment to individuals receiving services and it has zero tolerance for acts of abuse or neglect. Thus, the neglect of an individual receiving services can be an offense of such severe nature that it warrants a Group III Written Notice with employee removal. Further, Standards of Conduct Policy No. 1.60 provides that sleeping while on duty is a group III offense.

Agency management issued the Grievant a Group III Written Notice with termination on November 4, 2010. The Written Notice described the nature of the offense and evidence as previously mentioned in the “Findings of Facts” section of this decision. I examine the evidence to determine if the Agency has met its burden.

## **I. Analysis of Issue before the Hearing Officer**

### **A. Did the employee engage in the behavior described in the Written Notice and did the behavior constitute misconduct?**

The November 4, 2010 Written Notice describes the Grievant as sleeping while on duty to sit at the medical center with a patient from the Agency and therefore neglecting the patient. The Written Notice alleges Grievant’s conduct on October 14, 2010 violated Agency policies 050-57 and DI-201.

Policy 050-57 defines neglect as “the failure by an individual, program or facility responsible for providing services to provide nourishment, treatment, care, goods or services necessary to the health, safety or welfare of a person receiving care or treatment in the facility.”<sup>5</sup>

Similarly, Agency policy DI-201 provides the following definition for neglect:

This means the failure by a person program, or facility operated, licensed or funded by the department, responsible for providing services to do so, including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of a person receiving care or treatment for mental illness, mental retardation, or substance abuse.

The evidence shows the Grievant was sleeping while on duty which endangered the patient’s safety. Grievant’s employer assigned her to the medical center to sit with an eighty-four year old severely mentally ill patient/client diagnosed with Schizoaffective Disorder, Bipolar Type. Medical records also show this client has a history of falling. Supervising Nurse LW testified that she observed the Grievant asleep on two occasions

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<sup>5</sup> Even though the policy as submitted in evidence indicates an effective date of December 20, 2010, both parties introduced it as evidence in this case and neither party contested its applicability on the date of the offense, October 14-15, 2010.



during the work shift after other staff at the medical center reported seeing the same.

Her testimony is corroborated by statements of other staff at the medical center which were compiled during an investigation conducted under Agency Policy DI 201. For example, Security Officer B reported observing the Grievant sleeping. He vividly described his observation in an interview stating that she had her head back and mouth open. He further commented that she must have been tired because she was “Out.” Independent of Security Officer B’s observation are those reported by medical center Nurse JW. She also reported observing the Grievant sleeping several times. In addition, she noted that after hearing movement in the patient’s room, she entered and found the patient naked, soaked in her own urine, and attempting to climb out of bed while the Grievant was in the recliner, relaxed (and at one point in a “snuggle” position) with her jacket covering her arms.<sup>6</sup>

The Hearing Offices has observed the demeanor of the witness, Supervising Nurse LW, and considered the evidence of record. The Hearing Officer finds the witness’ testimony and other evidence show the Grievant was observed sleeping while on duty.

Further, the Hearing Officer finds that considering the sitter was on duty for the necessary safety of the 84 year old mentally ill patient who had a history of falling, the sitter failed to provide a service while she slept. Thus, she neglected the patient. The Hearing officer also notes that the Grievant’s behavior violated the Agency’s Operating Procedures for Sitters who are also tasked with communicating to medical center staff observations about the resident’s/patient’s behavior and requesting assistance when needed to meet the patient’s needs. The Grievant did neither when the patient was trying to climb out of bed, naked, and soaked in her urine.

Thus, the Hearing Officer finds that the Grievant engaged in the behavior described in the Written Notice and the behavior constituted misconduct; that is, sleeping while on duty and neglecting the patient.

Having made this finding the Hearing Officer is mindful of the Grievant’s contentions that she was not asleep and that the medical center’s nursing assistant neglected the patient. The evidence as noted previously shows otherwise. The Hearing Officer also notes the Grievant’s own statements to Supervising Nurse LW refute the Grievant’s denial. For example, when the Grievant was awakened by the medical center supervising nurse, the Grievant stated “I won’t sleep anymore. Please don’t do this. I will lose my job.” Accordingly, the Hearing Officer finds the Grievant’s position that she was not asleep contrary to the weight of the evidence.

## **B. Was the Agency’s Discipline consistent with law and policy?**

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<sup>6</sup> While the Hearing Officer finds the evidence establishes the Grievant was asleep several times while on duty, the evidence is unclear whether the Grievant was asleep at the time the patient was in need of care because of her incontinence, state of undress, and behavior as reported by Nurse JW.

Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. Among other offenses, sleeping on the job is a Group III offense.

Grievant's sleeping was severe. The evidence shows that the Grievant reported to sit with the patient sometime between 11:00 p.m. and 11:20 p.m. on October 14, 2010. She was to sit with patient for the entire shift beginning at 11:00 p.m. on October 14, 2010, and ending October 15, 2010 at 7:30 a.m. By 2:00 a.m., only 3 hours into her shift, staff at the medical center had observed her asleep on at least three occasions. The security guard stated the Grievant must have been really tired as she was laid back in the chair, and her mouth opened. He further described her as "Out." Although the evidence as presented is unclear whether the Grievant was asleep at the very moment the patient was found naked, soaked in her urine and attempting to climb out of bed, this incident illustrates that sitters are vital to the provision of patient safety. Reasonably an awake sitter who observes patient behavior as described above would immediately contact the medical facility staff to address the safety concerns and provide for the needs of the patient. During the times Grievant was asleep while on duty, she could not have monitored the patient's behavior and alerted staff to any safety concerns that occurred. Thus, the facts depict a severe offense and the appropriateness of the Group III Written Notice with removal.

The Grievant argues that others who have slept on the job have not been similarly disciplined. A review of the evidence does not support this accusation. Grievant's immediate supervisor, although on the job for only several months when she fired the Grievant, did not waiver when she testified that if an employee sleeps on the job, that employee would be terminated. The Agency's human resource manager testified that during her employment with the Agency, she was aware of six employees disciplined for sleeping on the job and all six had been terminated.

What is more, the Grievant's own witnesses could not substantiate her argument. Witness ES testified on behalf of the Grievant. When asked by the Grievant's representative about the discipline other employees have received for sleeping while on duty, Witness ES denied seeing anyone "flat out" sleep. He further stated that if an employee nods off or looks sleepy, the supervisor would suggest the employee walk around.<sup>7</sup> Another witness who testified on behalf of the Grievant was Witness LJ, a 12 year employee of the Agency whose job responsibilities also include, among others, sitting with patients. When first asked at the hearing about employees sleeping on the job, Witness LJ stated she had not witnessed it. Upon further questioning by the Grievant's representative, Witness LJ altered her testimony and stated that when it (sleeping) happens, the employee would receive a Group II Written Notice or a warning from the supervisor. The Hearing Officer had an opportunity to observe the demeanor of these witnesses and finds their testimony independently and/or collectively unpersuasive as it fails to substantiate the Grievant's argument that others who have slept on the job have received different treatment or less severe discipline than the Grievant.

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<sup>7</sup> The Hearing Officer notes that while Witness ES is an employee of the Agency, he does not work in the same unit -Geriatric Unit - at the Agency as the Grievant.

**C. Was the Grievant denied due process?**

The Standards of Conduct Policy No. 1.60 provides that prior to the issuance of any Written Notice and termination, the employee must be given notification of the offense, an explanation of the agency's evidence in support of the charge against the employee, and a reasonable opportunity to respond. The policy continues by stating that normally, a 24 hour period is a reasonable opportunity for the employee to respond.

Initially, the Grievant's immediate supervisor terminated the Grievant on October 15, 2010. Although the immediate supervisor issued a Group III Written Notice on October 15, 2010, the Grievant received it on October 18, 2010. That Written Notice described the offense as "SLEEPING ON DUTY AND PATIENT NEGLECT."

Human Resource Manager ER and Grievant's immediate supervisor concede that when the Agency initially terminated the Grievant, it failed to afford her due process. Thus, the Agency by letter dated October 21, 2010, rescinded the Group III Written Notice that it issued on October 15, 2010. In the October 21, 2010 letter it notified the Grievant that effective October 15, 2010, she was on pre-disciplinary leave; that is the Agency suspended the Grievant with pay pending the outcome of a full investigation under policy DI 201, Reporting and Investigating Abuse and Neglect of Clients.

Next, by letter dated October 22, 2010, the Agency informed the Grievant that the investigation was continuing because the investigator's preliminary review under Policy DI 201 of the neglect charge against the Grievant indicated reason to suspect neglect existed. This second letter again informed the Grievant that she was placed on pre-disciplinary leave. The Grievant was also informed that she would be contacted for an interview with the investigator and that if the investigator found neglect, the Grievant may be given a Group III Written Notice and terminated.

Then on November 3, 2010, the Agency's acting director caused a letter dated November 3, 2010, to be hand delivered to the Grievant. This correspondence notified the Grievant that the investigation regarding allegations of neglect by the Grievant at the medical center on or about October 14, 2010 was completed and Grievant was found to have neglected the client. The acting director also informed the Grievant that she intended to issue a Group III Written Notice with termination. The third paragraph of that letter stated the following:

You are hereby given 24 hours from receipt of this letter to respond to the proposed action of termination. Upon receipt of your written response a decision will be made regarding your continued Employment with [the Agency].

The evidence does not show the Grievant responded to the November 3, 2010 letter she received by hand delivery within 24 hours of receiving it. On November 4, 2010,

management issued and the Grievant received a Written Group III Notice with termination.

Therefore, considering the evidence, the Hearing Officer finds that prior to the Agency issuing the Group III Written Notice with termination on November 4, 2010, the Agency provided the Grievant notice on October 21, 2010, October 22, 2010, and November 3, 2010, of the allegations of her sleeping on duty and neglecting the patient/client. Also, the Agency afforded the Grievant a reasonable opportunity to respond. The investigator interviewed the Grievant on October 26, 2010 enabling the Grievant to respond to the neglect allegation. The evidence shows that the Grievant read a prepared response. Also, the Grievant was given an opportunity to respond within 24 hours of receiving the November 3, 2010 letter. The Hearing Officer finds the Agency afforded the Grievant due process under Standards of Conduct Policy No. 1.60 and under the work force protections of Policy DI 201. Thus, the Agency provided due process.

Further, the Agency afforded the Grievant due process under Policy RI 050-57 RESPONSIBILITIES/PROCEDURES Paragraph 13 which requires the agency to give the employee who has been determined to warrant termination a due process letter and an opportunity to respond to the allegation in one day.

The Hearing Officer is mindful that the initial termination was without due process. The Grievant was made whole as that termination was rescinded. The agency then, as noted above, afforded the Grievant due process before disciplining her on November 4, 2010.

The Hearing Officer is also mindful that the Grievant asserts denial of due process because the investigation under Policy DI 201 was flawed. The Grievant's representative contends the investigatory report contains inconsistent statements and gives incorrect times. Further, she contends the investigator failed to interview the Agency employee the Grievant relieved at the medical center and the medical center nursing assistant. The evidence shows the investigator was required to complete her investigation within five workdays. Further, she made attempts to interview the forenamed persons without success. The Hearing Officer finds the investigation report is not flawed because no interview was obtained from the forenamed individuals. The Hearing Officer further finds even without those individuals' input in the investigation, sufficient evidence exists to show Grievant was asleep while sitting with the patient. Having considered all the evidence, the Hearing Officer finds the Grievant was not denied due process because of any alleged flaws in the DI 201 investigation.

## **II. Mitigation**

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution.”<sup>8</sup> EDR's *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a ‘super-

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<sup>8</sup> Va. Code Section 2.2-3005 (c)(6)

personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”<sup>9</sup> More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency’s discipline was consistent with law and Policy, the agency’s discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>10</sup>

Thus the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found the Grievant engaged in the behavior described in the Written Notice, that behavior constituted misconduct, and the Agency’s discipline was consistent with law and policy.

The Grievant argues in effect that the disciplinary action should be mitigated because others who have fallen asleep while on duty have not lost their jobs. As noted previously in this decision, the evidence fails to support the Grievant’s claim.

The Hearing Office also notes she has considered evidence of the Grievant’s most recent performance evaluation and its overall satisfactory rating (“ a contributor),” her twelve year employment with the Agency, that she volunteered to sit with the patient, and the Agency unannounced inspection’s report dated June 24, 2010. Having considered this evidence and the Agency’s discipline, the Hearing Officer finds the Agency’s discipline was within the limits of reasonableness.

### **DECISION**

For the reasons stated herein, the Hearing Officer upholds the Agency’s issuance to the Grievant of a Group III Written Notice disciplinary action with removal.

### **APPEAL RIGHTS**

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

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<sup>9</sup> *Rules for Conducting Grievance Hearings VI(A)*

<sup>10</sup> *Rules for Conducting Grievance Hearing VI(B)*

**Administrative Review:** This review is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision.

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decisions is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Request should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> floor Richmond, VA 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure that the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decisions so that it complied with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

**Judicial Review of Final Hearing Decision:** Within thirty days of final decisions, a party may appeal on the ground that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Directory before filing a notice of appeal.

Entered this 17<sup>th</sup> day of February 2011.

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Ternon Galloway Lee, Hearing Officer

cc: Representative for Grievant  
Grievant  
Agency representative/ Human Resource Director for the Agency  
Hearings Program Director of EDR