

Issue: Group III Written Notice with Suspension (violation of drug/alcohol policy);
Hearing Date: 08/24/18; Decision Issued: 08/30/18; Agency: DBHDS; AHO: Carl
Wilson Schmidt, Esq.; Case No. 11226; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11226

Hearing Date: August 24, 2018
Decision Issued: August 30, 2018

PROCEDURAL HISTORY

On April 11, 2018, Grievant was issued a Group III Written Notice of disciplinary action with a fifteen day work suspension for violation of the Agency's drug policy.

Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On July 2, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On August 24, 2018, a hearing was held at the Agency's office. Grievant was advised of the date, time, and location of the hearing but did not appear.

APPEARANCES

Agency Representative
Witness

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 Behavioral Health and Developmental Services employs Grievant as a Direct Service Associate II at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was named in an abuse investigation.¹ The Agency requires employees involved in abuse investigations to be tested for alcohol and drugs. Grievant was required to provide an oral fluid sample to be tested by an independent laboratory.

Grievant provided an oral fluid sample on March 22, 2018. She signed a Lab-Based Oral Fluid Drug Testing Custody & Control Form which was placed with her oral fluid sample. On April 6, 2018, the Lab tested Grievant's oral fluid sample and it concluded Grievant's sample was "Positive for: AMPHETAMINE ORAL FLUID."² A Medical Review Officer reviewed the results and confirmed the results.

¹ The Agency ultimately concluded the allegation of neglect against Grievant was unfounded.

² Agency Exhibit G.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”³ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Departmental Instruction 502 authorizes the Agency to collect oral fluid samples when an employee is subject to an allegation of abuse. The Policy requires the testing of an oral fluid sample for “Amphetamines (meth, speed, crank, ecstasy)”. “For all other employees who test positive for drugs, the Department shall take the following actions: Issue a Standards of Conduct Group III Written Notice and suspend the employee for a minimum of 15 work days.”

Grievant tested positive for amphetamines. 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 suspend an employee for up to 30 work days. Accordingly, Grievant’s 15 workday suspension must be upheld.

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”⁴ 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.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with a 15 workday suspension is **upheld**.

³ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ *Va. Code § 2.2-3005.*

APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and 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]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.