

Issue: Group III Written Notice with termination (unacceptable conduct which undermines ability to perform job – prescription drug abuse); Hearing Date: 08/02/05; Decision Issued: 08/08/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8130



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8130**

Hearing Date: August 2, 2005  
Decision Issued: August 8, 2005

**PROCEDURAL HISTORY**

On April 29, 2005, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*In December 2004, this information was brought to our attention; but this incident happened earlier in the year. Information from State Police did not have a specific date. Unacceptable conduct which undermined your ability to do your job. Documentation from the State Police shows that you obtained a 30 day supply of hydrocodone from one doctor and then eight days later you obtained another 30 day supply from another doctor. State Police obtained enough evidence, after interviewing both doctors, to secure a conviction but the Commonwealth's Attorney declined prosecution. You admitted that you did this. You also illegally obtain drugs over the Internet. This conduct diminishes your credibility in being able to supervise and work with other staff members.*

On May 16, 2005, 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 July 7, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 2, 2005, a hearing was held at the Agency's regional office.

## **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
Witnesses

## **ISSUE**

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level 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 employed Grievant as a Corrections Sergeant until her removal effective April 29, 2005. The purpose of her position was:

To provide security, custody, and control of inmates according to post orders, Department and Institutional Operating Procedures. Maintain a safe [and] orderly environment in assigned areas.<sup>1</sup>

She had been employed by the Agency for over nine years. She consistently received favorable evaluations. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

Grievant shared a house with the Corrections Officer. On April 20, 2004, the Corrections Officer wrote a letter to the Captain at the Facility where the Grievant and the Corrections Officer worked. The letter stated, in part, "I found several bottles of

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

hydrocodone .... I confronted her about the drugs and she told me she had been addicted to the drugs since 2001." \*\*\* Up until Jan. 2004 she was getting the drugs by seeing several different doctors and getting the prescriptions filled at different pharmacies around [the locality]."<sup>2</sup> The Captain informed the Warden of the Corrections Officer's allegation. The Warden took no action.

On December 3, 2004, the Corrections Officer informed the Warden that he needed to speak with the Warden right away. Another employee relieved the Corrections Officer of his post and the Corrections Officer met with the Warden. The Corrections Officer told the Warden that he and Grievant were roommates, there had been problems, and Grievant was addicted to prescription drugs that she was obtaining illegally. The Corrections Officer presented the Warden with labels from prescription drug bottles. These labels showed Grievant was ordering bottles with 60 tablets of hydrocodone more frequently than appropriate. Grievant used variations in her name and different addresses where the bottles were to be shipped.

On December 4, 2004, Grievant met with a Captain at the Facility. Grievant did not know that the Corrections Officer had spoken with the Warden on the prior day. She asked the Captain if he knew of any way she could get help for her addiction. The Captain spoke with the Warden regarding his conversation with Grievant.

On December 13, 2004, the Warden met with a local Sheriff to discuss possible violations of law by Grievant. The Sheriff referred the matter to the Virginia State Police who conducted an investigation. On April 4, 2005, a Lieutenant with the Virginia State Police wrote the Warden a memorandum stating in part:

On [Grievant's] drug profiles, one violation involving hydrocodone stood out. In 2004, [Grievant] obtained a thirty day supply of hydrocodone and then eight days later she obtained another thirty day supply from another doctor. This is commonly referred to as "doctor shopping". [Special Agent] interviewed both doctors involved in this particular violation and obtained enough information to secure a conviction.<sup>3</sup>

Grievant began treatment for her addiction on December 7, 2004. She wrote in her Step response, "I take no type of medication at this time, nor do I want any."<sup>4</sup>

The local Commonwealth's Attorney declined to prosecute Grievant because she had sought treatment.

## **CONCLUSIONS OF POLICY**

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<sup>2</sup> Grievant Exhibit 1.

<sup>3</sup> Agency Exhibit 4.

<sup>4</sup> Agency Exhibit 1.

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.

Group III offenses include, “violation of any criminal drug law, including sentencing under the first time offender’s law, based upon conduct occurring either on or off the workplace.”<sup>5</sup> *Va. Code § 18.2-258.1* states, in part:

A. It shall be unlawful for any person to obtain or attempt to obtain any drug or procure or attempt to procure the administration of any controlled substance or marijuana: (i) by fraud, deceit, misrepresentation, embezzlement, or subterfuge; or (ii) by the forgery or alteration of a prescription or of any written order; or (iii) by the concealment of a material fact; or (iv) by the use of a false name or the giving of a false address.<sup>6</sup>

Grievant obtained prescription drugs from a second doctor by failing to disclose that she had already obtained hydrocodone from a different doctor eight days earlier. Grievant violated *Va. Code § 18.2-258.1*. Although Grievant was not convicted of violating this law, the DOC Standards of Conduct do not require a conviction. The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice. A first occurrence of such behavior normally warrants removal. Accordingly, Grievant’s removal must be upheld.<sup>7</sup>

Grievant argues that because she voluntarily identified herself as someone needing drug treatment, DOCPM § 5-55.7 prohibits her from being disciplined. DOCPM § 5-55.7 states, in part:

B. [E]mployees identifying themselves as having an illegal substance abuse problem will be referred to an Employees Assistance Services for evaluation and referral for treatment. Such identification may be made to the supervisor, organizational unit

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<sup>5</sup> DOCPM § 5-10.17(B)(23).

<sup>6</sup> See also, *McCutcheon v. Commonwealth*, 224 Va. 30, (1982) holding that the Commonwealth can establish a prima facie violation of this statute by showing the accused has used a false name to obtain a drug.

<sup>7</sup> No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

head, or Human Resource Officer. Employees may use appropriate leave to participate in treatment programs.

- C. Employees must successfully complete a treatment program (successful completion as defined by the treatment program) before being allowed to return to work and will be subject to regularly-scheduled testing for a period of two years.

This exception under policy does not apply to Grievant. She voluntarily identified herself on December 4, 2004. The Warden had convincing evidence of her unlawful behavior on December 3, 2004 and had decided to initiate an investigation of her. The disciplinary action was based in large part on the findings of the State Police which involved facts other than Grievant's admission of being addicted to prescription drugs.

Grievant argues that the Agency's action will have a chilling effect on other employees who are addicted to prescription drugs but will refuse treatment for fear of losing their jobs. Grievant's argument is logical and reasonable, but whether the Agency believes there will be a chilling effect and how it wishes to address that possibility is within its management discretion which the Hearing Officer cannot disturb.

### **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 file an administrative review request within **15 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 15 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 15-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>8</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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>8</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.