

Issue: Group III Written Notice with termination (positive drug screen); Hearing Date: September 19, 2001; Decision Date: September 19, 2001; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5282



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Grievance No: 5282**

Hearing Date: September 19, 2001  
Decision Issued: September 19, 2001

**PROCEDURAL HISTORY**

On August 16, 2001, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*Your random urine screen on July 2, 2001, was reported by [Doctor] (Medical Review Officer-Commonwealth Occupational Safety and Health Associates, Inc.) as being confirmed positive for Cocaine. According to DOC Procedure Number 5-55 and the Attachment, Notification of Receipt of DOC Procedure 5-55 which you signed on October 17, 1997, if you test positive for illegal drug use, your employment will be terminated. The Department views a positive urine screen for illegal drug use as illegal conduct which endangers the public safety, internal security or affects the safe and efficient operation of the Department. To continue you in your position could constitute negligence in regard to the agency's duties to the public or to other employees.*

On August 17, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 28, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 19, 2001, a hearing was held at the Agency's regional office.



## **APPEARANCES**

Grievant  
Agency Party Designee  
Legal Assistant Advocate  
Medical Review Officer

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal.

## **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. 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 Correctional Officer Senior at one of its facilities. Her name was randomly selected by the Agency for drug testing. On July 2, 2001, she gave a urine sample at the collection location. The sample was placed in two bottles and sealed. Grievant initialed the seals on each bottle.

The testing laboratory received the two bottles on July 3, 2001. The laboratory conducted two tests on one of the bottles. The first test was designed to screen out samples that did not contain illegal drugs. Once the first test showed that the sample might contain cocaine, the sample was further tested. The second test was more rigorous and specific. It confirmed that the sample contained cocaine.

Because there is some risk that an individual may be exposed to "second hand" cocaine inhalation, each test provides for a cutoff screen. If the sample contains traces of cocaine below the cutoff amount, then the sample is deemed to have no cocaine in it. The amount of cocaine in Grievant's sample exceeded the cutoff screen, and thus, the test showed positive for cocaine. Her usage could not have resulted from "second hand" inhalation of cocaine.

The lab issued a report to the Medical Review Officer (MRO) on July 5, 2001. The MRO is a physician who is responsible for verifying that the lab results are accurate. He spoke with Grievant and informed her of the test results and asked if she could explain why the test might be inaccurate. Grievant subsequently provided the MRO with a list of her medications. None of those medications could have resulted in a false positive according to the unrebutted testimony of the MRO. The MRO also informed Grievant that she could have the second bottle tested at another lab. She did not request testing of the second bottle.

### **CONCLUSIONS OF LAW**

Department of Corrections Policy Manual ("DOCPM") § 5-55 establishes procedures for random urinalysis testing for illegal drug use and alcohol. Grievant received written notice of this policy and the consequences for violating the policy. The Agency complied with all relevant provisions governing specimen collection and laboratory analysis.

The Agency has a zero tolerance policy regarding use of illegal drugs. Violation of DOCPM § 5-55 is a Group III offense with termination. DOCPM § 5-10.17(D). Grievant violated the policy and her termination was appropriate.

Grievant contends she did not use cocaine and that the tests must be inaccurate. Based on the evidence presented, however, the Agency proved that (1) the specimen was properly collected, tested and re-tested; (2) Grievant was given a reasonable opportunity to offer an explanation for an inaccurate test; (3) Grievant's explanation that the medication she was taking could have generated a false positive test was not possible; and (4) Grievant was given the opportunity to have a separate test done, but failed to do so. The Hearing Officer concludes that Grievant's defense is inadequate to rebut the Agency's evidence.

### **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**

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this 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 four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **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 cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 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 HRM, 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.

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Carl Wilson Schmidt, Esq.  
Hearing Officer