

Issue: Group II Written Notice (unauthorized possession of drugs in the workplace);  
Hearing Date: 11/18/03; Decision Issued: 11/25/03; Agency: DOC; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 5843



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5843**

Hearing Date: November 18, 2003  
Decision Issued: November 25, 2003

**PROCEDURAL HISTORY**

On June 26, 2003, Grievant was issued a Group II Written Notice of disciplinary action for:

*On May 27, 2003 you admitted to taking possession of a substance from [Officer M]. This substance has been identified as a prescription medication [Lidocaine]. This is a violation of the Employee [Standards of] Conduct and performance concerning DHRM Policy 1.05 for Unauthorized possession of drugs in the workplace.*

On July 21, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On October 22, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 18, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee

Agency Advocate  
Witnesses

## ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action.

## 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 employs Grievant as a Corrections Officer at one of its Facilities. The purpose of her position is to “provide security and supervision of adult offenders.”<sup>1</sup> No evidence of prior disciplinary action against Grievant was introduced at the hearing.

On January 1, 2002, Grievant signed a certificate of receipt showing she had received a summary of the Commonwealth of Virginia’s Policy on Alcohol and Other Drugs.<sup>2</sup>

On January 14, 2003, Grievant had oral surgery to remove impacted wisdom teeth. She returned to work on January 22, 2003 and worked in the control room at the Facility. She was suffering a great deal of pain because the sutures in her mouth had not yet dissolved. Corrections Officer M entered the control room where Grievant was working. They briefly discussed Grievant’s surgery and Grievant said she was in a lot of pain. Officer M said she had a dental problem in the past and had some numbing medication that may help with the pain Grievant was experiencing. On the following day, Officer M brought Grievant a bottle of Lidocaine, Hydrochloride Oral Topical Solution, USP 2%. The symbol “Rx only” appeared on the bottle. Officer M had removed the label customarily attached by a doctor to medicine bottles. Officer M told

---

<sup>1</sup> Agency Exhibit 6.

<sup>2</sup> Agency Exhibit 5.

Grievant that the medication was like Anbesol and if she swished the medication around in her mouth that it would make Grievant's entire mouth numb. Grievant told Officer M that she did not want her entire mouth to be numb. Officer M suggested Grievant put a little bit of the medication on a cotton swab and place it on the area of Grievant's mouth that Grievant wanted numb. Since Grievant did not have access to a cotton swab and she was still debating whether to use the medication, Grievant placed the bottle in her purse. She decided not to use the medication but did not return the bottle to Officer M because Officer M had left the Facility before Grievant had made her decision. Grievant took the medication to her home and placed it in her medicine cabinet where it remained for several months. Grievant intended to return it to Officer M but kept forgetting to take it with her before going to work. Grievant did not realize the bottle she received was of a prescription medication.

### CONCLUSIONS OF 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 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 unlawful or unauthorized manufacture, distribution, dispensation, possession, or use of alcohol or other drugs in the workplace" is a violation of DHRM Policy 1.05. An employee violating DHRM Policy 1.05 "shall be subject to the full range of disciplinary actions, including discharge, pursuant to applicable disciplinary policies, such as Policy 1.60, Standards of Conduct."<sup>3</sup> Grievant possessed an "other drug" thereby violating DHRM Policy 1.05.

Group III offenses include, "violation of *Alcohol and Other Drug* (considered a Group III offense, depending upon the nature of the violation, such as use or possession of a controlled drug while on the job)."<sup>4</sup> A controlled drug is:

Any substance defined as such in the Drug Control Act, Chapter 34, Title 54.1 of the Code of Virginia, as amended, and whose manufacture, distribution, dispensation, use, or possession is controlled by law.<sup>5</sup>

---

<sup>3</sup> DHRH § 1.05(V)(A).

<sup>4</sup> DOCPM § 5-10.17(B)(18).

<sup>5</sup> DHRM § 1.05(II)(D).

Va. Code § 54.1-3455 defines controlled schedule VI drugs to include drugs required to bear the symbol "Rx only." This symbol appeared on the bottle of Lidocaine possessed by Grievant. Agency testimony showed that Lidocaine is a controlled drug. Accordingly, the Agency could have issued Grievant a Group III Written Notice for possessing a controlled drug in the workplace. Instead, the Agency mitigated the disciplinary action to a Group II Written Notice.

Grievant argues that she should not be disciplined because she did not know she was in possession of a controlled drug. The Department of Corrections Procedures Manual does not require possession with knowledge that the drug is a controlled drug. It only requires possession. Grievant knew she was in possession of Lidocaine since the name is plainly written on the bottle.

Grievant contends the Agency issued disciplinary action against her in retaliation for her complaining to Agency executive managers about the Facility's Superintendent. No credible evidence was presented supporting the conclusion that the Agency retaliated against Grievant. The Agency consistently applied its disciplinary action. For example, Officer M received a Written Notice with suspension, yet Officer M was not an employee who complained about the Superintendent.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**.

## 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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

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.<sup>6</sup>

[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].

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.