

Issue: Group III Written Notice with Termination (sleeping during work hours);
Hearing Date: 03/26/13; Decision Issued: 03/29/14; Agency: DBHDS; AHO:
Frank G. Aschmann, Esq.; Case No.10040; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10040

Hearing Date: March 26, 2013
Decision Issued: March 29, 2013

PROCEDURAL ISSUE

No procedural issues raised.

APPEARANCES

Grievant
Grievant's Husband
Grievant's Witness
Agency Representative
Agency Witness

ISSUE

Did the Grievant violate Agency policy by sleeping during work hours such as to warrant the issuance of a Group III Written Notice with employment termination?

FINDINGS OF FACT

The Grievant was employed by the Agency as a Direct Service Associate II. The Grievant's job duties include assisting, communicating and interacting with residents throughout their daily routine. On January 3, 2013, between 8 and 9 a.m. the Program Manager, the Grievant's supervisor, entered one of the homes and observed the Grievant sitting in a chair with her head down and propped on her hand. The Grievant's eyes were closed and the Grievant did not speak. Based upon her direct observations of the Grievant, the Program Manager concluded the Grievant was asleep. This occurred while the Grievant was on duty. Another staff member was present and spoke to the Program Manager when she inquired about a Christmas inventory. The other staff member was in a chair which has wheels on it and was in close proximity to the chair the Grievant was sitting in. The Program Manager observed the other staff member tap the Grievant and she awoke at that time. The other staff member got up and assisted the Program Manager with locating the inventory. The Program Manager then left the room.

In the afternoon the Grievant and the other staff member were confronted about the incident and the Grievant was informed the Agency intended to issue her a Group III Written

Notice for sleeping during work hours. The Program Manager had consulted with Human Resources to make sure she followed proper procedure in dealing with the policy violation of staff after the incident because she was new to the position. The Grievant was allowed to present a statement, as was the other staff member. The Grievant denies being asleep. The other staff member denies ever observing the Grievant being asleep. Subsequently, the Grievant was issued a Group III Written Notice for sleeping during work hours with a sanction of employment termination and the other staff member was issued a Group I Written Notice for failing to report a staff member violation of policy. The other staff member disputes the written notice but has taken no action to appeal it. The Grievant has appealed her written notice which is the subject of the due process hearing.

APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with 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 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 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 of Conduct 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 Agency uses these policies for its Standards of Conduct.

The Standards of Conduct define a Group I violation as offenses which have a relatively minor impact on agency business operations but still require management intervention and includes unsatisfactory performance as an example. Group III offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant employment termination. Sleeping during work hours is listed as an example of a Group III violation under the Standards of Conduct.

The Agency presented evidence of the direct observation by the Program Manager of the Grievant sleeping during work hours. The testimony of the Program Manager was credible, presenting specific details of her observation which were consistent with someone sleeping. While the Grievant denies sleeping at the time, she presents absolutely no evidence or explanation why the Program Manager would be motivated to lie or want to harm her. The evidence presented supports the Program Manager's credibility in that she had not been working in the position for a long time, did not know the Grievant well and no prior conflicts existed between the Program Manager and the Grievant. Thus there is no evidence that the Program Manager would fabricate the testimony of her observations because she had no motive to do so.

While the Grievant denies sleeping, her testimony lacks credibility because she has the clear motive to deny the allegation to try and preserve her employment. Her testimony is further impugned by the circumstances. The morning tasks had been performed and the two staff members were sitting in the common area of the home while the other staff member monitored the residents. The Grievant never describes doing anything but sitting in the chair at that time. The Grievant is not actively engaging with the residents or the other staff at the time. In this lull it can be inferred that the Grievant dozed off.

The Grievant presented the testimony of the other staff member who denies ever seeing the Grievant asleep. The other staff member's testimony lacks credibility as well. He has the clear motive to deny ever observing the Grievant sleeping because he is disciplined with a written notice for failing to report a policy violation. This is the specific denial that he makes. He does not vouch for the Grievant with a statement that he observed her awake at the time but rather states he was focused upon the residents and did not see her sleeping. The other staff member is only a few feet away from where the Grievant is sitting and she should have been within his field of vision. The other staff member has asserted that he was vigilant to the activities of the residents including being watchful for the resident who's room was behind him. Thus it is illogical that he would never have observed the Grievant sitting a few feet away and to the front and side of him. Additionally, the circumstances create an inference that the Grievant was asleep. The other staff member never states that the Grievant was doing anything but sitting in the chair near him. He does not testify that they engaged in any conversation or that she did anything which drew his attention. Thus the Grievant must have been very quiet and inactive, consistent with someone sleeping.

The Grievant attempted to impeach the credibility of the Program Manager by presenting the testimony of the other staff member who states he did not tap the Grievant to awaken her. He asserts that he was too far away to have done so. This Hearing Officer does not find this attempted impeachment persuasive. As discussed above both the Grievant and the other staff member have motives to fabricate their version of events. Even if the other staff member was out of reach at one point he could have easily rolled the wheeled chair over a foot and touched the Grievant. The Program Manager's detailed observation of the Grievant sleeping is not contradicted by whether the other staff member tapped the Grievant to awaken her. Tapping the Grievant to wake her is a collateral issue of fact which is insufficient to impeach the Program Manager's testimony as it relates to her observations which show the Grievant was asleep when

the Program Manager entered the room.

The Grievant attempted to impeach the Program Manager through the testimony of the other staff member who stated the Program Manager used the phrase “you guys” when asking about the inventory. The Grievant argues that the Program Manager would not have used language which indicates she was addressing both the Grievant and the other staff member if the Grievant was asleep. This Hearing Officer does not find this argument persuasive. As discussed above both the Grievant and the other staff member have motives to fabricate their version of events. The Program Manager does not claim to have used this language. Further, even if the Program Manager did use this language it is not inconsistent with the facts she testified to because she stated that the other staff member had awakened the Grievant when the Program Manager came into the room.

The Grievant argues that the Program Manager did not observe her sleeping because she did not take her aside and address the issue immediately. This Hearing Officer finds this argument unpersuasive. The Program Manager explained that she was new to the position and wanted to be certain she followed the proper procedure and complied with policy on the issue. Therefore, she consulted with Human Resources and got the approval of her supervisor before taking action directly with the Grievant. This Hearing Officer finds this testimony credible and a reasonable explanation for the delay in confronting the Grievant.

The Agency has met its burden of proof to show that a violation of policy occurred, sleeping during work hours. The Grievant has denied the event occurred and not produced any evidence of mitigation. The Standards of Conduct list sleeping during work hours as a Group III level offense which severely impacts Agency operations. In this case sleeping during work hours jeopardizes both staff and resident safety as well as fails in the Agency’s mission to provide quality service. Therefore, the Agency sanction of employment termination is warranted.

DECISION AND ORDER

The disciplinary action of the Agency is affirmed.

APPEAL RIGHTS

You may file an administrative review request within 15 calendar days from the date the decision was issued, if any of the following apply:

1. 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

or, send by fax to (804) 371-7401, or email.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by email to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be received by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's decision becomes final when the 15 calendar day period has expired, or when requests for administrative 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. Agencies must request and receive prior approval from 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.

Frank G. Aschmann
Hearing Officer