



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11656

Hearing Date: April 25, 2022
Decision Issued: May 16, 2022

PROCEDURAL HISTORY

On January 12, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for testing positive for an illegal drug.

On January 22, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 16, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The matter was scheduled initially but continued several times at Grievant's request. On April 25, 2022, a hearing was held by remote conference.

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Substance Abuse Counselor at one of its facilities. Grievant worked in a corrections facility with access to inmates. She had been employed by the Agency for approximately seven years. She received favorable performance evaluations. No evidence of prior active disciplinary action was introduced during the hearing.

Ms. M, an Officer Service Specialist, received training regarding how to assist employees with oral fluid drug tests.

Grievant was selected randomly for a drug test.

On December 21, 2020, Grievant entered the Facility at approximately 8:30 a.m. She encountered but did not have physical contact with any inmates. Ms. S notified Grievant that she was subject to a drug test. At approximately 9 a.m., Grievant met Ms. S in a conference room.

The collection package consisted of a smaller bag and a bigger bag. Ms. S handled the bigger bag but not the smaller bag. The testing package was valid until July 2021. Grievant used a pen that was sanitized prior to her use.

Grievant entered her contact information including social security number into a pre-printed Custody and Control Form showing a Specimen Id Number ending in 72. Grievant removed two stickers with bar codes and placed them on Custody and Control Form. The bar codes ended in the number 72. Grievant initialed labels A and B.

Grievant opened the testing package to remove the vial and stick package. She opened the package with the swab and touched only the blue handle. She put the swab inside her mouth and then placed the swab between her cheek and gum for approximately four minutes. Ms. S timed the test. Grievant removed the swab from her mouth, opened the vial, and placed the swab in the vial. She then broke off the stick and sealed the vial. Grievant repeated this procedure in order to take a second oral fluid sample which resulted in a second vial. Grievant completed giving two samples consecutively without a break in between.

Grievant had placed the stickers with bar codes on the two vials so that her Custody and Control Form could be matched with the two vials.

Grievant placed the vials in a small specimen bag that contained the Control and Custody Forms. Ms. S sealed the small specimen bag in front of Grievant. Ms. S was in the room with Grievant the entire time the specimen was collected.

Ms. S placed the bag in the Delivery Company bag labeled for delivery to Lab A.

Ms. S called the Delivery Company to have them pick up the Delivery Company bag. She obtained a confirmation number from the Delivery Company. Ms. S kept the bag in her locked desk drawer until the Delivery Company arrived. When the Delivery Company driver arrived, Grievant took the Delivery Company bag to the driver.

The bag of another donor was also placed in the Delivery Company bag. The other donor's bag was sealed in the same way Grievant's bag was sealed.

Lab A received the specimen on December 23, 2020. Lab A tested one of Grievant's vials.

On December 28, 2020, a Medical Review Officer issued a Drug Test Report showing that Grievant tested positive for Cocaine Oral Fluid. The Drug Test Report was for specimen number ending in 72 collected on December 21, 2020. On December 28, 2020, the Agency received the results of Grievant's drug test.

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2020, the Agency received the results of Grievant's drug test. Grievant learned of her positive drug test on December 28, 2020.

On December 29, 2020, Grievant asked for a re-test, meaning that the second vial would be tested by another lab. Lab A sent the second vial to Lab O for testing.

Lab O received the second sample on January 7, 2021. The second test showed Grievant's sample ending in 72 to be positive for benzoylecgonine and cocaine.

After Grievant's termination she took additional drug tests. She took a blood test that was negative for cocaine.

On January 14, 2021, Grievant submitted hair follicles for a Hair 5 Drug Panel test with Lab O. On January 21, 2021, Lab O reported Grievant's sample as negative for Cocaine/Metabolites.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force." Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."¹

Operating Procedure 135.4 governs Alcohol and Other Drug Testing. This policy includes definitions:

Oral Fluid Testing - Testing of saliva samples to screen for specific illegal drug concentration; the collection process may be conducted on site by designated trained DOC personnel or by a trained third party collector and sent to a SAMHSA Certified Laboratory for testing.

Initial Test - A laboratory test to eliminate "negative" urine or oral fluid specimens from further analysis or to identify a specimen that requires additional testing for the presence of alcohol or other drugs

Confirmation Alcohol or Other Drug Test - A second analytical procedure performed on a urine specimen or oral fluid specimen to identify and quantify the presence of alcohol or a specific other drug or drug metabolite

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

Specimen/Sample - Bodily exponents or fluid including breath, urine, saliva, hair, and blood provided or requested as appropriate to be utilized for alcohol or other drug testing

Split Sample Test - A second oral fluid specimen or a part of the urine specimen that is sent to a first laboratory and retained sealed, and is transported to a second laboratory in the event that an employee/applicant requests that it be retested following a verified positive test of the primary specimen, or a verified adulterated or substituted urine test result.

Verified Test Results - Urine or oral fluid/saliva test results from a SAMHSA certified laboratory that have undergone review and final determination by the Medical Review Officer.

Section IV(B) provides:

Random Drug Testing (Non-DOT)

1. All wage, full and part time salaried employees and paid interns are subject to random drug testing.

Section II. General Provisions provides:

A. Oral fluid testing is the preferred method of drug testing, and the employee will be required to provide two oral fluid samples collected consecutively under the direct supervision of a trained employee or by a trained third party collector.

1. The only time oral fluid testing will not be utilized is for employees that hold a CDL.

2. The samples are sent to a Substance Abuse and Mental Health Services Administration (SAMHSA) certified laboratory for testing and the third party administrator (TPA) or the Medical Review Officer (MRO) reports the results to the Designated Employer Representative (DER).

a. Oral fluid samples are first screened in the laboratory using enzyme immunoassay technology, which has proven reliable for routine drug testing.

b. Any oral fluid sample testing positive in the screening process is then subjected to gas chromatography/mass spectrometry/mass spectrometry (GC/MS/MS) confirmation testing.

3. The oral fluid specimens should be sent to the SAMHSA certified laboratory via the shipping method established by the third party vendor.

4. In order to retain proper custody and control of the specimen, at no time should the specimens be dropped in a pick-up box or otherwise leave the custody of the DER until such time as the specimens can be directly handed to the driver of the pick-up service.

D. Employees Who Test Positive for Unlawful/Illegal Drug Use

1. Employees who test positive for unlawful or illegal drug use on the initial screen will have their test results verified through a laboratory confirmation test using an alternate testing methodology with a greater sensitivity than the initial test confirmation:

- a. Urinalysis - Gas Chromatography/Mass Spectrometry, (GC/MS) or Gas Chromatography/Tandem mass spectrometry, (GC/MS/MS)
- b. Oral Swab - Liquid Chromatography/Tandem Mass Spectrometry, (LC/MS/MS)

2. Employees who are confirmed positive for unlawful or illegal usage will be terminated for "illegal conduct which endangers the public safety, internal security, or affects the safe and efficient operation of the DOC".

Employees may challenge their positive test results as outlined below:

- a. The employee has seven calendar days to submit the Retest Request form provided by the test administrator with the required payment to the HRO's attention.
- b. The employee will be required to pay for the cost of the retesting.
- c. Once received, the HRO must immediately send the Retest Request and the payment directly to the MRO via overnight delivery.
- d. Upon receipt of the Retest Request and payment, the MRO will arrange for the secondary oral fluid sample or the split sample urine specimen to be sent to a certified, independent laboratory for testing as a Split Sample Test.

If the laboratory finds that the retest has any detectable amount of the drug reported from the initial primary test, it will be considered a confirmation of the reported positive test results, and the employee or applicant will remain responsible for the cost of the second test.

Group III offenses include:

Violation of DHRM Policy 1.05 Alcohol and Other Drugs or Operating Procedure 135.4, Alcohol and Other Drug Testing. Use of alcohol while on the job; any/all use, possession, distribution, sale, etc. of illegal drugs; or unlawful use of controlled substances will result in termination. ***

An illegal drug violation of Operating Procedure 135.4, Alcohol and Other Drug Testing, will result in a Group III offense and termination.²

² See, Operating Procedure 135.1.

Section IV(11) provides:

If a random drug test result is verified positive, the employee will be terminated from employment. Due process proceedings must be followed in accordance with Operating Procedure 135.1, Standards of Conduct.

Grievant was selected randomly for a drug test. She met with Ms. S who guided Grievant in the proper way to create the oral fluid samples. The samples were tracked with a Custody and Control Form that was completed accurately by Grievant, Ms. S, and laboratory employees. Grievant's initial test was reviewed by the Medical Review Officer who verified Grievant's initial sample tested positive for cocaine. Grievant requested the second sample be tested. The second sample was tested by another lab and showed a second positive result for cocaine. The second test confirmed the initial test. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued, "I [Grievant], have never used illegal drugs in my entire life. It is my considered opinion that the drug test in question is contaminated or false positive. *** "From time to time, I take a sleep aide, Unisom, and over the counter allergy pills. *** I have never and will never abuse drugs, alcohol, or other substances."³

Grievant presented evidence showing that she had not taken cocaine. She presented drug tests including a hair follicle drug test which should have detected cocaine in Grievant's body for three months prior to the testing including the time period of December 21, 2020. Her tests were negative for cocaine. Grievant testified that she did not consume cocaine and that the Agency's drug test was in error. The Agency, however, has met its burden of proof by showing that it followed Operating Procedure 135.4 to properly collect, transport, and have tested Grievant's oral fluid specimens. Grievant tested positive for cocaine.

The Hearing Officer does not believe Grievant's specimen was contaminated. Ms. S took precautions to ensure she did not contaminate Grievant's specimen. Grievant sealed the vial in a bag and the bag was held by Ms. S in a locked drawer until it was given directly to the Delivery Company Driver. The Lab opened and tested Grievant's sample. The vials had stickers that Grievant placed on them and Ms. S signed. The Agency presented adequate evidence that the chain of custody was continuous and consistent with its policy. It seems unlikely that someone working at Lab A switched Grievant's vials with the vials of another person.

Grievant argued that the oral fluid tested by both labs was not her sample. She sought to have a DNA test of the remainder of either vial of oral fluid. The Lab destroyed

³ Agency Exhibit p. 18.

the oral fluid in the vials which prevented her from conducting the DNA test. The Hearing Officer had ordered the Agency to facilitate Grievant's request. Grievant's counsel sent the Agency letters insisting that the Agency preserve evidence. Grievant asks that the Hearing Officer draw an adverse inference against the Agency because the Agency did not preserve Grievant's oral fluid. The Hearing Officer will not draw an adverse inference against the Agency because the Agency attempted to comply with the Hearing Officer's orders and requests. The Agency's Employee Relations Manager made numerous attempts to have the labs preserve the vials and allow Grievant to have them tested for Grievant's DNA. The lab destroyed the oral fluid samples in accordance with its policies and in disregard of the requests of the Employee Relations Manager. The error in this case was made by the lab and not at the Agency's request or because of the Agency's fault.

The Hearing Officer does not believe Grievant's drug test was a false positive for cocaine. If the first test was a false positive, the second test by Lab O should have revealed this conclusion. The odds that both the first and second labs would have false positive tests for different vials of oral fluid seems unlikely.

Grievant argued that Ms. S was not adequately trained to perform the testing procedures. The evidence showed that Ms. S had adequate training and experience⁴ to facilitate Grievant's drug test.

Grievant argued that she took Unisom and over-the-counter antihistamines which resulted in the false positive for cocaine. The evidence showed Unisom and antihistamines did not cause a false positive in this case.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management"⁵ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁴ Ms. S assisted with approximately 25 screenings per month.

⁵ *Va. Code § 2.2-3005.*

The Agency represented that it made Grievant ineligible for rehire. The Agency did not show a policy in effect at the time of Grievant's disciplinary action that would allow the Agency to make her ineligible for rehire. Accordingly, the Agency is ordered to change Grievant's status to eligible for rehire.

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 **upheld**. The Agency is **ordered** to make Grievant eligible for immediate rehire.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

^[1] 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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer