

Issue: Group III Written Notice (violation of drug/alcohol policy); Hearing Date: 10/20/17; Decision Issued: 12/06/17; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 11082; 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: 11082**

Hearing Date: October 20, 2017  
Decision Issued: December 6, 2017

#### **PROCEDURAL HISTORY**

On June 1, 2017, Grievant was issued a Group III Written Notice of disciplinary action for violating Policy 1.05 governing alcohol and other drugs.

On June 6, 2017, 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 he requested a hearing. On September 5, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On October 20, 2017, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency 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 Virginia Department of Transportation employs Grievant as a Transportation Operator II at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency randomly tests certain employees for illegal drugs. Specimen collection is handled by an Agency vendor. On the day of collection, employees are taken to a restroom to provide a urine sample. Employees cannot use water from the restroom to dilute their urine sample because the restroom faucets are rendered inaccessible and a blue chemical is poured into toilet water.

On May 1, 2017, Grievant was randomly selected to take a drug test. The Safety Manager arrived at Grievant's work location at approximately 7:05 a.m. She learned from another person that someone was outside waiting in the parking lot. She walked outside and met Grievant. Grievant said he did not feel well, he had the "chills," and was thinking on going home. The Safety Manager told Grievant he could not leave because he had been selected for a drug test. The Safety Manager left Grievant in the parking lot and returned to the Building. She instructed the specimen collection individuals to set up the restroom and prepare to receive employees. Grievant was the first employee to provide a specimen. His urine was sealed in a container. Grievant and the collectors completed the Federal Drug testing Custody and Control Form and Grievant's sample was sent to an appropriate laboratory for testing.

Grievant's urine sample was tested and showed a ph level of less than 2.5. This meant that the sample had been adulterated. A normal ph level is between 5 and 9.

The Medical Review Officer (MRO) obtained copies of the laboratory test results and custody and control form. The MRO called Grievant and told Grievant that his urine specimen was adulterated. She asked Grievant about his medical condition and any drugs he was taking that could have explained the test results. Grievant disclosed the prescription drugs he was taking and his home remedies. The MRO concluded that none of those items would have caused Grievant's urine sample to have a ph level below 2.5.

Several days after speaking with the MRO, Grievant called the MRO and asked for a split sample<sup>1</sup> test. Another laboratory tested Grievant's urine sample and reached the same conclusion that Grievant's ph was below 2.5. The MRO concluded that the split sample was also adulterated. She also concluded that Grievant's illness on the day of the test did not explain the low ph level.

The Agency issued Grievant a Group III Written Notice. As part of the Written Notice, the Agency wrote:

Therefore, in addition to this Group III written notice, as a condition of continued employment with VDOT, you are required to timely enter into, comply with and complete the SAP program as designed by VDOT's contractor ....

Please note that any subsequent violation of VDOT's drug and alcohol safety directive and/or failure to successfully complete the SAP program as well as all mandatory DOT follow-up testing prescribed by your designated SAP may result in termination of your employment with the Virginia Department of Transportation.<sup>2</sup>

## **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."<sup>3</sup> Group II offenses "include acts of misconduct of a more serious

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<sup>1</sup> The Agency's Safety Policy defines "Split Specimen" as a "collection in which the urine collected is divided into two separate specimen bottles, the primary specimen (Bottle A) and the split specimen (Bottle B.) In this case, it appears that the Laboratory took Grievant's urine sample, created two specimens, and tested the first specimen.

<sup>2</sup> Agency Exhibit 3.

<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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.”

The Agency’s Safety Policy provides:

#### 6.2.7 Adulterated or Substitute Result

All urine specimens verified by the MRO as an adulterated or substituted drug test result shall be treated as refusal. The refusal shall be documented by the collector and/or MRO on the Federal Drug Custody and Control Form and SPMD<sup>4</sup> must be informed immediately. A refusal must be treated as an offense of this policy (similar to a positive test result). \*\*\*

#### 6.4.2 Drug Offenses

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##### First Offense

Employees having a positive (including non-negative) drug test shall be issued a Group III Notice under the Standards of Conduct.<sup>5</sup>

On May 1, 2017, Grievant submitted a urine sample that was adulterated. Under the Agency’s policy an adulterated sample is treated the same as a positive test for drugs. An employee who tests positive for illegal drugs may be issued a Group III Written Notice. Accordingly, the Agency’s issuance to Grievant of a Group III Written Notice must be upheld.

Grievant did not present any credible evidence to disprove the Agency’s allegation that his urine sample was adulterated. Grievant did not present any evidence showing that the adulteration was caused by anyone else handling the sample.

In this case, the Agency’s written notice contains a condition of employment that Grievant timely enter into and complete a substance abuse program. Under the Standards of Conduct, an employee who commits a Group III offense may be sanctioned by being issued a Group III Written Notice. The employee may also be removed from employment unless mitigating circumstances exist. When mitigating circumstances exist, an agency does not need to remove an employee. Indeed:

Mitigating circumstances for a Group III offense may support, as an alternative to termination, an employee's demotion or transfer to a position with reduced responsibilities and a disciplinary salary action with a

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<sup>4</sup> Safety and Performance Management Division.

<sup>5</sup> Agency Exhibit 10.

minimum 5% reduction in salary; transfer to an equivalent position in a different work area; and/or suspension of up to 30 workdays.<sup>6</sup>

Nothing in the Standards of Conduct authorizes an agency to include in the written notice the sanction of a new condition of employment. In this case, the Agency's Written Notice sanctioned Grievant by setting a condition of employment that he timely enter into and comply with, and complete a substance abuse program. This provision of the Group III Written Notice issued to Grievant is void.

The Agency argued that attaching the condition of employment to the Written Notice benefited Grievant by allowing him to remain an employee instead of being terminated. The Agency's objective is reasonable, appropriate, and within its discretion. That objective, however, must be exercised outside of the disciplinary process. In other words, the Agency's objective can be accomplished by separate letter to the Grievant.

*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 ...."<sup>7</sup> 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 is **upheld** except as discussed above.

## 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.

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<sup>6</sup> DHRM Policy 1.60.

<sup>7</sup> Va. Code § 2.2-3005.

Please address your request to:

Office of Equal Employment and 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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