

Issue: Group III Written Notice with termination (violating the Alcohol/Drug policy);
Hearing Date: 11/15/06; Decision Issued: 12/05/06; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 8449; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8449

Hearing Date: November 15, 2006
Decision Issued: December 5, 2006

PROCEDURAL HISTORY

On May 5, 2006, Grievant was issued a Group III Written Notice of disciplinary action for violation of DOC Procedure 5-55 and DHRM Policy 1.05, *Alcohol and Other Drugs*. 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 16, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 15, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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 Corrections, Probation and Parole, employed Grievant as an Office Service Specialist at one of its facilities. Grievant's work performance was acceptable to the Agency. A co-worker described Grievant as a "great worker."

Grievant was notified that she had been selected randomly for drug testing. On April 26, 2006, she gave a urine sample at the collection location. Grievant's sample tested positive for at least 1000 NG/ML of Amphetamine.¹ Her sample was tested again and it exceeded the confirmation level of 500 NG/ML. The lab issued a report to the Medical Review Officer (MRO). The MRO is a physician who is responsible for verifying that the lab results are accurate. The MRO spoke with Grievant regarding the test results.

Amphetamine is a controlled drug which must be dispensed by prescription. Grievant did not have prescription for Amphetamine.

¹ Grievant did not allege that the sample tested belonged to someone else. Thus, it was not necessary for the Agency to have presented a "chain of custody" form matching her with the sample tested.

CONCLUSIONS OF POLICY

Department of Corrections Policy Manual (“DOCPM”) § 5-55 establishes procedures for random urinalysis testing for illegal drug use and alcohol.² Grievant received written notice of this policy and the consequences for violating the policy.³ The Agency complied with all relevant provisions governing specimen collection and laboratory analysis.

Department Procedure 5-55, *Urinalysis and Alcohol Testing* defines “illegal drugs” to include “illegal or unprescribed use of controlled substances (prescription drugs.)” 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.”⁴ *Va. Code § 54.1-3401* states, “‘Controlled substance’ means a drug, substance or immediate precursor in Schedules I through VI of this chapter.” Amphetamine is a Schedule II controlled substance pursuant to *Va. Code § 54.1-3448*. Accordingly, amphetamine is an illegal drug under Department Procedure 5-55 with respect to an employee who consumes amphetamine without a prescription.

“An illegal drug violation of Department Procedure 5-55 *Urinalysis and Alcohol Testing* will result in a Group III offense and termination.”⁵ “Employees who are confirmed to be positive will be dismissed from the Department of Corrections”⁶ Grievant did not have a prescription for amphetamine. Her sample tested positive for an illegal drug and contrary to Department Procedure 5-55.⁷ The Agency has presented sufficient evidence to support its issuance to Grievant of a Group III offense with removal.

Grievant contends she did not intentionally consume amphetamine. She must use a pill crusher to crush her medications. She shared that pill crusher with her fiancé. She argued that she must have consumed residue left in the pill crusher after her fiancé crushed his pills which included amphetamine. There is insufficient evidence before the Hearing Officer for the Hearing Officer to determine whether residue in a pill crusher explained the positive test results. It is unclear what amount of amphetamine residue routinely remained in the pill crusher and whether any such amount would be sufficient

² This policy applies “to all full and part-time salaried, employees, wage employees and contract employees of the Department of Corrections who work in ... parole offices” See, § 5-55.4(A).

³ Agency Exhibit 5.

⁴ DHRM Policy 1.05(II)(D).

⁵ Department of Corrections Operating Procedure 135.1(XII)(D).

⁶ DOC Procedure Number 5-55.9(G).

⁷ It is not necessary for the Agency to show that Grievant’s work performance was affected by the unprescribed controlled drug.

to trigger a positive test. Grievant's assertion remains a possibility but not one for which the Hearing Officer can conclude with any certainty that the residue resulted in the positive test result. Based on the evidence presented, Grievant's assertion is possible but not probable.

Grievant argued that her prior gastric bypass surgery caused her to absorb medications more quickly. The MRO testified that the rate of absorption of a medication would not convert one of Grievant's prescribed medications into amphetamine. Thus, Grievant's prior surgery does not explain the positive test result.

Mitigation

Grievant contends the disciplinary action should be mitigated. *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..."⁸ 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." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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.

⁸ *Va. Code § 2.2-3005.*

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.⁹

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.