

Issues: Group III Written Notice (positive drug test, violation of Drug/Alcohol Policy) and termination; Hearing Date: 03/14/07; Decision Issued: 03/29/07; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No. 8515; Outcome: Group III – No relief, agency upheld in full. Termination – No relief, agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8515

Hearing Date: March 14, 2007
Decision Issued: March 29, 2007

PROCEDURAL HISTORY

On September 5, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for testing positive for marijuana. 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 February 5, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 14, 2007, 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 Corrections employed Grievant as a Corrections Officer at one of its Facilities. He had been employed by the Agency for approximately 22 years. No evidence of prior active disciplinary action against the Grievant was introduced during the hearing.

On August 5, 2006, Grievant attended a bachelor's party. One of the people involved in the party, brought five or six cigars and made them available to anyone wanting one. Marijuana had been placed inside the cigars. The person bringing the cigars did not tell anyone marijuana was inside the cigars. Grievant ran out of cigarettes and decided to take one of the cigars. He placed it in his shirt pocket and then later smoked the cigar. As he smoked it, he noticed a strawberry odor coming from the cigar. Since he had not smoked marijuana before, he did not recognize the smell as that of marijuana.

Grievant was selected randomly for drug testing at the Facility in accordance with Agency policy. On August 18, 2006, Grievant provided a urine sample for testing. A privately owned laboratory tested Grievant's sample and it showed positive for marijuana. A second more specific test confirmed that Grievant's sample showed Grievant had consumed marijuana. Grievant spoke with a Medical Review Officer for the testing laboratory who asked Grievant about other medications he was taking in

order to determine if the test results could be explained by some thing other than marijuana. The Medical Review Officer concluded Grievant was not taking any other prescription drugs that might create a false positive result on the drug test.

On August 28, 2006, Facility managers told Grievant he had tested positive for marijuana and that he would have an opportunity to explain how that could have happened. Grievant mentioned that he had attended a bachelor party and had smoked a cigar that produced a strawberry smell. As a result of that meeting, the Personnel Analyst at the Facility emailed the Agency's Human Resource Manager in Richmond and explained that Grievant may have unintentionally consumed marijuana. The Human Resource Manager responded that, "Many employees who test positive during a random drug screen insist that they don't know how that's possible. *** Regardless, he should be terminated."¹ The Facility's Warden Senior issued Grievant a Group III Written Notice with removal effective September 5 2006.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."² Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

DOC Procedure 5-55 sets forth the Agency's procedures for urinalysis and alcohol testing. Regarding random drug testing, the Procedure provides, "Employees who are confirmed to be positive will be dismissed from the Department of Corrections" Grievant received a copy of this policy on October 31, 1997. DOC Operating Procedure 135.1(XII)(D) states, "An illegal drug violation of Department Procedure 5-55 *Urinalysis and Alcohol Testing* will result in a Group III offense and termination." Because Grievant tested positive for marijuana, the Agency has presented sufficient evidence to support its issuance to Grievant of a Group III Written Notice with removal.

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

¹ Agency Exhibit 1.

² Virginia Department of Corrections Operating Procedure 135.1(X)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

Resolution....”⁵ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because of length of service and he did not knowingly consume the marijuana.

The Agency is responsible for custody of convicted felons including those involved in the use or sale of illegal drugs. The Agency has established a zero tolerance for illegal drug consumption. DOC Operating Procedure 135.1(XII)(B) lists examples of offenses that could be considered Group III offenses. Rather than listing testing positive for drugs as one of those examples, the Agency created a subsection D and listed a positive drug test as the only item in subsection D. The Agency intended to create a prophylactic rule to establish its zero tolerance policy regardless of employee fault. The Agency intended to distinguish positive drug test results from other Group III offenses.

If the Hearing Officer were to mitigate the disciplinary action because Grievant was not at fault for having consumed marijuana, the effect would be to re-write the Agency’s policy to permit exceptions to the prophylactic rule.⁶ The *Rules* require Hearing Officers to accept Agency policy as written when they are plainly stated. In this instance, Grievant had adequate notice of the Agency’s policy and mitigation is not appropriate. In light of the standard set forth in the *Rules*, 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

⁵ Va. Code § 2.2-3005.

⁶ Grievant’s length of services is not, in itself, a mitigating factor under the *Rules*.

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.⁷

[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].

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer