

Issue: Group III Written Notice with Termination (violation of drug/alcohol policy);
Hearing Date: 04/04/19; Decision Issued: 04/25/19; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 11316; Outcome: Full Relief; **Administrative
Review Ruling Request received 05/08/19; EDR Ruling No. 2019-4927 issued
06/04/19; Outcome: Remanded to AHO; Reconsideration Decision issued
06/14/19; Outcome: Agency ordered to retest; 2nd Reconsideration Decision
issued 07/10/19; Outcome: Negative result on retest, Grievant reinstated with
full back pay; Attorney's Fee Addendum issued 07/22/19 awarding \$2,882.00.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11316

Hearing Date: April 4, 2019
Decision Issued: April 25, 2019

PROCEDURAL HISTORY

On January 16, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating Operating Procedure 135.4, Alcohol and Other Drug Test.

On January 29, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 7, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 4, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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 Corrections Officer at one of its facilities. Grievant began working for the Agency in 1998. Grievant had prior active disciplinary action. On October 23, 2018, Grievant received a Group III Written Notice with disciplinary demotion for sleeping during work hours.

The Agency's policy governing drug testing is available on the Agency's intranet.

On December 4, 2018, Grievant was one of seven employees randomly selected for drug testing.

On December 18, 2018, Grievant met with the OSS in the Human Resources Unit. The OSS told Grievant he needed to complete a Random Drug Screen. She removed the drug screen form from her desk along with the bottles containing swabs. Grievant filled out portions of the Form. The OSS opened the bag with two vials. She asked Grievant to write his employee number and the date on each vial. She asked Grievant to open the vial and pull out the first swab and then put it in his cheek. Grievant placed the first swab in the first vial.¹ He repeated the process with the second vial. Grievant placed a label A on the first vial and a label B on the second vial.

¹ The OSS did not touch the swab or vial after it was opened.

Grievant placed the vials in a bag and sealed the bag. The chain of custody form was also included. The sealed bag was placed in a mailing bag and the OSS called a delivery company. The delivery company arrived at the Facility and the OSS gave the bag to the driver. The bag was delivered to the Testing Lab on December 19, 2018.

An employee with the Testing Lab opened the bag and ensured that the vials' seals were intact. The employee assigned a lab number to the sample.

On December 23, 2018, the Testing Lab evaluated the first oral fluid sample for cocaine with a screening level of 5 NG/ML and a confirmation level of 2 NG/ML. The test showed Grievant's oral fluid sample was positive for cocaine. The quantitative value was 10 NG/ML.

The Testing Lab did not evaluate the second oral fluid sample. It was to remain stored in the Laboratory with the first oral fluid sample for a year.

Cocaine tends to stay in a person's system for one or two days. But it can be a longer period of time if the person is a chronic user of cocaine.

The Medical Review Officer (MRO) received the test results on December 23, 2018 at 5:17 p.m. The Medical Review Service notified the Agency on December 24, 2018 to have Grievant contact the MRO. On December 27, 2018, the MRO attempted to contact Grievant by telephone. Grievant did not answer the call. Grievant's voice mail was not set up so the MRO could not leave a message. On December 28, 2018, the MRO called and spoke with Grievant. The MRO advised Grievant of the laboratory findings and discussed with Grievant possible medical explanations for the results. Grievant denied using cocaine but was unable to provide a valid medical explanation for the result. The MRO noted Grievant's response to the test results:

no no no this don't make no sense.²

The MRO's practice was that if an employee wanted a sample retest, the MRO would refer the employee to the Agency.

The MRO advised Grievant the results would be released to the Agency and referred Grievant to the Agency to discuss their policies. The MRO did not provide Grievant with a telephone number to call back the MRO.

Shortly after speaking with the MRO on December 28, 2018, Grievant called Facility staff. He said he needed to speak with someone in human resources. Grievant's call was transferred to the Personnel Analyst. Grievant testified he asked the Personnel Analyst for a retest.

On December 28, 2018, the MRO released the results to the Agency.

² Agency Exhibit 10.

The Personnel Analyst testified she received the drug test results and was told to call Grievant. She testified she called Grievant on December 28, 2018 and was able to speak with him. She told Grievant that as of that day he was on administrative leave because of a positive drug test. She told Grievant he would have due process. Grievant asked what was due process. She told Grievant someone would call him.

The Personnel Analyst also testified that Grievant called her and said he had gotten a call from the MRO. Grievant said he had tested positive for something. Grievant asked her what he needed to do. The Personnel Analyst said I don't have access to that information and will have to call the HR Director who was on vacation to get that information. The Personnel Analyst then called the HR Director and told the HR Director that Grievant had gotten a call from the MRO. The HR Director looked at her email and said to tell Grievant he was being placed on administrative leave and explain to him due process. The Personnel Analyst called Grievant and told him that as of that day he was on administrative leave and he would receive due process. Grievant asked what was due process.

The Personnel Analyst testified that Grievant did not ask her for a retest. She testified that if Grievant had asked her for a retest she would have had to look at the policy because "I am not up on the policy."

Grievant met with the Warden on January 8, 2019. The Warden told Grievant he tested positive for cocaine and showed Grievant the Drug Test Report. Grievant denied the allegation and said he never used illegal drugs. During that meeting, Grievant received the telephone number of the MRO.

On January 8, 2019, Grievant met with his former attorney, Ms. M. Grievant told her about the drug test and showed her the paper given to him by the Warden. She told Grievant they should call the number on the drug screen report to see if a retest could be completed. They called the MRO at the telephone number given to Grievant by the Warden. They spoke with the Director of Medical Review Services, Mr. S. Grievant and Ms. M asked about having a retest completed. Mr. S informed Grievant and Ms. M that Grievant should contact the Agency to request a retest because such request needed to be received by the MRO from the Agency. Mr. S told them that once the MRO received a retest request from the Agency, the MRO would provide an authorization form for both the Agency and Grievant to sign. Following the telephone call with Mr. S, Grievant and Ms. M tried calling the Facility telephone number. No one was available and they were told someone would call Grievant later. Grievant left Ms. M's office.

Grievant called the Facility HR Director to discuss having a retest completed. The Facility HR Director said that a retest could not be done because Grievant was asking for a retest more than 72 hours after receiving the test results from the MRO.

Hair testing shows whether a person has used cocaine in the prior 90 days. If a person uses cocaine one or two times, the cocaine may not be revealed by a hair test.

A hair test would reveal usage by a chronic cocaine user. Testing hair on a person's body is not as reliable as testing the hair on the person's head.

10 NG/ML of cocaine would not constitute a high level of cocaine use while the cocaine was in a person's body.

Grievant met with his Attorney who suggested Grievant go to an independent testing lab and have his finger nails clipped and tested. Grievant went to Lab US and asked the women there for a finger nail test. Grievant was told that his finger nails were not long enough to test. The women suggested Grievant's body hair be tested because it was more reliable than the hair on his head. Grievant complied with their suggestion. His body hair was collected on January 16, 2019 and tested for five illegal drugs including cocaine. Grievant was negative for cocaine with a screening cutoff of 500 pg/mg.

CONCLUSIONS OF POLICY

Operating Procedure 135.4 governs Alcohol and Other Drug Testing. This policy provides, "As a condition of employment, employees, ... agree to abide by DOC requirements for an alcohol and drug-free workplace and ... may be asked to submit to appropriate substance abuse screening" Section IV(B)(4) provides:

Having a verified positive drug test will result in termination regardless of the substance involved. (See Attachment 2: Substances and Cut-Off Levels.)³

Section (IV)(D)(p) provides:

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

Section (IV)(C)(7) provides:

- Employees who are confirmed positive for illegal drug usage may request within 72 hours of notification by the Medical Review Officer that their urine or oral fluid specimen be retested by a certified independent laboratory that is coordinated between the MRO and donor. The employee should make this request directly to the MRO.
- The split sample urine specimen or secondary oral fluid sample will then be transported to the selected certified independent laboratory for testing. ***

³ The Agency failed to provide Attachment 2 as an exhibit.

- The employee shall be required to pay for the cost of the retesting.
- Employees whose urine or oral fluid specimen retest results in a confirmed negative report shall be considered to be negative for unlawful or illegal drugs and the results of the first test shall be expunged, the employee reinstated, and the cost of the test reimbursed to the employee.
- If the laboratory finds that the second retest has any detectable amount of the drug reported from the initial positive test it is considered to have confirmed the reported positive test and the employee or applicant shall remain responsible for the cost of the second test.

The Agency did not comply with its requirement to test the second oral fluid sample after Grievant asked for a retest. Because the Agency did not comply with its policy, the disciplinary action must be reversed and Grievant be reinstated.

Grievant contested the drug test results from the beginning of his interaction with the MRO to the date of the hearing. The Agency complied with the selection, collection, and testing processes under its policy. Whether the Agency complied with the retesting provision of the policy depends on Grievant's interaction with the MRO on December 28, 2018.

The key issue in this case is not whether Grievant asked the Personnel Analyst on December 28, 2018 for a retest; the key question is whether Grievant asked the MRO on December 28, 2018 for a retest. The Policy states, "[t]he employee should make this request directly to the MRO." The policy does NOT say the employee must ask the MRO for a retest and then again ask the Facility HR staff for a retest. It only requires the request to be made to the MRO.

Grievant testified he asked the MRO for a retest on December 28, 2018. This is within the 72-hour time requirement. The Agency did not present any evidence showing that Grievant failed to ask the MRO for a retest. The MRO took notes of his conversation with Grievant but did not capture every detail of the conversation. The limited evidence from the MRO is consistent with Grievant's claim he asked the MRO for a retest. First, the MRO quoted Grievant saying, "no no no this don't make no sense." Saying test results do not make sense is consistent with someone desiring to have results retested. Second, the MRO referred Grievant to the Facility. Referring Grievant to the Agency is consistent with the MRO's practice of referring employees seeking retest to the Agency. To send the second vial to another facility for testing, the MRO needed a form signed by the Agency and Grievant. The Agency needed to collect a fee from the employee for the second test.

Grievant presented sufficient evidence to show that he asked the MRO for a retest on December 28, 2018 and that the Agency failed to retest his oral fluid sample. It appears that the Agency's Personnel Analyst and HR Director were not sufficiently

knowledgeable of the Agency's drug testing policy to inquire whether Grievant had asked the MRO for a retest and then process the request.

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 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 another 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. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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]

[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

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



COMMONWEALTH of VIRGINIA
Office of Equal Employment and Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 11316-R

Reconsideration Order Issued: June 14, 2019

RECONSIDERATION ORDER

EDR Ruling 2019-4927 remanded this matter to the Hearing Officer for further consideration. The Hearing Officer Orders:

1. The Agency immediately shall cause the second oral sample to be tested by second independent laboratory in accordance with the Agency's policy.
2. The Agency shall ensure that it follows the chain of custody protocols.
3. The Agency shall pay the cost to have the sample retested.
4. The Agency shall complete this process by July 15, 2019.
5. The Agency shall report the results of the retest and disclose the chain of custody form to the Grievant's Counsel and the Hearing Officer.
6. After the retest process is completed, each party may provide additional argument regarding the retest.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case No: 11316-R2

Second Reconsideration Order Issued: July 10, 2019

SECOND RECONSIDERATION DECISION

EDR Ruling 2019-4927 remanded this matter to the Hearing Officer for further consideration. The Hearing Officer ordered a test of the second oral sample. An independent laboratory confirmed the test of the second oral sample as "NEGATIVE RESULT."

The Hearing Officer finds that the first oral sample was a false positive for cocaine. Grievant's denial of cocaine use during the hearing was credible and confirmed by the second oral sample negative test result. Accordingly, the Original Hearing Decision rescinding the Group III Written Notice and reinstating Grievant with back pay and back benefits is affirmed. Grievant is also entitled to additional attorney's fees relating to the Agency's administrative appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 11316-A

Addendum Issued: July 22, 2019

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.⁴ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.⁵

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's Attorney devoted 22 hours to representing Grievant in this grievance. EDR awards attorney's fees at the rate of \$131 per hour. Accordingly, Grievant is entitled to reimbursement in the amount of \$2,882.

AWARD

The grievant is awarded attorneys' fees in the amount of \$2,882.

⁴ Va. Code § 2.2-3005.1(A).

⁵ § 7.2(e) Department of Human Resource Management, *Grievance Procedure Manual*, effective August July 1, 2017. § VI(E) EEDR *Rules for Conducting Grievance Hearings*, effective July 1, 2017.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer