

Issue: Group III Written Notice with Termination (violation of drug/alcohol policy);
Hearing Date: 09/18/17; Decision Issued: 09/20/17; Agency: DOC; AHO: John R.
Hooe, III, Esq.; Case No. 11074; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA
Office of Equal Employment and Dispute Resolution**

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of: Case No. 11074

Hearing Date: September 18, 2017
Decision Issued: September 20, 2017

PRELIMINARY MATTERS

Upon being appointed as the Hearing Officer in this matter, effective August 8, 2017, the Hearing Officer arranged a pre-hearing telephone conference which was conducted on August 15, 2017. The telephone pre-hearing conference was conducted with the Grievant and the Agency advocate. During the telephone pre-hearing conference, it was agreed that the grievance hearing was to be conducted on Monday, September 18, 2017 beginning at 10:00 a.m. at the facility. It was also agreed that a copy of all exhibits a party intends to introduce at the hearing and a list of witnesses to be called would be provided to the Hearing Officer and the other party no later than Monday, September 11, 2017 by 5:00 p.m.

APPEARANCES

Grievant
Agency Advocate
Agency Witness 1 (Lieutenant)
Agency Witness 2 (Sergeant)
Agency Witness 3 (Assistant Warden)
Agency Witness 4 (Warden)

ISSUES

1. Did the Grievant violate Operating Procedure 135.4 by refusing to take a required drug test and failing to follow a supervisor's instructions to submit to the test?
2. If so, did the Grievant's failure to follow her supervisor's instructions to take the drug test or the Grievant's refusal to take the drug test constitute a Group III violation?

3. If the Grievant's behavior constituted the alleged violation, was termination of Grievant's employment in accordance with policy and procedure?

EXHIBITS

The Agency Exhibits admitted into evidence are contained in one notebook with the following contents:

1. Group I Written Notice
2. Grievant's Form A and attachment
3. OP 135.4 Alcohol or Other Drug Testing
4. OP 038.1 Reporting Serious or Unusual Incidents
5. OP 135.1 Standards of Conduct
6. Incident Reports and Workers' Compensation Reports
7. Memorandum-Statement of Sergeant P.J.
8. Statement of Lieutenant
9. Statement of Nurse
10. Statement of L.A.
11. Department of Corrections Orientation Checklist
12. Expectations of Employment

The Grievant did not introduce exhibits in addition to the Agency Exhibits.

FINDINGS OF FACT

The Agency's witness 1, (the Lieutenant) testified that she has been an employee of DOC for twenty years and has worked at the facility for three years. She referred to Agency Exhibit 8 which is her narrative of what happened on June 4, 2017. In her narrative she states that a Sgt. advised her that the Grievant had splashed a chemical in her eye and that the Grievant needed to leave. The Lieutenant instructed the Grievant to be checked out by the Nurse. The Nurse related that the Grievant's eyes were flushed for thirty minutes at the wash station with water and saline solution. The Nurse further stated that although the appearance of the Grievant's eyes were "...clear, no redness..." the Grievant said "my eyes are burning and blurred." The Lieutenant testified that she advised the Grievant that the workers' compensation package needed to be completed, that she should choose a doctor from the package, and that the Sergeant would drive her to the doctor. According to the Lieutenant, the Grievant walked out of her office and said "I am going to call my dad." The Lieutenant testified that she gave the workers' compensation paperwork to the Sergeant to take with the Grievant to be completed. The Lieutenant testified that when the Grievant returned to the facility after having been to the hospital she spoke with the Grievant on the telephone and told her that she had to take the drug test. The Lieutenant testified that the Grievant responded "No. My family is here." The Lieutenant testified that she warned the Grievant that she would be written up and that the Grievant said "Do what you got to do. I'll come back tomorrow to do the drug test." The Lieutenant testified that she was prepared

to give the Grievant the drug test and that any Watch Commander could give the test and that they are all trained to give the test.

Agency witness 2, the Sergeant, an employee of DOC for nineteen and a half years, (the entire time at the facility) testified that she was called by the Lieutenant to take the Grievant to "Medical Express." She testified that when the Grievant continued to complain of problems with her eye, the Sergeant called the Lieutenant and advised that she was going to the Hospital. The Sergeant further testified that while at the Hospital the charge nurse said that they would not do the drug test. She further testified that she told the Grievant that the Grievant needed to fill out the incident report and take the drug test when they returned to the facility. The Sergeant testified that upon returning to the facility the Grievant refused to complete the incident report or take the drug test and stated "I am tired and ready to go" or a statement similar. Referring to Agency Exhibit 7, the Sergeant testified that when she arrived back at the facility with the Grievant the Grievant entered the front entry and spoke on the telephone with the Lieutenant, the Sergeant testified (and states in her memorandum at Agency Exhibit 7) that she heard the Grievant say to the Lieutenant (during the telephone conversation) that "I'll take that write up. My ride is waiting for me" and that the Grievant then exited the facility. The Sergeant admitted upon cross examination by the Grievant that the Grievant while at the Hospital agreed to do the drug test before the nurse and doctor at the Hospital declined to perform the test.

Agency Exhibit 6 Internal Incident Report was completed by the Lieutenant on June 4, 2017 at 9:46 p.m. The Incident Report indicates that the date/time of the incident was June 4, 2017 at 1:30 p.m. The Incident Report includes the narrative of what was related to the Lieutenant including that fact that the Grievant after going to the hospital returned to the facility at 9:10 p.m.

Agency Exhibit 9 is the statement of the Nurse relaying her knowledge of the incident which occurred on June 4, 2017. She stated that the Grievant ran towards her fanning her eyes and yelling out. The Nurse walked to the area where cleaning supplies were stored and saw green liquid on the floor with a bottle lying next to it labeled "floor stripper". The Nurse said in her statement that although they continued to rinse the Grievant's eyes for over fifteen minutes, the Grievant complained that she was having no relief from the pain and could not see out of her left eye.

Agency Exhibit 10 is the handwritten statement of the Grievant dated June 7, 2017. In the Grievant's written statement she says at page 6 that it wasn't until she arrived at the Hospital that the Sergeant told the Grievant and the doctor that the Grievant had to take a drug test that the Lieutenant had forgotten. Although the Grievant's written statement is not clear, the Grievant testified that she agreed to take the drug test at the hospital but the nurse and doctor at the hospital declined to perform the drug test. The Grievant's statement goes on to say that when she arrived back at the facility with the Sergeant she was given the phone to talk to the Lieutenant, the Grievant stated that the Lieutenant wanted the Grievant to do the paperwork at that time but that the Grievant told the Lieutenant that she could not see and could not do the paperwork at that time. The Grievant testified that it was in that context that she told the Lieutenant that she could "write it up" and left the facility.

Three Agency witnesses, the Assistant Warden, Human Resources Officer and Warden, testified regarding their involvement with the disciplinary proceedings with the Warden emphasizing that although he considered mitigating factors, policy is hardline regarding refusing to take a drug test and that after consideration termination was considered consistent with policy and procedures.

The Grievant testified that she never refused to do a drug test. She testified that no one said anything about a drug test prior to her leaving for the Hospital and that she agreed to take the drug test while at the Hospital. The Grievant denied that the Lieutenant said anything about the drug test when she spoke with her on the phone upon returning from the hospital to the facility.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code ' 2.2-2900 et. seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee=s ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code ' 2.2-3000 (A) sets forth the Commonwealth=s grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints.....

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under ' 2.2-3001.

Operating Procedure 135.4, at page 11 provides that “The post-accident drug and alcohol test should be conducted as soon as medically practical following an accident or injury that meets the criteria for testing.” It further provides (at page 6) that “Employees who refuse to submit to alcohol and/or drug testing will be dismissed for “failure to follow a direct order which could endanger the public safety, internal security, or affect the safe and efficient operation of the DOC.”

Operating Procedure 135.1 Standards of Conduct provides that Group III offenses include, but are not limited to “refusal to obey instructions that could result in weakening of

security.”

In considering all of the evidence, it is the Hearing Officer’s opinion that the Grievant was told by the Lieutenant before she left the facility to go to the hospital, that upon her return she was to take the drug test. The Grievant was also told by the Sergeant while at the Hospital that the Grievant would need to return to the facility for a drug test. Finally, it is the Hearing Officer’s opinion that upon the Grievant returning to the facility, the Lieutenant told the Grievant over the telephone that she had to take the drug test and the Grievant refused.

DECISION

The Hearing Officer upholds the Written Notice, Group III issued July 6, 2017 and termination as being consistent with policy and procedure.

APPEAL RIGHTS

A hearing decision must be consistent with law, policy, and the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings). A hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to administrative review by both EDR and the DHRM Director based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or email. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests for administrative review must be provided to the other party, EDR and the Hearing Officer.

Important Note: Requests for administrative review must be in writing and received by the reviewer within fifteen calendar days of the date of the original hearing decision. AReceived by@ means delivered to, not merely post-marked or placed in the hands of a delivery service.

Requesting Administrative Review:

1. **A challenge that the hearing decision is inconsistent** with state or agency policy is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. The director=s authority is limited to ordering the Hearing Officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-371-7401 or emailed.

2. **A challenge that the hearing decision is not in compliance with the grievance procedure (including the Grievance Procedure Manual and the Rules for**

Conducting Grievance Hearings), as well as a request to present newly discovered evidence, is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance. EDR=s authority is limited to ordering the Hearing Officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the office of Employment Dispute Resolution, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-786-1606 or emailed.

In response to any requests for administrative review, the opposing party may submit a written challenge (rebuttal) to the appropriate reviewer. If the opposing party chooses to submit a rebuttal, it must be received by the reviewer within ten calendar days of the conclusion of the original fifteen day appeal period. A copy of any such rebuttal must also be provided to the appealing party, EDR, and the Hearing Officer.

Administrative review decisions issued by the Director of DHRM and EDR are final and not appealable. If the DHRM Director or EDR orders the Hearing Officer to reconsider the hearing decision, the Hearing Officer must do so. If request for administrative review have been made to both the DHRM Director and EDR, the Hearing Officer need not reconsider his/her decision, if ordered to do so on remand, until both administrative reviews are issued or otherwise concluded unless otherwise directed by EDR in the interest of procedural efficiency. If requests for administrative review have been made to both the Director of DHRM and EDR, EDR shall generally respond first. Administrative reviews by the Director of DHRM should be issued within thirty calendar days of the conclusion of any other administrative reviews.

Final Hearing Decision. A Hearing Officer=s original decision becomes a final hearing decision, with no further possibility of administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the Hearing Officer has issued a revised decision. **Judicial Review of Final Hearing Decision:** Once an original hearing decision becomes final, either party may seek review by the Circuit Court on the ground that the final hearing decision is contradictory to law. Neither the Hearing Officer nor the Department of Human Resources Management (or any employee thereof) shall be named as a party in such an appeal.

An employee does not need EDR=s approval before filing a notice of appeal. However, an agency must request and receive approval from EDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal. The request for approval to appeal must be received by EDR within 10 calendar days, which means delivered to, not merely postmarked or placed in the hands of a delivery service. The agency may make its request by email or fax. The agency must provide a copy of its appeal request to the employee.

EDR will provide a response within 10 calendar days of the agency=s request.

A notice of appeal must be filed with the Clerk of the Circuit Court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision. At the time of filing, a copy of the notice of appeal must be provided to the other party and EDR. The judicial review procedure shall be as more particularly set out in the Grievance Procedure Manual.

John R. Hooe, III
Hearing Officer