

Issue: Group III Written Notice with Termination (violation of drug/alcohol policy);  
Hearing Date: 05/23/16; Decision Issued: 05/26/17; Agency: DOC; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 10987; Outcome: Full Relief; **Administrative  
Review: Ruling Request received 06/09/17; Ruling No. 2017-4567 issued  
07/14/17; Outcome: AHO's decision affirmed.**



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10987**

Hearing Date: May 23, 2017

Decision Issued: May 26, 2017

#### **PROCEDURAL HISTORY**

On February 9, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for testing positive for an illegal substance.

On March 8, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 21, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 23, 2017, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Representative  
Witnesses

#### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

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") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

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

The Department of Corrections employed Grievant as a Probation and Parole Officer at one of its locations. He began working for the Agency in 1991. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant became ill and was admitted to the Hospital. As part of its medical process for Grievant, the Hospital conducted a urine drug screen. The drug screen showed that Grievant was negative for cocaine on January 15, 2017.<sup>1</sup> Grievant resumed working on January 23, 2017.

Grievant was randomly selected for a drug test. A third party conducted the selection process and notified the Agency that Grievant's name had been selected for him to be drug tested.

On January 30 2017, the Supervisor called Grievant to the office and informed him he was required to participate in a drug test. Grievant was provided with a vial to collect oral fluid. After providing an oral fluid sample, he sealed the vial and placed it in a package for a common carrier to transport to the lab. Grievant signed the "chain of custody" form and wrote the date of January 30, 2017 and time of 3:28 p.m. Because of the late hour of the day, the Supervisor gave the package to another employee to keep in the office until the common carrier could come the following day. The common

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<sup>1</sup> The report indicated that the results were for use in a medical setting only because the results were unconfirmed and should not be used for non-medical purposes such as employment testing.

carrier picked up the package the following day and it was delivered to the Laboratory. The Laboratory tested Grievant's oral fluid and concluded that it was positive for cocaine.

On February 6, 2017, the Medical Review Officer (MRO) received the test results from the Laboratory. The Agency was instructed to have Grievant call the MRO. On February 7, 2017, Grievant called the MRO's office and spoke with Dr. W. Dr. W conducted a "standard interview" where Dr. W advised Grievant of the MRO's role in the drug testing process. Grievant denied using cocaine. Dr. W asked Grievant what medications he was taking. Grievant did not know the names of the medications he was taking because his medications had recently changed and he did not know how to pronounce the names of the medications. Although Dr. W did not know the medications Grievant was taking, she concluded Grievant was unable to provide a valid medical explanation for the positive test result.

The Agency received a Drug Test Report dated February 7, 2017. It did not reveal the tests performed but indicated it was for Grievant's specimen and that the result was "Positive for: COCAINE ORAL FLUID". The report was signed by the Medical Review Officer.

Grievant was removed from employment on February 9, 2017.

Grievant knew that cocaine stays in a person's body for approximately 24 to 48 hours with respect to a urine sample. He knew he had not consumed or been exposed to cocaine in the 48 hours before January 30, 2017.

Grievant disputed the Agency's conclusion that he had consumed cocaine. He went to an HHS Certified Laboratory on February 13, 2017 and submitted a hair sample for a hair follicle drug test. His hair was cut by an employee of the testing laboratory and tested by the lab. The Drug Detail Report completed by the laboratory that tested Grievant's hair showed that Grievant was negative for cocaine. Based on the testimony presented, the "look back" period was 90 days for the hair follicle test. That look back period included January 30, 2017, the day the Agency claimed Grievant's oral fluids showed cocaine use. In other words, the hair follicle test showed that Grievant had not consumed cocaine at least 90 days before February 13, 2017 including time period covering the Agency's oral fluid test.

### **CONCLUSIONS OF POLICY**

The Agency followed its Alcohol and Other Drug Testing policy but the results are not sufficient to support the disciplinary action. The test report submitted by Grievant shows that an initial test was conducted "300 pg/mg" and then confirmed by a "GC/MS Confirm test" for "300 pg/mg." The test report submitted by the Agency did not show if it was based on an initial screening only or both an initial screening with a confirmation. The Agency's policy describes a Screening Test as intended to eliminate negative oral

fluid specimens from further analysis and a Confirmation test as a second analytical procedure performed on oral fluid to identify and quantify the presence of illegal drugs. The Hearing Officer cannot assume the Agency's Laboratory completed a confirmation test.

The Agency did not call Dr. W as a witness. It is unclear how Dr. W reached her conclusion without knowing the medications Grievant was taking. It is unclear why the MRO's Drug Test Report did not describe whether an initial and a confirmation test were completed on Grievant's oral fluid sample. It is unclear why the oral fluid test would be more reliable than the hair follicle test. It is unclear why the hair follicle test would be negative for cocaine while the oral fluid test on a specimen collected 13 days earlier would be positive. In short, the drug test provided by the Agency is no more reliable than the drug test provided by Grievant. The burden of proof rests on the Agency to show by a preponderance of the evidence that Grievant's positive drug test is valid. The Hearing Officer cannot reach this conclusion and, thus, the disciplinary action must be reversed.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

## 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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

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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>2</sup>

[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].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>2</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.