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DIVISION OF INTELLECTUAL DISABILITIES SERVICES formerly Division of Mental Retardation Services v. DIKO CORNELIUS, Grievant

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BEFORE THE CIVIL SERVICE COMMISSION

FOR THE STATE OF TENNESSEE

DIVISION OF INTELLECTUAL DISABILITIES SERVICES (formerly Division of Mental Retardation Services) **v.** **DIKO CORNELIUS** **Grievant**	**DOCKET NO: 26.09-099579J**

INITIAL ORDER

This matter was heard on June 17, 2009, before Leonard Pogue, Administrative Judge, sitting for the Tennessee Civil Service Commission in Nashville, Tennessee. Ms. Marilynn Tucker, counsel for the Division of Intellectual Disabilities Services ("DIDS"), represented the State. Grievant Diko Cornelius was present but not represented by counsel. This matter became ready for consideration on September 13, 2009, the deadline for submission of proposed findings of fact and conclusions of law.

The subject of the hearing was Grievant's appeal of her termination of employment by the Division for inattentiveness/sleeping while on duty. After consideration of the record in this matter, it is determined that the termination should be **UPHELD**. This decision is based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Grievant was employed from June 1, 2001 until her termination in March 2008 as a developmental technician at Clover Bottom Developmental Center (CBDC), a residential center managed by DIDS for individuals (service recipients) with intellectual disabilities.

2. On January 6-7, 2008, Grievant was working third shift (10:30 p.m. - 6:00 a.m.) in the Cypress Living Home. Grievant and Paul Belachew, a developmental technician, were assigned to eight adult males; four each per developmental technician.

3. On January 7, 2008, at approximately 3:02 a.m., Grievant was observed by the grounds supervisor, Winell Adams, asleep and inattentive during her shift as she sat at a table in the home's main area or day room of the male unit.

4. Ms. Adams, after entering the home from an outside entrance and proceeding towards the male unit, observed Grievant and Mr. Belachew asleep and inattentive to their surroundings. Both were seated at a table in the male unit's day room and were visible to Ms. Adams. To Ms. Adams, they both appeared to have their heads bent down and their eyes closed.

5. Initially Ms. Adams stood outside the shift supervisor's office looking into the male unit which is adjacent to the office doorway and then continued her observation after walking into the male unit.

6. Ms. Adams returned to the unit supervisor's office, located adjacent to the male unit and off of the hallway, and asked shift supervisor Florence Fulghum to accompany her to where the two had been observed sleeping and inattentive.

7. Upon re-entering the unit, Ms. Adams again observed Grievant asleep. Shortly after this, Ms Adams saw a service recipient entering the day room and Grievant raised her head and called after him. Both developmental technicians were observed raising their heads from the table.

8. Ms. Fulghum's written statement on January 10, 2008, given to the DIDS investigator, stated in pertinent part "…When I got on the unit both staff looked up as the [sic] sat at their tables. It seemed as if they were (had been) asleep." Ms. Fulghum's verbal statement taken earlier by the investigator at 1:38 a.m. by telephone on January 10, 2008, stated that "– went to male unit & saw Diko & Belachew w/ heads down, raised head, looked like had been asleep."

9. In Mr. Belachew's written statement to the investigator, he admitted that he was asleep for a couple of minutes but did not know if Grievant was asleep. Mr. Belachew was also disciplined for this incident.

10. Grievant denies sleeping and denies having her head down. She testified that she saw the service recipient and got up to take care of him. Grievant stated that Ms. Adams acknowledges that she heard Grievant talking to the service recipient which shows that she was not sleeping. She also stated that she saw both Ms. Adams and Ms. Fulghum enter the unit together. However, Grievant never testified that she saw Ms. Adams when Ms. Adams initially found her asleep/inattentive. Grievant testified that Ms. Adams would not have been able to see Grievant because of where Grievant was seated.

11. Grievant believes that Ms. Adams was out to get her, but no proof of this was presented at the hearing to support her assertion. Ms. Adams was not involved in Grievant's three other incidences of discipline for inattentiveness. Ms. Adams is a CBDC employee of over 22 years. Ms. Adams observed Grievant asleep or inattentive on other occasions before the one subject incident and had talked or counseled with Grievant about her inattentiveness.

12. Grievant's inattentiveness was investigated by the Protection from Harm investigator for abuse, neglect and exploitation. The investigator substantiated Grievant as inattentive to her job duties and supervision neglect.

13. Developmental technicians need to remain alert on the job because the service recipients have physical and mental disabilities and many have medical issues. Many are nonverbal and observation is the only way to denote any stress. Service recipients are individuals with very low IQ's and due to their disabilities require around-the-clock help in all aspects of their daily living as well as when they are asleep. Through training and through written documents, direct care staff is constantly reminded of the importance of remaining alert while on duty.

14. Developmental technicians are trained and are made aware of the written policy concerning "inattention to job duties." Staff is expected to be awake or alert at all times. Grievant received this training and was reminded of the importance of being attentive on a regular basis.

15. Grievant had 3 prior incidences of sleeping or being inattentive on the job. She received and served disciplinary suspensions for all three of these incidences and received notice of such in three separate letters dated February 12, 2004, January 4, 2005, and May 17, 2007.

16. CBDC Deputy Chief Officer, Diane Brightwell was a part of the Investigation Review Committee that reviewed the Protection from Harm investigation and recommended to the CBDC Chief Officer, Dr. Levi Harris, appropriate corrective actions for his consideration and implementation. Dr. Harris chose to terminate Grievant, by letter dated February 26, 2008, for violation of the Protection from Harm Policy and Tennessee Department of Personnel Rule 1120-10-.06 (20) Sleeping or failure to remain alert during duty hour. The Deputy Commissioner of the Department of Finance and Administration subsequently upheld the recommendation for termination following a Due Process Hearing and a Step IV Hearing.

CONCLUSIONS OF LAW

1. Tennessee Department of Human Resources Rule 1120-10-.07, PROGRESSIVE DISCIPLINARY ACTION, states in relevant part:

> (1) The supervisor is responsible for maintaining the proper performance level, conduct and discipline of the employees under his supervision. When corrective action is necessary, the supervisor must administer disciplinary action beginning at the appropriate step as described.
>
> (2) Oral Warning
>
> (3) Written Warning
>
> (4) Suspension Without Pay
>
> (a) After minimal due process is provided, a suspension without pay may be issued by the appointing authority for one (1) to thirty (30) days.
>
> (5) Dismissal

(a) After minimum due process is provided, an employee may be dismissed by the appointing authority from his position for unacceptable conductor performance of duties.

(6) Transfer or Demotion

2. T.C.A. § 8-30-330, Progressive Discipline, states in relevant part:

(a) The supervisor is responsible for maintaining the proper performance level, conduct, and discipline of the employees under the supervisor's supervision. When corrective action is necessary, the supervisor must administer disciplinary action beginning at the lowest appropriate step for each area of misconduct.

(c) When corrective action is necessary, the supervisor must administer disciplinary action beginning at the step appropriate to the infraction or performance. Subsequent infractions or poor performance may result in more severe discipline in accordance with subsection (a).

3. Division of Mental Retardation Services, Clover Bottom Developmental Center, Index #:1004, Inattention to Job Duties, states in relevant part:

II. PURPOSE:

It is the purpose of this policy to outline the expectation of staff alertness while on duty and the consequences of staff inattention and/or sleeping while on duty.

IV. POLICY:

It is the policy of CBDC to ensure that all employees remain alert at all times while on duty. Any staff found to be asleep or inattentive to assigned responsibilities while on duty will be subject to disciplinary action based on the severity of the situation.

V. DEFINITIONS:

A. Inattention to Job Duties: The inability of staff to remain alert at all times due to such factors to include but not limited to: carelessness, negligence, dozing, daydreaming or being under the influence of agents such as alcohol or drugs.

VI. PROCEDURES:

The minimum disciplinary action to be taken as a result of an investigation for sleeping or inattention to job duties conducted by either the FI-ANE or the FI-RSM, is a written counseling. However, the Chief Officer has the discretion, based on information provided to issue a lesser or a more severe disciplinary action to include termination.

4. Division of Mental Retardation Services, Clover Bottom Developmental Center, Index #:1002, Protection From Harm, states in relevant part:

II. PURPOSE:

The purpose of this policy is to establish a written process for the appropriate and timely response to reportable incidents including, but not limited to, all allegations of abuse, neglect, exploitation, and staff misconduct.

V. POLICY:

CBDC prohibits abuse, neglect or exploitation of service recipients. Allegations will be investigated in a timely manner.

VI. PROCEDURES:

C. Allegations of Abuse, Neglect or Exploitation:

C.1. All allegations of abuse, neglect or exploitation are required to be reported to the FI-ANE (Facility Investigator-Abuse, Neglect, Exploitation) within one hour of observation or discovery.

C.7. Disciplinary and/or corrective action will be taken at the discretion of the Chief Officer/designee for substantiated allegations of abuse, neglect or exploitation.

D. Reportable Staff Misconduct:

D.6. Classifications of Reportable Staff Misconduct include, but are not limited to the following;

> D.6.2. Supervision- staff less than alert/sleeping while on duty.
>
> D.7. Disciplinary and/or corrective action will be taken at the discretion of the Chief Officer/designees for validated allegations of reportable staff misconduct.

5. Tennessee Department of Personnel Rule 1120-10-.06, EXAMPLES OF DISCIPLINARY OFFENSES, lists the following as examples of disciplinary offenses:

> (20) Sleeping or failure to remain alert during duty hours.

6. Grievant's job requires her to be alert at all times due to the vulnerable individuals served at CBDC. The proof showed that Grievant was asleep and inattentive while on duty. Both the DIDS policies/procedures and the Department of Human Resources rules prohibit such conduct. Grievant was aware that DIDS policies/procedures prohibited inattention to job duties and sleeping on duty. In fact, Grievant had previously been suspended on three prior occasions for sleeping or being inattentive on the job. Termination comports with the applicable policies, rules, and statute and is the appropriate step of progressive discipline in this instance.

It is **ORDERED** that the decision by the Division to terminate Grievant's employment with the Division be **UPHELD.**

This Initial Order entered this 20th day of November, 2009

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Thomas G. Stovall, Director

Administrative Procedures Division