

DECISION OF HEARING OFFICER

IN RE: CASE NO. 11917

HEARING DATE: May 11, 2023

DECISION ISSUED: May 31, 2023

PROCEDURAL HISTORY

Grievant was issued a Written Notice on November 15, 2022, regarding results from a random drug screening. Grievant filed an Appeal<sup>1</sup> and the Hearing Officer was appointed on November 30, 2022. The pre-hearing conference was scheduled on February 23, 2023, and rescheduled to March 6, 2023. The matter was heard on May 11, 2023.

APPEARANCES

Agency Advocate

Agency representative as witness

One additional agency witness

Grievant pro se as witness

ISSUES

- 1) Whether Grievant violated operating procedure 135.1.
- 2) Whether Grievant violated operating procedure 135.4.
- 3) Whether Grievant violated Offense Code 31.
- 4) Whether Grievant's actions meet the definition of prohibited behavior.
- 5) Whether a Group III discipline with termination was an appropriate discipline.
- 6) Whether there were mitigating circumstances.

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<sup>1</sup> Agency Exhibit 14

## BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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. Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §5.8.

## APPLICABLE POLICY

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq the Rules for Conducting Grievances effective July 1, 2012, and the Grievance Procedure Manual (GPM) effective July 1, 2017

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “includes acts of minor misconduct that require formal disciplinary action.” Group II offenses “include acts of misconduct of a more serious and/or repeat nature that requires formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.” More than one (1) active Group II offense may be combined to warrant termination. Agency relies on Operating Procedures 135.1<sup>2</sup>, 135.4<sup>3</sup>, and Offense Code 31<sup>4</sup>.

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<sup>2</sup> Agency Exhibit 13

<sup>3</sup> Agency Exhibit 9

<sup>4</sup> Agency Exhibit 12

## FINDING OF FACTS

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

Although not listed in the Written Notice, the Agency is relying on two (2) Operational Procedures. The Commonwealth of Virginia has a policy to randomly test Department of Corrections employees for drug and or alcohol use. The policy (OP 135.4 IV, B, 10, page 13)<sup>5</sup> provides zero tolerance for substance abuse and requires termination following positive test results.

Grievant was randomly called to the Human Resource office for drug testing. Two swab examples were taken. One was sent off for testing and the other kept in chain of command. A Grievant has the right to request the second reserved test also be tested provided the grievant pays a \$200 fee. Grievant's test results were positive for the first sample<sup>6</sup> as well as the second sample requested by Grievant.<sup>7</sup>

Grievant stated he paid \$200<sup>8</sup> and thought he would be re-swabbed for the second test. Rather, the backup sample of the first test was analyzed. Both times, Grievant's test results showed opiate drug involvement. Grievant provided a physician's prescription for the Oxycodone found in his system. The prescription was written more than a year earlier than the random screen.<sup>9</sup>No prescription was provided the Hydrocodone also found in

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<sup>5</sup> Agency Exhibit 9

<sup>6</sup> Agency Exhibit 2

<sup>7</sup> Agency Exhibit 5

<sup>8</sup> Agency Exhibit 4

<sup>9</sup> Agency Exhibit 6

Grievant's system. Grievant stated he had no idea how hydrocodone could have been in his system.

Although the physician's prescription was dated, the state did not hold Grievant responsible for unauthorized use of Oxycodone. However, no reasonable explanation was given for the presence of Hydrocodone.

Agency provided several documents showing facts that led to the action of termination. The Agency showed proper procedural process, the policies agency relied upon, documented evidence that Grievant was aware of the policies<sup>10</sup> and positive test results. Agency's first witness testified to the collection procedure for drug and alcohol testing. Agency's second to witness testified as to the discipline given to the Grievant.

Grievant produced no exhibits. He stated he was expecting to take a new test for the \$200 he had paid. Grievant stated other employees who had an alcohol problem were sent to rehabilitation rather than terminated. However, he presented no evidence to support this statement. Grievant stated he had no idea how he was positive for Hydrocodone. Grievant stated his remorse and requested his job back.

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<sup>10</sup> Collective Agency Exhibits 7, 8, 10, 11, 12.

## OPINION

This Hearing Officer was well aware Grievant had great remorse over losing his job. However, given the weight of evidence in favor of the Agency's action, Group III with termination was the only choice the Agency could make.

## MITIGATION

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 the rules established by the Department of Human Resource Management..." 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:

- (1) whether an employee had notice of the rule, how the Agency interprets the rule, and/or the possible consequences of not complying with the rule.
- (2) whether the disciplinary is consistent with the Agency's treatment of other similarly situated employees or
- (3) whether the penalty otherwise exceeds the limits of reasonableness under all the relevant circumstances.<sup>19</sup>

No evidence of mitigating circumstances was proffered.

## DECISION

Given the evidence above, the Agency's decision to terminate Grievant is UPHHELD.

## 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 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 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.<sup>[1]</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].



Sondra K. Alan  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.