



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.



COMMONWEALTH of VIRGINIA
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 11261-R

Remand Decision Issued: August 7, 2020

REMAND DECISION

I. PRODEDURAL HISTORY

The Virginia Department of Corrections (DOC) employed Grievant from December 27, 2016 until July 17, 2018. On July 17, 2018, Grievant was issued a Group III Written Notice of disciplinary action for failing to submit to a random¹ drug test and falsifying records. On October 30, 2018, the Hearing Officer issued a Decision upholding the Agency's decision.

On April 5, 2019, the Honorable Beverly W. Snukals, Judge, Circuit Court of the City of Richmond, **Ordered**:

The matter is remanded to the Hearing Officer to determine whether Grievant's employment with the Virginia Department of Corrections was a "safety-sensitive job" that qualifies as an exception to the warrant requirement of the Fourth Amendment.

The Agency appealed the Circuit Court Judge's Order to the Virginia Court of Appeals. On November 25, 2019, the Virginia Court of Appeals concluded the Agency's appeal was premature and the Virginia Court of Appeals lacked jurisdiction to hear the merits of the case. The appeal was dismissed without prejudice which returned the matter to the Hearing Officer.

¹ This remand decision addresses only random drug testing of employees by the Agency.

On February 18, 2020, a Remand Hearing was held at the Agency's Central Office Headquarters. The parties presented additional testimony and exhibits. Exhibits and evidence from the original grievance hearing were incorporated into the Remand Hearing evidence.

II. 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.

III. ISSUES

1. Whether Grievant's position with the Virginia Department of Corrections was a "safety-sensitive job?"
2. Whether the Agency's discipline was consistent with law?

IV. DISCUSSION

To resolve the issue remanded to the Hearing Officer, the Hearing Officer must (1) make findings of fact regarding Grievant's work duties, (2) define the phrase "safety-sensitive job", (3) determine whether Grievant's position was a safety-sensitive job, and (4) determine whether the Agency's random drug test qualified as an exception to the Fourth Amendment requirement for a search warrant.

Findings of Fact – Grievant's Work Duties

The mission of the Department of Corrections "is to enhance the quality of life in the Commonwealth by improving public safety. The Department accomplishes its mission through reintegration of sentenced men and women in the department's custody and care by providing supervision and control, effective programs and re-entry services in safe environments that foster positive change and growth consistent with research-based evidence, fiscal responsibility, and constitutional standards."²

The Department of Corrections employed Grievant as a Telecom/Network Coordinator. He began working for the Agency in December 2016.

² 6 VAC 15.

On December 27, 2016, Grievant signed a Receipt of Operating Procedure 135.4, 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.³ ***

DOC Operating Procedure 135.4 governs Alcohol and Other Drug Testing. Section III contains Definitions. 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:

I. 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.

Grievant completed a Computer Applications Access Checklist on September 26, 2016 and October 17, 2017 identifying his ability to access and use DOC Technology Information resources. Out of approximately 47 applications, Grievant was given access only to "Email/Outlook." He was not given access to inmate security related applications such as "VACORIS" which contain information about inmates and "Rapid Eye" which relates to video recording within prisons. Grievant and a supervisor signed the Checklist.

An Employee Work Profile is the, "form used to complete the annual performance evaluation that includes a brief work description, performance plan, core responsibilities, performance measures, and employee development goals."⁴

³ Agency Exhibit 8.

⁴ DHRM Policy 1.40, Performance Planning and Evaluation.

On November 20, 2017, Grievant received an Employee Work Profile effective December 1, 2017. On January 29, 2018, Grievant received another version of his Employee Work Profile effective December 1, 2017.⁵

Grievant's Purpose of Position was:

To provide technical expertise for managing [the] Department of Corrections' computer networks and telecommunications technology. This includes network administration, performance monitoring, hardware support, project planning, development of technical standards and policies, and providing overall technical leadership.⁶

The Organizational Objective of his position was:

Evaluates and coordinates voice and wireless communications systems; Administers voice and wireless telecommunications hardware and software applications such as voicemail, directory services, paging systems, and remote messaging devices; Provides technical support to voice systems related project activities.⁷

Grievant's Core Responsibilities⁸ (listed in order of importance) included:

A. Performance Management.

Responds to instructions and feedback of supervisors in a constructive manner in order to improve personal performance.

B. Telecommunication management for the Department of Local Area Network (LAN) and Wide Area Network (WAN).

Monitors the development and integration of telephony of telephony systems and services in a LAN/WAN environment with DSL, ISDN, T1, DS3, ATM, routers, switches and hubs. Working knowledge and experience of Cisco's UCaaS and Call Manager and Call Manager Express VoIP solutions. Perform basic telecommunications moves, add, changes, and deletes TSRs. Elevate existing networks, troubleshoot escalated technical issues, and recommend additional solutions and upgrades. Evaluates service requests and coordinates installations. Supports voice and communications systems upgrades. Troubleshoots telecommunications,

⁵ This EWP was in effect at the time of the Agency attempted to drug test Grievant.

⁶ Reconsideration Agency Exhibit 2.

⁷ Reconsideration Agency Exhibit 2.

⁸ Core Responsibilities are "[j]ob responsibilities that are primary and essential to the type of work performed by an employee and normally remain relatively consistent during the performance cycle." See, DHRM Policy 1.40 Policy Planning and Management.

data services and hardware for remote sites. Coordinates with ITP and service providers to resolve system, hardware, and circuit issues. Provide weekly status reports.

C. Prioritizes projects.

Maintain appropriate networking and two-way communication with Department and external resources. Plans and conducts technical analysis of DOC facilities and offices to identify telecommunications requirements and problems. Verifies hardware configurations and installations. Researches and evaluates new technology to improve telecommunications in the DOC and in the migration of the Department toward IP Telephony. Performs impact analysis including cross platform compatibility.

D. Develops system standards and policies based on analysis of network performance.

Document specifications for procurement of telephony services and equipment. Develops and implements policies, procedures, and processes. Ensures implementation of technology does not compromise current systems. Performs impact analysis. May lead various projects and report completion to upper management.

E. Provides technical leadership and expertise to Local Support Partners (LSP), Site Technicians, Help Desk, and end users.

F. Other Duties and Special Projects as Assigned by the A&O Manager or CIO.⁹

When Grievant was hired, the Agency expected him to travel 25% of the time and be on-call rotation.¹⁰ Grievant would sometimes drive a State vehicle. Grievant's Physical Demand Worksheet showed he was expected to spend 80 percent of his time sitting and 20 percent of his time walking.¹¹

Grievant reported to the Supervisor who reported to the Chief Information Officer. Grievant was not responsible for supervising any employees.

If the Governor shut down State agencies due to inclement weather, DOC security employees would have to report to a prison in furtherance of public safety. Grievant would not need to report to the Central Office when the Governor shut down State agencies.

The Agency has security personnel working in prisons who directly supervise inmates. Most of these employees wear uniforms and hold rank such as Corrections

⁹ Remand Agency Exhibit 2.

¹⁰ Remand Agency Exhibit 3.

¹¹ Grievant Reconsideration Exhibit 4.

Officer, Corrections Sergeant, Corrections Lieutenant, Corrections Captain, and Corrections Major. Some security personnel are trained and authorized to use weapons. Grievant did not supervise inmates, wear a uniform, or hold rank. He did not carry a firearm or O.C. spray while working.

Grievant's position did not require him to have "direct contact" with inmates on a daily basis. Inmates were not issued Agency cell phones and not permitted to have them. Grievant would not be in a position to provide services or assistance directly to an inmate as part of his job. Grievant did not transport inmates. He was not responsible for observing or reviewing inmate work. Any contact Grievant had with offenders would have been under the supervision or close observation of DOC security employees.

The Agency had an "Offender Phone System (GTL)" that was available to inmates at facilities. None of Grievant's duties involved the Offender Phone System. He did not have authorization from the Agency to access that application. Grievant has not worked on the Offender Phone System.

The Agency has several Correctional Facilities located throughout the Commonwealth. Most of these prisons are secured by a tall perimeter fence with razor-wire intended to keep inmates from escaping the prison. Inmates live in housing units inside the prisons. Many of these housing units have cells with doors that are locked and unlocked by a corrections officer sitting in a control booth not accessible to inmates. In order to enter the secured area of a prison, a visitor must pass through "shake down" where corrections officers search visitors for contraband. Once inside a prison, a visitor can only go into areas as permitted by corrections officers who open and close secured doors.

The Agency has its Central Office located in Richmond, Virginia. This headquarters is located in an office building without a fenced perimeter. Grievant worked in the Central Office.

To gain access to his desk in the Central Office, Grievant had to show his identification to a contractor employee at the building entry. He and his belongings were not searched when he entered the Central Office building.

Grievant worked on cell phones use 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 would sometimes leave a customer's cell phone on his desk.

Inmates posing lowered security risks were transported from prisons to work at the Central Office and then returned to their prisons after work. For example, some inmates from a women's prison worked preparing and serving food in the Central Office cafeteria. Two other inmates performed maintenance work in the Central Office. Grievant worked from his office in the Central Office building. He was not involved in supervising any inmates in the Central Office or any inmates in Agency correctional facilities. Non-

employee authorized visitors to the Central Office would have the same access to the Central Office cafeteria as would any employee working in the Central Office.

Some Agency employees have been able to smuggle illegal drugs into prisons despite the Agency's search and security precautions. Bringing drugs into a correctional facility would be contrary to Agency policy and could result in criminal proceedings against the carrier. When Grievant entered a secured portion of a prison, he would be subject to the same search given to other employees and public visitors.

The Agency has a telecommunications circuit that is the "backbone" of the Agency's telecommunications system. This circuit connects employees with Agency applications such as email and VACORIS. In order to prepare reports explaining bandwidth usage, Grievant would have to have access to the telecommunications circuit. Some of Grievant's duties included special projects. For example, the Agency wanted to ensure separate telephone systems for its employees and inmates. If the Agency needed to shut down the phone system to a facility when inmates rioted, Grievant could be tasked to provide analysis on how to accomplish that task.¹² Grievant did not have keys to data closets at facilities. To gain access to communications cables inside data closets, he would have to be given access by another employee.

The Agency had data network closets which consisted of network servers, routers, switches, and cables. Some of the cables provided access to the Internet.

Grievant had a special project when the Agency moved a Probation Office to another location. He was responsible for ensuring that bandwidth was moved to the new location without disconnecting it at the old location. He completed the task without leaving his office.

Grievant had a special project involving a "monitor refresh." He took new computer monitors to a different facility. He unpackaged the monitors and set them up for DOC employees to use. He retrieved the old monitors and brought them back to the Central Office.

Grievant had the authority to purchase items to perform his job duties. After obtaining approval from the Supervisor, he would obtain many items. With respect to purchasing cell phones for employees, however, he did not need the Supervisor's prior approval.

Grievant had not been advised he would be responsible for responding to an attempted inmate escape. The likelihood Grievant would be asked to help in response to an inmate escape was negligible.

¹² No evidence was presented showing that the Agency experienced an inmate riot and had to shut down its phone system.

Grievant had access to the Agency's business-related information. He did not have access to any safety-sensitive or confidential information.

Grievant was not responsible for operating heavy equipment. He was not required to have a commercial driver's license to operate Agency equipment.

Grievant was not responsible for supervising or operating Agency physical infrastructure.

Definition of Safety-Sensitive Job

The Commonwealth of Virginia does not have a statute or regulation defining "safety-sensitive job." The Department of Human Resource Management and the Department of Corrections do not have policies defining "safety-sensitive job."

The Commonwealth of Virginia has a statute defining "sensitive positions." The Department of Human Resource Management and the Virginia Department of Corrections have policies defining "sensitive positions."

The phrase, "safety-sensitive job" is best defined by analogy with statutes and policies defining "sensitive positions." This analogy is appropriate because a person seeking a sensitive position and a person holding a safety-sensitive job would be subject to higher levels of review to ensure they are individuals of good character.¹³ In short, "safety-sensitive jobs" closely resemble a subset of "sensitive positions." Furthermore, if a position is not a "sensitive position," then it should not be considered a "safety-sensitive job."

Title 2.2, Chapter 12 of the *Code of Virginia* governs the Department of Human Resource Management. *Va. Code § 2.2-1201.1* sets forth DHRM's responsibility with respect to sensitive positions. This section provides:

The Department shall develop a statewide personnel policy for designating positions within each state agency as sensitive. Such policy shall provide that a state agency require any employee, contractor, or final candidate for employment in a position that has been designated as sensitive to submit to fingerprinting and to provide personal descriptive information to be forwarded along with the applicant's fingerprints through the Central Criminal Records Exchange to the Federal Bureau of Investigation for the purpose of obtaining criminal history information regarding such individual.

Each state agency shall continue to record positions designated as sensitive in the Personnel Management Information System (PMIS) to

¹³ For example, a person holding a sensitive position would be subject to a criminal background check and finger printing. A person holding a safety-sensitive job would be subject to random drug testing.

ensure that the Department has a list of all such positions. For purposes of this section, "sensitive positions" shall include those positions:

1. Responsible for the health, safety, and welfare of citizens or the protection of critical infrastructures;
2. That have access to sensitive information, including access to federal tax information in approved exchange agreements with the Internal Revenue Service or Social Security Administration; and
3. That are otherwise required by state or federal law to be designated as sensitive.

Department of Human Resource Management Policy 2.10 governs Hiring.¹⁴ This policy defines a sensitive position as:

A position designated by the agency as directly (i) responsible for the health, safety and welfare of the general populace or protection of critical infrastructures, (ii) that have access to sensitive information, including access to Federal Tax Information in approved exchange agreements with the Internal Revenue Service or Social Security Administration; and (iii) that are otherwise required by state or federal law to be designated as sensitive” for which a criminal history, including fingerprinting, must be obtained for the final candidate from the Federal Bureau of Investigation through the Department of State Police (Va. Code § 2.2-1201.1).

State agencies are authorized to develop Human Resource policies that do not conflict with State policies or procedures.¹⁵ DOC Operating Procedure 102.3 governs its Background Investigation Program. Section III sets forth definitions:

Sensitive Position - A sensitivity designation of a position that has elevated potential for damage to agency security or could have a materially adverse effect on the DOC; a sensitive position is one where the employee individual has consistent supervision and control authority ongoing contact with over offenders, client population, or access to restricted information (including access to VACORIS). (revised 12/12/14)

Non-Sensitive Position - A sensitivity designation of a position that has low potential for damage to agency security; a non-sensitive position is one where the employee individual does not have consistent supervision and control authority ongoing contact with over offenders, client population, or access to restricted information. This may also be any other position so designated by the DOC Director. (revised 12/12/14)¹⁶

¹⁴ DHRM Policy 1.05 governs Alcohol and Other Drug. It does not address drug testing.

¹⁵ See, DHRM Policy 1.01.

¹⁶ The Agency's policy shows revision made to the policy.

Based on State law and DHRM Policy, the Hearing Officer concludes that safety-sensitive jobs are a subset of sensitive positions. A sensitive position may focus on both safety-related duties and non-safety related duties (such as access to sensitive information). The duties of a safety-sensitive job, however, focus on safety. In other words, a safety-sensitive job is:

Responsible for the health, safety, and welfare of citizens or the protection of critical infrastructures.

Was Grievant's Position a Safety Sensitive Job?

Grievant did not hold a safety-sensitive job with the Department of Corrections for several reasons:

First, Grievant's job duties were directed at providing services to other Agency employees and not to inmates. Grievant was to provide technical expertise for managing the Department of Correction's computer networks and telecommunications technology. The Department's computer networks and telecommunications technology was devoted to Agency employees.

Second, from the Agency's organizational perspective, Grievant's job was to evaluate and coordinate voice and wireless communications systems for employees. His position within the organization was to assist employees, not inmates.

Third, Grievant's position had six Core Responsibilities: A. Performance Management; B. Telecommunication management for the Department of Local Area Network (LAN) and Wide Area Network (WAN); C. Prioritizes projects; D. Develops system standards and policies based on analysis of network performance; E. Provides technical leadership and expertise to Local Support Partners (LSP), Site Technicians, Help Desk, and end users; and F. Other Duties and Special Projects as Assigned by the A&O Manager or CIO. None of these core responsibilities related to health, safety, and welfare. Grievant's Core Responsibilities addressed the ability of Agency employees to perform their job duties. Grievant was responsible for providing support and assistance to Agency employees. None of his Core Responsibilities were designed to protect the public or other employees from the actions of inmates.

Fourth, Grievant was assigned to work in the Agency's Central Office and not in a prison. An employee's position location affects the employee's ability to undermine the Agency's public safety mission. For example, an Administrative Support Specialist working inside the secured perimeter of a prison would likely have significantly more daily access to and interaction with inmates than an Administrative Support Specialist working in the Agency's Central Office. Grievant worked in the Agency's Central Office. His interaction with inmates in the Central Office was not significant.

Fifth, when Grievant traveled to Agency prisons, his opportunity to interact with and influence inmates was limited. Some Agency prisons had their administrative offices

outside of the secured perimeter and Grievant would not have to enter the secured portion of the prison. If Grievant had to enter a prison and go inside the secured perimeter, he was searched for contraband. Once inside the secured perimeter, he could only enter those areas authorized by security staff and remain there only so long as security staff permitted him to do so. If Grievant interacted with inmates inside a prison, his interaction would most likely be monitored by video and observed by security staff.

Sixth, Grievant's position did not require that he carry a firearm. He was not engaged in the interdiction of drugs. The Agency did not train Grievant regarding use of a firearm. In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989), the Supreme Court held:

We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness.

Seventh, Grievant was granted access only to the Agency's email and calendar system that he would use to communicate with other employees and Agency vendors and customers. Grievant did not have access to safety-related computer applications such as VACORIS or Rapid Eye. The Agency argued Grievant could enter a data closet and hack into the Agency's data network/backbone to access VACORIS and other sensitive Agency computer systems. This argument is not persuasive because the chance of this happening seems unlikely. Moreover, in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677-78 (1989), the Supreme Court declined to permit warrantless searches of a class of Customs Service employees who "handle classified material" because it suspected that the Customs Service had "defined this category of employees more broadly than is necessary." Grievant's access to data closets and the Agency's computer wiring is akin to handling classified material.

Eighth, Grievant sometimes drove a State vehicle but he was not expected to operate an Agency vehicle that could only be operated by an employee with a Commercial Driver's License. His operation of a State vehicle did not relate to safety.¹⁷

Ninth, Grievant was not involved in the protection of critical physical infrastructure.

¹⁷ See *Am. Fed. of Gov't Employees v. Cheney*, No. C-88-3823-DLJ, 1992 U.S. Dist. LEXIS 20003 (holding that the United States Navy had a sufficient interest in randomly drug testing medical personnel, electronics workers, and boiler workers but not electricians, plumbers, and sheet metal workers); *Bluestein v. DOT*, 908 F.2d 451 (9th Cir. 1990) (holding that aviation industry employees, including flight attendants, air traffic controllers, and maintenance personnel could be randomly drug tested).

Tenth, in *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 628, the Supreme Court identified safety-sensitive positions as including employees whose duties were "fraught with such risks of injury to others that even a momentary lapse of attention [could] have disastrous consequences." If Grievant was performing his job duties and had a momentary lapse of judgment, the consequences to public safety likely would be minimal.

Eleventh, both State law and DHRM Policy require an Agency to designate a sensitive position as sensitive. The Hearing Officer defines the act of designation as an agency first considering all of its positions and then identifying and labeling those positions which are sensitive. An agency could designate all, some, or none of its positions as sensitive. The Agency did not designate Grievant's position as a sensitive position. The Agency's failure to designate Grievant's position as a sensitive position is consistent with the conclusion that Grievant's position was not a safety-sensitive job.

Exception to the Fourth Amendment

The Department of Corrections may not conduct random drug searches of its employees unless permitted by law. Although the Hearing Officer typically presumes the appropriateness of an agency's policies, in this case the question is before the Hearing Officer.

The *Fourth Amendment* to the *United States Constitution* provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of Virginia, Article I. Bill of Rights, Section 10 provides:

General warrants of search or seizure prohibited.

That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.¹⁸

The Department of Corrections is a State agency within the Executive Branch of the Commonwealth of Virginia. When DOC managers act through DOC policies, their actions are actions attributable to the Commonwealth of Virginia. In other words, a

¹⁸ See also, Va. Code § 19.2-59 which provides, "No officer of the law or any other person shall search any place, thing or person, except by virtue of and under a warrant issued by a proper officer."

random drug test conducted by DOC employees is a random drug search conducted by the Commonwealth of Virginia.

A drug test by Oral Fluid Testing is a search within the meaning of the Fourth Amendment. Oral Fluid Testing involves collecting saliva from an employee using a swab. The sample is sent to a laboratory to be tested for illegal drugs. An Oral Fluid Test is more than a minimal intrusion of an employee's right of privacy. The Agency did not obtain a search warrant before attempting to drug test Grievant.

Warrantless searches "are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967).

In *Chandler v. Miller*, 520 U.S. 305, 313 (1997), the Supreme Court held:

To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. (Citations omitted). But particularized exceptions to the main rule are sometimes warranted based on "special needs, beyond the normal need for law enforcement."

The Supreme Court further held:

Our precedents establish that the proffered special need for drug testing must be substantial – important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion.¹⁹

The Agency's public safety mission focused on inmates. Positions with frequent interaction and supervision of inmates were more likely to be safety-sensitive than positions with only occasional involvement with inmates.

The Agency's need for drug testing of Grievant was not substantial. It was not important enough to override Grievant's privacy interest. The Agency's need was not sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion.

In conclusion, the Agency's attempt to randomly drug test Grievant was contrary to the Fourth Amendment. Because the Agency's action was not permitted by law, Grievant was not obligated to comply with the random drug search. The Agency was not authorized to take disciplinary action against Grievant for his failure to complete a random drug test. The Group III Written Notice with removal must be reversed.

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

¹⁹ *Chandler v. Miller*, 520 U.S. 305, 319 (1997).

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 Remand Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

V. ORDER

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. 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

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an 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 DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of 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: 11261-A

Addendum Issued: October 9, 2020

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.¹ 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.²

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 has substantially prevailed on the merits of his grievance and ordered to be reinstated. There are no circumstances that would make an award unjust.

If an attorney files a timely fee petition, that attorney may amend or supplement that petition to include time devoted to subsequent appeals or to comply with the Hearing Officer's request for clarifying information.

¹ Va. Code § 2.2-3005.1(A).

² § 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.

Grievant's Attorney devoted 26.9 hours to the first grievance hearing. He devoted 15.8 hours to the second grievance hearing. He devoted an additional 6.8 hours to respond to the Agency's administrative appeal. Grievant's attorney devoted a total of 49.50 hours. DHRM requires reimbursement at the hourly rate of \$131. Thus, Grievant should be reimbursed attorney's fees in the amount of \$6,484.50.

The Agency argued that an award of attorney's fees would be unjust because the Grievant chose not to raise in the first hearing his defense that the random drug test was unconstitutional. The Agency argued that Grievant's strategy resulted in the need for a court appeal and second hearing over a year after the first hearing took place. The Agency asserts if Grievant had raised his defense in the initial grievance, the subsequent time and expense required from the parties could have been avoided. The Agency asked that attorney's fees be limited to 15.8 hours at \$131 per hour.

The Agency's argument is partly based in speculation. If Grievant had raised his constitutional defense in the first hearing, it is likely that hearing would have taken much longer and resulted in additional attorney hours. If Grievant had prevailed after the first hearing based on constitutional grounds, it is likely the Agency would have appealed that decision. Thus, the timing of Grievant's defense would not have prevented subsequent appeals or avoided unnecessary expense. The Hearing Officer denies the Agency's request.

AWARD

Grievant is awarded attorney's fees in the amount of \$6,484.50.

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