

Issue: Group III Written Notice with termination (violation of drug policy);
Hearing Date: 09/13/02; Decision Date: 09/16/02; Agency: Dept. of Juvenile
Justice; AHO: David J. Latham, Esq.; Case No.: 5516



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5516

Hearing Date: September 13, 2002
Decision Issued: September 16, 2002

PROCEDURAL ISSUE

Because of unavailability of participants, this case could not be docketed until the 30th day following appointment of the hearing officer.¹

APPEARANCES

Grievant
Superintendent
Legal Assistant Advocate for Agency
One witness for Agency

¹ § 5.1, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual* requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

ISSUES

Did the grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice and termination from employment issued for violation of the agency's drug policy.² Following a denial of relief at the third resolution step, the agency head qualified the grievance for a hearing.³

The Virginia Department of Juvenile Justice (DJJ) (hereinafter referred to as agency) has employed the grievant as a rehabilitation counselor for 18 years. Grievant has two active disciplinary actions – a Group II Written Notice for failure to report to work without proper notice to supervision for three consecutive days, and a Group III Written Notice for falsification of official state documents.⁴

Pursuant to the Commonwealth's policy on Alcohol and Other Drugs,⁵ the agency has promulgated its own policy that more strictly regulates alcohol and other drugs in the workplace. Grievant received a copy of the department's policy and signed a notification of receipt form.⁶ The policy provides for random drug testing and provides, in pertinent part:

Employees who are confirmed as testing positive for use of a controlled substance will be dismissed from the Department of Juvenile Justice for "Conduct which endangers the public safety, internal security, or adversely affects the safe and efficient operation of the Department."⁷

On April 23, 2002, the facility superintendent received from the agency's central office a sealed list of employees whose names had been selected for random drug testing. A personnel analyst contacted grievant and personally notified him that he was to report to a local hospital for testing within one hour. The grievant reported to the hospital and provided a specimen that was tested for controlled substances. The test results were sent to the Medical Review Officer

² Exhibit 5. Written Notice, issued May 8, 2002.

³ Exhibit 6. Grievance Form A, filed June 3, 2002.

⁴ Exhibit 8. Written Notices, issued September 27, 2001.

⁵ Department of Human Resource Management Policy No. 1.05, *Alcohol and Other Drugs*, effective September 16, 1993.

⁶ Exhibit 3. Notification of Receipt of DJJ Procedure 05.005, signed May 14, 1999.

⁷ Exhibit 2. Section V.C.2.I, DJJ Procedure Number 05-005, *Employee Drug and Alcohol Testing*, effective July 1, 1999.

and reflected that the specimen was verified positive for cocaine and morphine.⁸ On May 8, 2002, the superintendent issued a Group III Written Notice to grievant and discharged him from employment.

Grievant acknowledged during the hearing that he had received the agency policy on drug testing. He admitted that the test results were accurate and did not contest the procedures utilized in obtaining a specimen and conducting the test. Agency policy provides for termination of employment whenever an employee tests positive for controlled substances. The policy does not include a mitigation provision.

At some time prior to discharge, grievant told his supervisor and the assistant director that he was under stress and was being treated. However, grievant never disclosed that he was using controlled substances, that he had a dependency problem, or that the treatment he was receiving was for substance abuse. Grievant did not disclose his treatment until the second step of the grievance resolution process more than two months following termination of his employment.

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 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.

⁸ Exhibit 4. Results of Controlled Substance Test, May 7, 2002.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁹

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training¹⁰ promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. One example of a Group III offense is violation of Policy 1.05, Alcohol and Other Drugs.¹¹

The facts in this case are undisputed. Grievant admitted that he had used cocaine and morphine, and that he tested positive on a random drug test conducted by the agency. Therefore, the agency has borne the burden of proof, by a preponderance of the evidence, to show that grievant violated the agency's drug testing policy.

Grievant contends that he was unfairly discharged. However, he has not provided any evidence to show that the process was unfair. Grievant admitted to illegal substance abuse and did not allege any error in the testing process. Grievant's only argument is that he was undergoing substance abuse treatment at the time he was discharged. Grievant provided evidence that he was a patient at a chemical dependency treatment center from January through August 2001.¹² He also provided a letter from a social worker who stated that grievant was receiving treatment between October 2001 and May 2002.¹³

However, grievant never disclosed to the agency that he had a substance abuse problem or that he was in a treatment program. Even if grievant had advised the agency of his participation in a treatment program, the outcome in this case would likely have been the same. The policy provides for random drug testing of all employees. The policy further provides that there is no discretion to waive the testing of any employee selected for random drug testing.¹⁴ Grievant

⁹ § 5.8, EDR *Grievance Procedure Manual*, July 1, 2001.

¹⁰ Now known as the Department of Human Resource Management (DHRM).

¹¹ Exhibit 7. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

¹² Exhibit 10. Letter from treatment center program director to agency, September 9, 2002.

¹³ Exhibit 9. Letter from social worker, August 20, 2002.

¹⁴ Exhibit 2. Section V.C.2.c, DJJ Procedure Number 05-005, *Ibid*.

was using controlled substances during a period when he was receiving treatment.

Grievant alleged (during his closing statement) that other employees have tested positive and subsequently been permitted to undergo chemical dependency treatment. However, grievant provided no evidence to support this assertion. The policy provides for mandatory dismissal of those who test positive during a random drug test.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and termination from employment issued on May 8, 2002 are hereby UPHELD. The Written Notice shall be retained in the grievant's personnel file for the period specified in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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.¹⁵

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

David J. Latham, Esq.
Hearing Officer

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.