

Issue: Group III Written Notice with Termination (failure to submit to drug/alcohol test);
Hearing Date: 10/10/18; Decision Issued: 10/30/18; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 11261; Outcome: No Relief – Agency Upheld;
Judicial Review: Appealed to Richmond City Circuit Court on 12/05/18;
Outcome: Remanded to the AHO (04/08/19).



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11261

Hearing Date: October 10, 2018

Decision Issued: October 30, 2018

PROCEDURAL HISTORY

On July 17, 2018, Grievant was issued a Group III Written Notice of disciplinary action for failing to submit to alcohol and/or drug testing and falsifying records.

On August 6, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 27, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On October 10, 2018, 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 Telecom/Network Coordinator. He began working for the Agency in December 2016. Grievant passed a pre-employment drug test.

On December 27, 2016, Grievant signed a Receipt of Operating Procedure 130.2, Alcohol and Other Drug Testing. The Receipt stated, in part:

All employees including full and part-time, wage, individual contract employees, volunteers and interns who routinely enter DOC Headquarters, regional offices, correctional facilities, probation and parole offices, day reporting programs, detention/diversion centers or court programs are subject to random drug testing. ***

If you test positive for illegal drug use, your employment will [be] terminated.¹ ***

Grievant worked on cell phones used by other employees. If an employee's cell phone was not working properly, the employee would give the cell phone to Grievant and he would attempt to repair the phone. If Grievant needed to leave his desk, he

¹ Agency Exhibit 8.

would sometimes leave a customer's cell phone on his desk. Grievant worked at a desk near Ms. T's desk. They sometimes referred to their supervisor as "someone."

The Agency randomly selected its employees for drug testing. Grievant was selected to be drug tested sometime in June 2018.

On Thursday, June 28, 2018, Grievant was working in the Agency's Building. He received a telephone call from Ms. K seeking assistance with changing the password on her cell phone. He left his office area and went to the Human Resource area in order to perform work duties. The Personnel Assistant observed Grievant working in the human resource section. She remembered Grievant had been selected to be drug tested. She approached Grievant at the Human Resource reception desk and said she needed to speak with them. Grievant said "OK". The Personnel Assistant asked Grievant to follow her into her supervisor's office. The Personnel Assistant routinely used her supervisor's office to collect drug test samples. Once they were inside the supervisor's office, Grievant said "What's up, [Personnel Assistant]?" The Personnel Assistant told Grievant that Grievant was on her Random Drug list for the month and she needed to do a test. Grievant said "OK". The Personnel Assistant asked Grievant if he would wait there while she went to get her phone and test supplies. Grievant remained in the Supervisor's office as the Personnel Assistant walked towards her office. She stopped at the office of another Human Resource employee to inform her of a conversation the Personnel Assistant had with another Human Resource employee. This conversation took fewer than two minutes.

An employee whose name Ms. T could not pronounce went to Grievant's desk while Grievant was in the Human Resources section. The employee asked Ms. T where was Grievant. Ms. T said Grievant had just left and should be back soon. The employee looked on Grievant's desk for her cell phone. The employee waited a few minutes and then went to Ms. T's desk and said she needed to leave right away to get back on the road and asked if Grievant could be contacted someday. Ms. T said she would call Grievant.

At approximately 2 p.m., while he was waiting in the office of the Personnel Assistant's Supervisor, Grievant received a call on his cell phone from Ms. T. Ms. T told Grievant the woman whose phone he was working on earlier was looking for her phone and she was already at his desk with the phone. Ms. T said the woman was asking if the phone was finished because she needed to leave right away.

Grievant left the Personnel Assistant's Supervisor's office and went to find the Personnel Assistant. He was holding his phone as he searched for the Personnel Assistant. Once he found and approached the Personnel Assistant, he told her "[Personnel Assistant], I need to leave because my boss is calling me." Grievant turned away from the Personnel Assistant, put his cell phone to his ear and told Ms. T "Ok I am on my way." Grievant continued walking to his desk. His telephone call with Ms. T lasted approximately 35 seconds.

Grievant did not attempt to locate the Personnel Assistant later in the day. The Personnel Assistant did not take any action to recall Grievant to be tested. Grievant was not drug tested that day.

Grievant took leave and was out of the office until July 6, 2018. Grievant was removed from employment effective the close of business on July 17, 2018.

Several key facts cannot be determined in this case. The Personnel Assistant testified that after Grievant said he needed to leave because his boss was calling him, she said “[Grievant], I need to” but before she could finish her sentence, Grievant had turned to exit and placed the cell phone against his ear. Grievant testified once he informed the Personnel Assistant he needed to leave, she said, “I’ll get you next time.” The Personnel Assistant’s testimony and Grievant’s testimony cannot both be true. The Hearing Officer closely observed the demeanor of both the Personnel Assistant and Grievant. Neither witness displayed demeanor clearly reflecting untruthfulness regarding their interaction.

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.”² 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.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

Group III offenses include:

Any violation of Operating Procedure 130.2, Alcohol and Other Drug Testing, including use of alcohol while on the job; and/all use, possession, distribution, sale, etc. of illegal drugs or unlawful use of controlled substances will result in termination.⁵

² Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁵ The Agency renumbered Operating Procedure 130.2 as Operating Procedure 135.4. The Agency failed to update its Standards of Conduct to refer to the revised policy number. Grievant had adequate notice of Operating Procedure 135.4 because it was available to him on the Agency’s intranet.

DOC Operating Procedure 135.4 governs Alcohol and Other Drug Testing. Section III contains Definitions. Oral Fluid Testing is defined as:

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

Refusal to Submit to a Substance Abuse Test is defined as:

When an employee or applicant:

- Fails to remain at the testing site until the drug and alcohol testing process is complete.
- Fails to provide a urine or oral fluid specimen for any alcohol or other drug test required by this procedure. ***
- Fails or declines to take a second drug or alcohol test that has been directed by the MRO for this procedure.

Section IV(D)(2) of this policy provides:

h. It shall be the responsibility of the Human Resource Officer, supervisor, or Unit Head to notify the employee that he or she has been selected for random alcohol and other drug testing.

i. Employees should not be given advance notice that they are have been scheduled for a random drug or alcohol test. Once called, the employee shall report for testing as soon as possible; preferably within 2 hours, but no later than by the end of the normal business day.

l. If an employee refuses to report for random drug testing on the day they are notified, it will be treated as refusal to test and grounds for termination.

Section IV(C)(9) provides:

Employees who refused to submit to alcohol and/or drug testing will be dismissed for “failed to follow a direct order which would endanger the public safety, internal security, or affect the safe and efficient operation of the DOC.”

Group III offenses include:

Any violation of Operating Procedure 130.2, Alcohol and Other Drug Testing, ... will result in termination.⁶

⁶ DOC Operating Procedure 135.1(D)(2)(j).

On June 28, 2018, the drug testing site was the Personnel Assistant's Supervisor's office. Grievant was taken to the drug testing site and asked to remain there by the Personnel Assistant. Grievant was informed he was selected to take a drug test and he agreed to take a drug test. Grievant failed to remain at the drug testing site until the drug test was completed. Grievant's failure to remain at the drug testing site until the drug test was completed constituted a refusal to submit to a substance abuse test. Grievant's refusal to submit to a substance abuse test is a basis for removal under DOC Operating Procedure 135.4, Alcohol and Other Drug Testing. The basis for removal is confirmed by DOC Operating Procedure 135.1, Standards of Conduct which provides that a violation of the Agency's Alcohol and Other Drug Testing policy is a Group III offense subjecting an employee to removal. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action with removal.⁷

Grievant argued that he did not refuse to take the drug test. Initially, he told the Personnel Assistant that he intended to take the drug test. He remained in the office while the Personnel Assistant left to obtain her testing equipment. Only after he understood that his supervisor was attempting to locate him did he leave the office. In order to meet its burden of proof, it is not necessary for the Agency to show the Grievant expressly refused to be drug tested. Under the Agency's policy, once Grievant left the testing site, he was deemed to have refused the drug test, thus, forming a basis for the disciplinary action.

Grievant argued that the Agency denied him substantive and procedural due process. Grievant alleged that the Chief Information Officer concluded on June 29, 2018 that Grievant should be terminated from employment on July 9, 2018 without having first considered Grievant's response to the Agency's allegations. To the extent Grievant's assertions are true, these defects have been cured by the hearing process. Prior to the hearing, Grievant was aware of the Agency's allegations. He had an adequate opportunity to prepare and present all of his defenses during the hearing.

⁷ The Agency also alleged that Grievant should receive a Group III Written Notice for falsifying records. The Agency alleged Grievant submitted a false statement of his account of the events on June 28, 2018. The Hearing Officer was not able to determine from Grievant's demeanor that he was untruthful regarding any material fact. Simply because Grievant and the Personnel Assistant had different accounts of their interaction does not mean Grievant was lying. It is not unusual for two witnesses to observe the same event yet have different accounts of that event. Grievant explained that when Ms. T said "someone" was looking for him he understood her to be referring to his supervisor because Ms. T and Grievant sometimes substituted "someone" for the Supervisor's name in a playful manner. Although the Personnel Assistant understood Grievant to suggest his supervisor was on that phone as he spoke with the Personnel Assistant, Grievant intended to suggest his boss was calling for him to return to his desk. The terse and hurried conversation between Grievant and the Personnel Assistant was fraught with uncertainties. Although there is not sufficient evidence to support the issuance of a Group III Written Notice for falsifying records, there remains sufficient evidence to support issuance of a Group III Written Notice under the Agency's Alcohol and Other Drug Testing policy.

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”⁸ 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.

Grievant argued that Grievant remained in his office for at least two and a half hours after being called away by Ms. T. The Personnel Assistant easily could have walked upstairs to Grievant’s office confirmed whether he intended to take the drug test. The Chief Information Officer testified he spoke with several Human Resource managers. One of those managers told the Chief Information Officer that once an employee refused to take a drug test, the Agency did not ask the employee a second time because the Agency did not want to be “piling on” and “further humiliate the individual.” The Agency’s preference for removing an employee rather than humiliating that employee seems illogical, but that decision is within the Agency’s discretion. In light of the standard set forth in the Rules, 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 removal is **upheld**.

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

⁸ Va. Code § 2.2-3005.

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.