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DEPARTMENT OF INTELLECTUAL AND DEVELOPMENT DISABILITIES vs. HELEN UDEZE, Grievant

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BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

DEPARTMENT OF)	
INTELLECTUAL AND)	
DEVELOPMENTAL DISABILITIES)	
)	Docket No. 26.45-111431J
v.)	
)	
HELEN UDEZE, Grievant)	

INITIAL ORDER

This contested case proceeding was heard on August 21, 2012, before Anthony Adgent, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Commissioner of the Tennessee Civil Service Commission. The Honorable Marilyn Tucker is present representing The Department of Intellectual and Developmental Disabilities. The Honorable John Iwu is present representing the Grievant. The subject of this appeal is the termination of the Grievant for sleeping on the job.

After consideration of the entire record and the arguments of the parties, it is **DETERMINED that the appeal is DENIED and the termination is upheld..**

This determination is based upon the following Findings of Fact and Conclusions of Law:

FINDINGS of FACT

1. Helen Udeze (Grievant) has been employed as a Developmental Technician (DT), a direct caregiver to the intellectually disabled individuals served by Clover Bottom

Developmental Center (CBDC), since 2003. (Transcript pg 63 line 5-11, hereinafter "TR").
(Exhibit 9 pg 121 collective, hereinafter "Ex")

2. She has received appropriate training related to her job duties and responsibilities and to the rules, regulations, procedures, residents' individual support plans (ISP), as appropriate, and all directives that govern her conduct while on duty. (TR pg 85, line 8 through pg 91 line 1- 8.) (Ex 6 pg 90).
3. On September 11, 2010, while on overtime/third shift (10:00 PM to 6:30 AM) assigned to eight male residents (1:8 ratio) in Cypress Cottage, Grievant was found sleeping and/or inattentive to her job duties by Howard Bowling, third shift Grounds Supervisor, in the room of Clark, one of her assigned residents. Mr. Bowling observed around 4:26 AM that Grievant was behind the open door of the resident's bathroom, in a chair, covered with a state blanket and her eyes were closed. (TR pg 20 line 12-25, pg 21 through pg 22 line 1-6, pg 24 line 12-25, pg 56 line 5-25, pg 57 line 1-8, pg 63 line 12-25, pg 64 line 1- 6.) (Ex 5 pg 49 collective, Ex 8 pg 31 and Ex 14 pg 25.)
4. Bowling remained standing in the hallway outside the open doorway for a period of time observing Grievant. He then went to the cottage office to phone the DT Supervisor on duty, Lakeshia Lewis, and reported the incident as is required by protocol and procedure. (TR pg 22 line 7-25, pg 23 through pg 24 line 1-3, pg 24 line 4-24, pg 25 line 9-25, pg 26 line 1-17.) (Ex 5 pg 49 collective, Ex 7 pg 78 collective, Ex 8 pg 31.)
5. Ms. Lewis was in another cottage, but soon after receiving the phone call, she was observed coming into Cypress Cottage by Mr. Bowling. Together they both went to resident Clark's room, where Mr. Bowling testified that Grievant still appeared to be sleeping. He observed from the open doorway while Ms. Lewis stood close to Grievant inside the resident's room. Ms. Lewis watched Grievant who apparently remained asleep

- in a chair and covered with a state-issued blanket. Mr. Bowling then heard Ms. Lewis audibly call out to Grievant twice, which awakened the Grievant. (TR 25 line 18-25, pg 26 line 1-11.) (Ex 5 pg 49 collective and Ex 14 pg 25.)
6. Once roused, Grievant was relieved of her duties by Ms. Lewis, her direct supervisor, as the policy and procedure required and an investigator was called and an incident report was filled out concerning the event by Mr. Bowling and Ms. Lewis, which were also CBDC requirements pursuant to policy and procedure. (TR pg 26 line 10-25, pg 27 line 1-25 through pg 31 line 1-23.) (Ex 5 pg 49 collective, Ex 7 pg 78 collective, Ex 8 pg 31.)
 7. Prior to her leaving the cottage, Mr. Bowling testified that Grievant begged that the incident not be reported and expressed fear that she would lose her job. (TR pg 32 line1-17.)
 8. The resident was checked by medical staff as were the other residents under Grievant's care, as required by policy and procedure. No apparent harm was found. (Ex 8 pg 31.) However, after a thorough investigation by the Department of Intellectual and Developmental Disabilities' (DIDD) Protection from Harm investigator, Grievant was substantiated for neglect for being inattentive in her duties to the residents she served. (TR pg 77 line1-25.) (Ex 1 pg 84.)
 9. Grievant's main defense at the time of the incident and throughout the grievance procedure has been that she was not sleeping, but observing the resident in his room as he slept because she had heard him utter a sound. (TR pg 143, line 2-3.) (Ex 7 pg 49 collective.)
 10. Residents are usually in their bedrooms asleep during third shift and Grievant's duties, in addition to the 1:8 assignment of direct care which consisted mainly of routine bed

checks, included cleaning the cottage and preparing it for the morning and day shifts.
(TR pg 62 line 16-25, pg 63 line 1-4, pg 96 line 18-25.) (Ex 10 pg 97.)

11. Cypress Cottage contained residents who were “walking”, meaning they required less care and supervision than the mostly medically fragile residents in the other cottages at CBDC. Several of the residents actually had day supervised jobs. Some Cypress residents also had some speech and required minimal nighttime direct care, hence the 1:8 ratio during third shift. Daytime ratio is usually 1:4. (TR pg 56 line 5-25, pg 57 line 1-8 , pg 58 through pg 61 line 1-17.) (Ex 10 pg 97.)
12. Clark did not have a history of sleep problems and there was no requirement in his ISP for direct care staff to sit in his room and observe him during sleep. Grievant’s assignment was 1:8 on September 11, 2010, not 1:1 direct care. (TR pg 16 line 1-25, pg 66 line 24-25, pg 67 line 1-3.) (Ex 4 pg 67, Ex10 pg 97.)
13. Grievant has an extensive disciplinary history at CBDC, which includes at least three or more prior incidences of sleeping while on duty.
14. In 2009, a Level 5 Civil Service Commission hearing was conducted by the Administrative Procedures Division of the Secretary of State’s office. The ALJ held that Grievant was properly suspended for three incidences in 2008 – (1) cursing in front of residents, (2) not maintaining a 1:1 ratio with a forensic resident who, as a consequence, fondled another resident and (3) for sleeping while on duty, which was her third infraction for *Inattention to Job Duties*. (TR pg 98 line 15-25, pg 96 through pg 101 line 1-22, pg 117 line 5-25, pg 118 through pg 121 line 1-15.) (Ex 9 pg 121 collective.)
15. DIDD determined after the Protection from Harm (ANE) investigation into the incident of September 11, 2010, that Grievant was to be terminated from her job at CBDC for the violation of policies concerning Inattention to Job Duties, Protection from Harm and for

TDHR rules concerning inattention to job duties and conduct unbecoming a state employee. (Ex. 2 and 3pg 84.) (Ex 7 pg 78 collective.)

CONCLUSIONS of LAW

1. The Rules of the Tennessee Department of Personnel, Disciplinary Action, Chapter 1120-10, Tenn. Comp. R. & Regs., describe certain prohibited conduct for State Employees that may result in disciplinary action being taken against them. As a state employee, the Grievant knew, or should have known, of the application of those rules to her conduct. Those rules contain the following provisions:

1120-10-.06 EXAMPLES OF DISCIPLINARY OFFENSES. The following causes are examples of those considered for disciplinary action and should not be considered the only causes of action.

(8)*** conduct unbecoming an employee in the State service.

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

2. CBDC policy #111, Protection from Harm [August 23, 2010], provides in pertinent part :

Section IV: DEFINITIONS

J. Neglect: Failure to provide goods or services necessary to avoid physical harm, mental anguish or mental illness, which results in injury or probable risk of harm.

Section VI: PROCEDURES

A.3. The following categories of incidents will be reported on the Reportable Incident Form:

A.3.2. Allegations of abuse, *neglect* and exploitation (Refer to definitions)

A.3.2.1. Abuse, *neglect* and exploitation include the *** disregard of an individual, whether purposeful or due to carelessness, *inattentiveness*, or omission by the perpetrator *** as perceived by the service recipient regardless of the individual's observed response or ability to comprehend the nature of the incident.

A.4. Any staff member that witnesses or discovers an incident as outlined in A.3 above is responsible for completion of the reportable incident form.

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

(Emphasis Added.)

3. CBDC Policy # 507, Inattention to Job Duties, [May 1, 2008] provides, in Section V, that the failure of staff to remain alert at all times, for any reason, including “dozing” is defined as “Inattention to Job Duties.” Section VI. E. of this policy provides that the *appropriate disciplinary sanction for a third infraction* of the policy is termination.

4. The Rules of the Tennessee Department of Personnel, Disciplinary Action, Chapter 1120-10, Tenn. Comp. R. & Regs., 1120-10-.07, PROGRESSIVE DISCIPLINE, provides in pertinent 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. (Emphasis added.)

5. Incident on September 11, 2010: Sleeping While on Duty

Although Grievant had proper training for her assignment as a Developmental Technician and specific training on each individual’s ISP and needs under her care, she failed to properly supervise and was thus substantiated for neglect for being asleep or less than alert, which is a violation of CBDC Policy #111, Section VI, A.3.2.1., *supra* and CBDC Policy # 507, *Inattention to Job Duties*, both of which specifically prohibit such behavior. Such behavior also is prohibited by *The Rules of the Tennessee Department of Personnel, Disciplinary Action, Chapter 1120-10 (20), supra*. By sleeping on the job, Grievant behaved in an unprofessional manner, with total disregard for the needs and welfare of the population that she was hired and trained to serve. *The Rules of the Tennessee Department of Personnel, Disciplinary Action, Chapter 1120-10 (8), supra*. Because this was her fourth such infraction, (policy requires three for termination, but an earlier one for termination was reduced to a suspension at a lower level in 2008), termination was appropriate as prescribed by CBDC policy, #507, Section VI. E., *supra*. (Ex 6 pg 90.)

6. Grievant had a serious past of several types of disciplinary infractions in addition to sleeping while on duty. These included incidences of negligence in the performance of duties, staff misconduct, conduct unbecoming a state employee, tardiness and attendance issues, insubordination and other prescribed disciplinary infractions. (Ex 9 pg 121 collective.) This long history of other types of disciplinary offenses combined with Grievant's numerous incidences of sleeping while on duty, presented a Level 5 case in which DIDD met its burden of proof by a preponderance of the evidence that termination was appropriate in this instance.

7. Grievant testified that she was not asleep, that she was not using a state blanket to cover herself but was using her jacket, that she did not see Mr. Bowling prior to her being asked to go home, that she was only in the room mere minutes while relieving another DT during break time and that Clark had made an utterance that required her to be in his room. (TR pg 139-147 line 1-22.) (Ex 5 pg 49 collective).

8. Testimony and evidence presented indicate that Grievant was inattentive to her job duties for a period of time of, at least, 30 minutes. Records and testimony corroborate that Bowling discovered Grievant sleeping around 4:26 AM and reported it around five to ten minutes later to Lakeshia Lewis, supervisor, who walked over to the cottage about two minutes after the call. Grievant, and her one Level 5 witness, stated that she went to check on Clark around 3:00 or 4:00 AM, which was the time Grievant in her witness statement stated that she relieved her witness. However, there is also evidence that 4:00 AM was the time she was to relieve another DT for break. There is some confusion in the record about whether Grievant was relieving another DT during that DT's break when found asleep or whether Grievant was carrying out her assignment with Clark since a log entry shows that she was responsible for several residents, including Clark, as early as 11:30 PM on 9/10/10. Also, staff assignment sheet shows that she was to relieve the other DT at 3:00 AM and not 4:00AM. If so, then it could be

argued that she was asleep in Clark's room for a time much longer than 30 minutes. This confusing information found in the records and in testimony, however, does not weaken state's contention that she was inattentive/asleep for a period of time enabling her to sit in a chair, cover herself with a blanket and not wake up until a supervisor once notified by Mr. Bowling, walked over to Cypress Cottage and into Clark's room to rouse Grievant after twice calling out to her. (TR pg 149 line 21-25, pg 150 line 1-12, TR pg153 line 16-25 pg155 line 3-12,pg 158 line 1-15, .) (Ex 5 pg 49 collective, Ex 10 pg 97, and Ex 11 pg 93.) Even accepting for a moment, *which the state only mentions as illustration*, that Grievant was merely sitting in the resident's room covered with *her* jacket, behind a door for only a few minutes in order to observe the resident because she had heard a sound from his room, that even that behavior indicates a deviation from what Grievant's assigned duties were on the night in question and such clearly indicates that Grievant was not following Clark's ISP, training, policy and procedure for her assigned coverage and other duties in Cypress Cottage. (TR pg 97 line 3-8.) (Udeze's actual count on 9/11/10 was five residents-1:5, (TR pg 144 line 1-6) (Ex 11 pg 93), since there was an uneven number on the unit. However, as testified, nighttime coverage in Cypress could be up to 1:8 dependent upon type of resident and actual census in cottage. (TR pg 16 line 1-25, pg 66 line 24-25, pg 67 line 1-3.) (Ex 4 pg 67, Ex 5 pg 49 collective and Ex 11 pg 93.))

9. Nothing was presented at the Level 5 hearing by Grievant that indicated by the preponderance of the proof that she was the target of any clique or that she was anything but inattentive to her assigned duties by sleeping on the job. (TR pg 101 line10-16, pg 147, line 9.)

In conclusion, based upon the above findings of fact/conclusions of law and argument the court finds that the state has met its burden of proof and has established by the preponderance of the evidence that Grievant, Helen Udeze, engaged in conduct prohibited by the *Rules of the Tennessee Department of Personnel (now TDHR)*, as in full force and effect prior to

October 1, 2012, and applicable DIDD Rules, regulations and policies and **UPHOLDS the termination and DISMISS Grievant's appeal.**

This Initial Order entered and effective this 14 day of January, 2013

Anthony Adgent
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 14 day of January, 2013

Thomas Stovall, Director
Administrative Procedures Division