Issue: Group III Written Notice with termination (violation of the Drug/Alcohol in the Workplace policy); Hearing Date: 08/22/06; Decision Issued: 08/25/06; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8402; Outcome: Grievant granted full relief; **Administrative Review: HO Reconsideration Request received 09/06/06; Reconsideration Decision issued 09/12/06; Outcome: Original decision affirmed**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8402

Hearing Date: August 22, 2006
Decision Issued: August 25, 2006

PROCEDURAL HISTORY

On June 23, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for violation of Departmental Instruction 502, *Alcohol and Drug Program.* On June 30, 2006, 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 he requested a hearing. On July 26, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 22, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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 Mental Health Mental Retardation and Substance Abuse Services employed Grievant as a Food Service Manager II at one of its Facilities. He held this position since April 1998. The purpose of his position included "plan, organize, and direct Dietary Services."[1] Grievant had prior active disciplinary action consisting of a Group II Written Notice issued on May 15, 2006.[2]

Departmental Instruction 502 authorizes the Agency to conduct random drug testing of its employees holding safety sensitive positions.[3] Attachment A to the policy lists those positions considered safety sensitive positions. For many years, Grievant's position had not been deemed a safety sensitive position. After appropriate consideration, Agency managers concluded Grievant's position should be included as a

[1] Agency Exhibit 5.

[2] Agency Exhibit 7.

[3] According to the Facility Human Resource Director, employees not holding safety sensitive positions would never be subject to random drug testing at the Facility.

safety sensitive position because of his degree of interaction with Agency clients.[4] Agency managers drafted a revised version of DI 502 to list Grievant's position as a safety sensitive position. The revision became effective June 13, 2006.

As the Agency was in the process of revising DI 502, it also took a sample of safety sensitive positions for random drug testing. Grievant was among those selected. The Facility Human Resource Director learned the names of employees who were selected for drug testing.

On June 14, 2006, the Human Resource Director met with Grievant and told him that his position recently became subject to DI 502 and that a random sample had been taken of social security numbers. She informed Grievant that he had been selected randomly for a drug test. Grievant complied with the Agency's instruction to be tested.

On June 20, 2006, the Agency learned that Grievant had a positive test for marijuana. Grievant spoke with the HR Director and admitted to smoking marijuana in the past 28 days.[5]

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." DHRM § 1.60(V)(B).[6] 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." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

DHRM Policy 1.05

[4] EDR's *Rules for Conducting Grievance Hearings* state, "the reasonableness of an established policy or procedure itself is presumed …." Accordingly, it is not necessary for the Agency to present evidence justifying its decision to add Grievant's position to the list of those subject to random testing. It is also not necessary for the Agency to present evidence to establish that is properly promulgated the policy. In addition, the Hearing Officer will not address whether the Agency's random drug testing policy is subject to Constitutional challenge.

[5] The Agency did not present a "chain of custody" form to establish that Grievant was the person tested. If an employee offers a credible denial to having consumed an illegal drug, the Agency must present a copy of the chain of custody form to establish the tested sample originated from the employee. A chain of custody form was not necessary in this case because Grievant did not denying having consumed marijuana.

[6] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

DHRM Policy 1.05, *Alcohol and Other Drugs*, states:

> Each of the following constitutes a violation of this policy:
>
> A. The unlawful or unauthorized manufacture, distribution, dispensation, possession, or use of alcohol or other drugs in the workplace;
>
> B. Impairment in the workplace from the use of alcohol or other drugs, except from the use of drugs for legitimate medical purposes;
>
> C. A criminal conviction for a:
>
> 1. violation of any criminal drug law, based upon conduct occurring either on or off the workplace; or
> 2. violation of any alcohol beverage control law or law that governs driving while intoxicated, based upon conduct occurring in the workplace; and
>
> D. An employee's failure to report to his or her supervisor the employee's conviction of any offense, as required in section III (B) above.

Grievant did not violate DHRM Policy 1.05. Having a positive reading on a drug screen is not a violation of DHRM Policy 1.05.

DHRM Policy 1.05 authorizes agencies to promulgate policies that more strictly regulate alcohol and other drugs in the workplace provided such policies are consistent with DHRM Policy 1.05. The Agency has implemented Departmental Instruction No. 502*, Alcohol and Drug Program*.

Departmental Instruction 502

Departmental Instruction 502 provides "guidance for administering drug and alcohol testing of employees …."[7] Employees holding safety sensitive positions are subject to drug testing on a random basis. "Safety sensitive positions [are] positions for which … drug testing … is a mandated position identified as a safety sensitive position by the Department …." "Positions are added to the list of safety sensitive positions when a relationship is identified and documented between the position and the safety of consumers."[8] Attachment A to DI 502 identifies safety sensitive positions. Grievant's position was added to Attachment A effective June 13, 2006.

Under DI 502-5, no employee "in a safety sensitive position shall … [r]eport for duty or remain on duty when … [h]e has a drug concentration that would test positive."[9]

[7] Grievant Exhibit 2.

[8] DI 502-3.

[9] DI 502-5.

When an employee tests positive for drugs, DI 502 requires the Department issue the employee a Group III Written Notice.

Although Grievant's behavior was contrary to DI 502-5 on its face, there are mitigating circumstances justifying removal of the disciplinary action.

Mitigation

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[10] Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy."

The disciplinary action against Grievant must be mitigated for several reasons. First, the Agency did not apply DI 502 as it is written.[11] Section 502-5 asks, "Who is tested and when?" The response is:

> Individuals who are accepted for employment, or re-employment, promotion, demoted, reallocated or transferred into safety sensitive positions listed in Attachment A, including safety sensitive positions requiring a CDL, are subject to testing ….

Grievant was an existing employee, not one who had been recently accepted for employment. He was not re-employed. He did not receive a promotion. He was not demoted. He was not reallocated.[12] He did not transfer into another position. Since Grievant was not one of the relevant employees, he should not have been "subject to

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[10] *Va. Code § 2.2-3005.*

[11] Another aspect of the Agency's failure to properly apply DI 502 is that Grievant did not have notice of how it interpreted DI 502 to include positions added to Attachment A. A mitigating factor is failure to give notice of "how the agency interprets the rule …." See, *Rules for Conducting Grievance Hearings § VI(B)(1).*

[12] DI 502 does not define "reallocated." This phrase appears to have been retained from Departmental Instruction 117 effective September 17, 1997. DI 117 preceded DI 502 and contains similar language in response to the question, "[w]ho is tested and when?" In 1997, DHRM Policy referred to a reallocation as a, "change in the classification assignment of a position as a result of a gradual change in the duties of the position." See DHRM Policy 3.05 effective September 16, 1993.

testing." Grievant had no actual[13] or constructive notice that the Agency would interpret DI 502 to include him merely because his position was added to Attachment A of DI 502 effective June 13, 2006. Nothing in DI 502 (or its predecessor, DI 117) states that employees whose jobs have been added to Attachment A are subject to drug testing.

Second, Grievant did not receive adequate notice that he would be subject to DI 502. Grievant was notified that the Agency considered him subject to DI 502 on June 14, 2006 which was the same time that the Agency applied DI 502 to Grievant. Such short notice was not adequate to enable Grievant to have some minimal opportunity to review and consider the policy's affect on him. In addition, the short notice may not have been consistent with the Agency Head's expectation. In a memorandum dated June 16, 2006 addressed to all Facility Directors, the Agency Head transmitted DI 502 and said, "[p]lease ensure that all appropriate personnel are notified of the updated guidelines that are established by this Instruction."[14]

After considering these reasons, the Hearing Officer concludes that the disciplinary action against Grievant must be rescinded.[15]

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney's fees unjust.[16] Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of the date of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

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[13] The Agency could have cured this defect in the policy by giving Grievant actual notice that it interpreted DI 502 to apply to him. For example, several days after Grievant was tested, the Agency required other employees in positions similar to Grievant's position to sign a written acknowledgement that they were subject to DI 502. Grievant was not asked to sign any acknowledgement showing he was subject to DI 502.

[14] Grievant Exhibit 2.

[15] The Agency's concern about one of its employees using marijuana is understandable. The reversal of this disciplinary action does not preclude the Agency from taking other appropriate actions to monitor and remedy Grievant's illegal use of drugs. Although the Hearing Officer may have concern regarding reinstating an employee who has engaged in illegal behavior, the Hearing Officer is not authorized to re-write Agency policy to account for circumstances it did not anticipate.

[16] The EDR Rules do not define when special circumstances exist.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **rescinded**. The Agency is ordered to reinstate Grievant to his former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for annual and sick leave that the employee did not otherwise accrue.

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 14th St., 12th 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 all of your appeals to the other party and to the EDR Director. 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.[17]

[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].

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8402-R

Reconsideration Decision Issued: September 12, 2006

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

The Agency argues Grievant had notice that marijuana is illegal in Virginia. The Agency's argument fails because Grievant was not charged with possession of marijuana. He was not in possession of marijuana on the day giving rise to the disciplinary action. Grievant did not violate DHRM Policy 1.05. No credible evidence was presented showing Grievant was impaired by the traces of marijuana in his body. Merely testing positive for traces of marijuana is not sufficient to show that the marijuana impaired Grievant's physical activities.

The Agency argues "random drug testing on positions added to Attachment A" of DI 502 "would not have been part of the updates." The Agency adds, DI 502 does not state "random drug testing of those individuals whose positions are listed in attachment A is an item requiring notification." The Agency's argument fails because the policy is not what determines the minimum level of notice necessary prior to disciplining an employee. Procedural due process requires an employee receive some reasonable notice that a policy applies to the employee. The absence of such notice is a reason to mitigate disciplinary action. Receiving notice that a policy applies to an employee at the same time the policy is being implemented for the first time is not adequate notice to the employee.

The Agency contends it has consistently applied disciplinary action and that its disciplinary action was free of improper motive. Neither of these facts reverses the fact

that the Agency failed to give Grievant proper notice of the application of a policy against him and failed to implement the written terms of DI 502.

The Agency's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the Agency's request for reconsideration is **denied.**

APPEAL RIGHTS

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

1. The 15 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.

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer