

Issue: Group III Written Notice with termination (failure to follow a direct order; failure to submit to random drug test); Hearing Date: July 25, 2002; Decision Date: August 24, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5482



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5482

Hearing Date: July 25, 2002
Decision Issued: August 24, 2002

PROCEDURAL HISTORY

On May 22, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Failure to follow a direct order which could endanger the public safety, internal security, or affects the safe and efficient operation of the Department by refusing to submit to a reasonable suspicion drug test on Friday, May 10, 2002.

On May 21, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 27, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 27, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative

Legal Assistant Advocate
Training and Development Coordinator
Narcotics Canine Handler
Correctional Canine Officer
Assistant Warden Operations
Assistant Warden Programs
Major
Equipment Repair Specialist
Casework Senior Counsel

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 for approximately 18 years until his removal effective May 16, 2002. He worked as a Corrections Recreation Supervisor. His job obligated him to “provide a year-round recreation program that includes team, individual activities and games for leisure to meet the needs of the inmate population.”¹ His most recent evaluation rated him as a contributor.²

On November 13, 1997, Grievant signed a statement indicating he had received a copy of the Department’s Procedure 5-55 and understood that, “employees are subject to drug and alcohol testing when reasonable suspicion exists”³ This policy

¹ Agency Exhibit 1.

² Agency Exhibit 1.

³ Agency Exhibit 3.

applies to “all full and part-time salaried employees, wage employees and contract employees”

In April 2002, an inmate overdosed on heroin brought into the Facility. Facility staff had been investigating a group of inmates originally from Richmond. Many of those inmates worked in the recreation department under Grievant’s supervision.

In May 2002, Agency staff working outside of Grievant’s Facility asked an inmate to submit to drug testing. The inmate said the drug testing was unnecessary because two weeks earlier he had participated in a “parole party” inside Grievant’s Facility where he used illegal drugs. Upon learning of the former inmates’ comments, the Warden decided to discontinue the investigation of the Richmond inmates and simply bring in drug detection dogs and remove the Richmond inmates from the Facility. Her objective was to eliminate the source of the drug problem at the Facility. The former inmate also informed Agency staff that drugs were being brought into the Facility during the week and hidden inside the Facility until the weekend. By waiting to distribute the drugs until the weekend, the inmates hoped to mislead Facility security personnel into thinking the drugs were being brought into the Facility during weekend visitations. The Warden decided to have a canine search the areas where the Richmond inmates frequented. These areas included the gym where Grievant worked.

Dogs have an exceptional ability to distinguish between odors. They can smell odors that humans cannot smell. In addition, dogs can isolate odors that humans cannot distinguish. For example, if a person notices the smell of spaghetti sauce, a dog smelling the same sauce will notice the smell of each of the ingredients making up the sauce. The Agency assigns dogs to certain corrections officers and each dog and officer receive extensive training in drug odor detection. The initial training lasts 12 weeks⁴ and then must be renewed annually. When the corrections officer instructs the dog to “find” the dog is trained to find the odor of certain illegal drugs. The dogs are also trained to disregard odors other than the odor of illegal drugs. For example, the dogs are trained to disregard food odors.

The Agency uses two types of drug detection canines. Positive drug detection dogs will locate the odor of illegal drugs and then scratch at the location of the drugs. Passive drug detection dogs will locate the odor of illegal drugs and then sit and look at the dog handler for a favorable response from the handler. When drugs are located in a specific area, positive dogs are adequate to locate the odor. If the odor comes from human, then positive dogs are not preferred because they would have to scratch the human to indicate the location of the odor. Thus, when drug odors are located on a human, passive dogs are preferred because they will touch or point to the human and then sit down immediately without injuring the human.

⁴ The 12 week training is conducted at the Agency’s academy. Men and women of all races are used as part of the training. The dogs do not distinguish between individuals based on race. A dog cannot be ordered to alert on a specific person who does not have the odor of drugs.

Traces of drug odors can be transferred among individuals even though the drug may not have been transferred. For example, if an inmate touches heroin and then touches keys and someone else later touches the keys, the drug odor may be transferred to the person later touching the keys. If the odor is sufficient, a drug canine would identify the odor on the person receiving the keys even though that person never handled heroin.

On May 10, 2002, the Narcotics Canine Handler brought his positive response dog into the gym area in order to determine the presence of odors of illegal drugs. This officer had worked as a canine officer for approximately six years. Grievant has an office as part of the gym. The positive response dog alerted to a handcart in the gym. Grievant opened his office and the dog alerted to a drawer in Grievant's desk. Next, the dog alerted to the bottom drawer of a file cabinet in the game room. Grievant had been watching the procedure. He indicated he needed keys and needed to go to the front. After using the keys, Grievant gave the keys to the Lieutenant. The Narcotics Dog Handler asked that the keys be placed between two chairs that the positive dog had already cleared. The positive dog then passed through the area with the plastic chairs and stopped and scratched at the keys to indicate the odor of drugs on the keys. At one point, Grievant was walking away and the positive dog followed Grievant suggesting Grievant had an odor of drugs on him. The dog did not respond to Grievant by scratching because the dog is not trained to respond to humans.

The Narcotic Canine Handler informed the Warden of the findings of the positive response dog. Based on this information, the Warden decided to bring in a passive dog.

The Correctional Canine Officer brought his dog into the Facility gym area. This officer had been a canine officer for five years and had been working with the passive dog for approximately four and a half years. After the positive response dog alerted to the keys that were placed between the plastic chairs, the Lieutenant put the keys in his pocket. The passive dog ran around the Lieutenant and alerted to his waist where the keys were located. No one informed the Correctional Canine Officer of who had previously handled the keys.

The Correctional Canine Officer took his dog to the gym. Grievant and all of the other people in the gym were asked to form a line, standing shoulder to shoulder but not touching each other. Grievant was the only African-American in the line. Others in the line included the Sergeant and the Assistant Warden Operations.⁵ The passive dog ran in front of the line and behind the line but every time the dog came close to Grievant, Grievant moved slightly. Grievant was bitten by a dog as a child and has a fear of dogs. The Correctional Canine Officer explained the problem to the Assistant Warden Operations who then instructed the group to shift around again and then remain still in line. Standing next to Grievant on Grievant's right side was his supervisor, the Assistant

⁵ The Lieutenant was excluded from the line because he had handled the keys that contained the odor of illegal drugs.

Warden Programs. The passive dog ran the line again, going in front of and behind the persons in line. While running, the dog sniffed close to each person in line. While on the back side of the line, the dog alerted between the last two people and gave an alert and then worked his way back to Grievant and the Assistant Warden Programs.⁶ The dog touched the eyeglass case held by the Assistant Warden Programs in his left hand. Then the dog placed his nose in the palm of Grievant's hand and immediately turned towards the Correctional Canine Officer and sat down. When the dog sat down he was physically behind the Assistant Warden Programs.

The Correctional Canine Officer concluded that the dog alerted on Grievant because the dog last touched Grievant and then sat down. An alert occurs when the dog touches the last person and then sits. Where the dog sits is not as significant. The dog did not sit immediately behind Grievant but that did not affect the conclusion that the dog alerted to Grievant.

Upon learning of the results of the passive dog, the Warden authorized a strip search of Grievant. Grievant felt humiliated by having to comply with the strip search.⁷ No drugs were found on Grievant.

The Warden concluded that there was a reasonable suspicion under Department of Corrections Policy 5-55 such that Grievant should be required to take a drug test. At approximately 3:00 p.m., she instructed the Assistant Warden Programs to take Grievant to a hospital. Once at the hospital, Grievant filled out necessary paperwork and attempted to provide a urine sample. Initially he was unsuccessful so he drank water. Before making his second attempt, Grievant concluded he had had enough of being imposed upon and declined to give a sample. The Assistant Warden Programs advised Grievant to complete the test because there would be adverse employment consequences for failing to do so. Grievant refused to comply. He felt he had been discriminated against by the Agency.

Based on Grievant's refusal to comply with the drug testing, the Agency removed him from employment.

CONCLUSIONS OF LAW AND POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. Group II offenses "include acts and behavior which are more severe in nature and are such that

⁶ Since air flow may affect the location of an odor, the dog sometimes walks between two people before tracing the odor to the location.

⁷ The Agency's strip search policy was not introduced as an exhibit. Grievant did not contend that the Agency failed to follow the strip search policy.

an additional Group II offense should normally warrant removal.” DOCPM § 5-10.16. Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCPM § 5-10.17.

The Agency implemented Procedure Number 5-55 effective October 16, 1997 to “establish procedures for urinalysis testing for illegal drug use and for alcohol testing of Department of Corrections employees, applicants and volunteers when reasonable suspicion exists, in post accident situations, and for random testing.”

“If a reasonable suspicion exists as defined under 5-55.6, any employee may be required to submit to drug testing.”⁸

A reasonable suspicion⁹ is defined as:

Knowledge by management which is sufficient to lead an **ordinarily prudent and cautious person to suspect someone of illegal drug use or possession**, or of being under the influence of alcohol given the circumstances. Reasonable suspicion must be directed at a specific person, be based on specific facts which can be articulated, and be based on the logical inferences and deductions that can be drawn from those facts. Reasonable suspicion may be based upon observable phenomena (such as direct observation or the physical symptoms of using or being under the influence of illegal drugs, controlled substances or alcohol such as, but not limited to, slurred speech, disorientation, a pattern of abnormal conduct or erratic behavior); information provided by reliable or credible sources; **a canine alerting on the individual**; information which is independently corroborated; or based upon other matters. (Emphasis added).

“Refusal to submit to drug and alcohol testing will result in employment being terminated for, ‘Failure to follow a direct order which could endanger the public safety, internal security, or affects the safe and efficient operation of the Department.’”¹⁰

The Agency has established that the Warden had a reasonable suspicion regarding Grievant based on the two canines alerting to Grievant’s work area, items he had touched, and to his person. The Agency properly instructed Grievant to submit to drug testing.

Grievant refused to complete the drug testing even after being warned that there may be consequences for failure to do so. Grievant was aware of the drug testing policy. The Agency properly removed Grievant from employment.

⁸ DOCPM § 5-55.10(A).

⁹ DOCPM § 5-55.6.

¹⁰ DOCPM § 5-55.10(B).

Grievant contends the dogs were attracted to him because he had eaten chicken at lunch and used his hands to hold his food. Based on the evidence presented, the Hearing Officer concludes that the dogs were sufficiently trained to disregard foods and to focus on the odor of illegal drugs such that what Grievant ate or handled for lunch did not cause the dogs to alert on him. The most likely explanation for Grievant having drug odor on him is that he handled keys and other objects also handled by the inmates he supervised.

Grievant contends the Agency subjected him to racial discrimination because he is African-American. No credible evidence was presented suggesting the Agency engaged in racial discrimination against Grievant.

Grievant contends the Agency subjected him to “employee discrimination.” No credible evidence was presented the Agency discriminated against him in his capacity as an employee.

Grievant contends that the dog responded to the Assistant Warden Programs as well and, thus, the AWP should have been stripped searched and drug tested as well. Grievant believes the AWP was not targeted because he is white and that Grievant was targeted because he is African-American. Even if the Hearing Officer adopts Grievant’s interpretation of the events, the most one can draw from the events is that Grievant misunderstood what actions by the dog constitute identifying the odor of drugs. Although the passive dog may have sniffed both the AWP and Grievant and may have gotten close to or touched the AWP’s eyeglass holder, the dog last touched and sniffed Grievant before sitting down. Only if the dog had sat down immediately after touching the AWP would the AWP have been identified by the dogs to have an odor of drugs. Grievant assumed that because the dog touched the AWP’s eyeglass case, the dog had also identified an odor on the AWP. Grievant’s assumption was false and was based on his lack of experience with drug odor detection dogs. This false assumption caused Grievant to believe he had been singled out by the Agency for a humiliating process of strip search and drug testing.

The Hearing Officer concludes that Grievant’s failure to follow DOCPM § 5-55 resulted from his mistaken belief that certain agency staff had targeted him based on his race. Although this is not sufficient basis to mitigate¹¹ the disciplinary action against Grievant, Grievant should not be unduly penalized for a single false assumption unrelated to his normal work responsibilities. The Hearing Officer recommends that the Agency, in its sole discretion, disregard the Group III Written Notice in the event Grievant seeks reemployment with the Agency.

DECISION

¹¹ The Hearing Officer has the authority to mitigate disciplinary action, but will not do so under the facts of this case because doing so would have the effect of reversing the Agency’s Policy 5-55.

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 three 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 Resource 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.

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 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.

Carl Wilson Schmidt, Esq.
Hearing Officer