

Issues: Group III Written Notice (violation of drug/alcohol policy) and Termination;
Hearing Date: 05/25/07; Decision Issued: 06/04/07; Agency: DCE: AHO: John V.
Robinison, Esq.; Case No. 8599; Outcome: Agency Upheld in Full; **Administrative**
Review: **HO Reconsideration Request received 06/14/07; Reconsideration**
Decision issued 07/03/07; Outcome: Original decision affirmed; Administrative
Review: **EDR Ruling Request received 06/15/07; EDR Ruling #2007-1720 issued**
07/10/07; Outcome: HO's decision affirmed.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8599

Hearing Officer Appointment: April 30, 2007

Hearing Date: May 25, 2007

Decision Issued: June 4, 2007

PROCEDURAL HISTORY AND ISSUES

In his Grievance Form A concerning this proceeding (the "Form A"), the grievant requested a hearing to challenge the termination of his employment by the Department of Correctional Education (the "Department" or the "Agency") and is seeking the relief requested in his Grievance Form A, including reinstatement and record clearance.

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the termination was warranted and appropriate under the circumstances.

The agency was represented by an attorney who is the Department's Director of Legal and Internal Affairs and the Agency drug coordinator. The grievant represented himself. Following a pre-hearing conference held by telephone on May 4, 2007, the hearing officer issued a Scheduling Order entered on May 4, 2007, which is incorporated herein by this reference.

Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely Agency Exhibits 1 through 11 and Grievant Exhibits 1 through 2.¹ The parties did not request from the hearing officer any orders for witnesses or documents.

¹ References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number.

APPEARANCES

Representative for Agency
Three Additional Witnesses for Agency
Grievant

FINDINGS OF FACT

1. The grievant was an instructional assistant, previously employed by the agency at a juvenile correctional facility.
2. On December 1, 2006, the independent contractor which the agency uses to administer its random drug testing program (the "Contractor"), randomly selected the grievant for a drug test in accordance with DCE Policy No. 1-30.
3. On March 19, 1998, the grievant signed a document titled "Notification of Receipt of DCE Policy; Subject: Urinalysis and Alcohol Testing" acknowledging that he had read and understood it. AE 2.
4. The grievant's supervisor informed the grievant of his random testing selection by the agency's independent contractor and advised the grievant to go to the agency's independent collection site in Richmond.
5. The grievant duly went to the collection site and supplied a sample of his urine on December 11, 2006.
6. Using the agency's chain of custody procedures and protocols, the sample was sent to the Contractor for testing.
7. On December 20, 2006, the Contractor's Chief Medical Review Officer reviewed the sample and rendered his professional medical opinion that the sample tested positive for Amphetamine.
8. On December 21, 2006, the grievant met with the agency drug coordinator and the employee benefits manager in the Human Resources Department of the agency's central office.
9. At this meeting, the grievant raised the possibility that the positive drug test might have been the result of the grievant's use of a Vick's Inhaler. The grievant showed the agency representatives 2 pages from a medical publication which the grievant has obtained from his personal physician. GE 2.

10. As a result of this meeting, the agency determined that another test would be conducted to rule out the possibility that the Vick's Inhaler caused the drug test to show positive. AE 6 and 9.
11. On January 12, 2007, the grievant requested in writing that the agency perform a second urine analysis test. AE 7.
12. The Contractor duly performed a racenic analysis (D/L testing) on the specimen, which showed that Vick's Inhaler use did not cause the grievant's test to be positive for amphetamine. AE 8.
13. The agency terminated the grievant's employment at 11:00 a.m. on January 26, 2007, pursuant to a Group III Written Notice for "[i]llegal conduct which endangers the public safety, internal security, or affects the safe and efficient operation of the Department." AE 9.
14. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
15. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
16. The testimony of the Agency witnesses was both credible and consistent on the material issues before the hearing officer. The demeanor of the Agency witnesses at the hearing was candid and forthright.

APPLICABLE LAW AND OPINION

The General Assembly enacted the *Virginia Personnel Act, Va. Code § 2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.

Pursuant to Departmental Policy No. 1-30 (AE 1) and consistent with the Standards of Conduct, a positive drug test can clearly constitute a Group III offense:

DISCUSSION: Employees of the Department of Correctional Education have a responsibility to protect the public safety. Additionally, employees have the right to work in an environment where the internal security is not jeopardized by fellow employees who are engaging in illegal drug use or are under the influence of alcohol. The safe and efficient operation of the Department is dependent upon employees who are free of illegal drugs and are not under the influence of alcohol. Therefore, employees and volunteers of the Department must be free of illegal drugs at all times and cannot be under the influence of alcohol while at work or in a facility. The use of illegal drugs by employees undermines the Department's ability to perform its mission, as well as, the public's perception of the Department's ability to fulfill its mission. Employees involved in illegal drug use or who are under the influence of alcohol may have their judgment and performance impaired and are therefore more susceptible to corruption and pose an unacceptable risk to the Department based on issues of security and civil liability. . .

G. Employees who are confirmed to be positive will be dismissed from the Department of Correctional Education for "Illegal conduct which endangers the public safety, internal security, or affects the safe and efficient operation of the Department."

As previously stated, the agency's burden is to show upon a preponderance of evidence that the termination of the grievant's employment was warranted and appropriate under the circumstances.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

As the agency argued in this proceeding, the policy requires dismissal. The case is indeed sad, as stated by the Department, because this is the grievant's first disciplinary infraction over a career of some 27 years in various state positions. The Department, exercising its professional judgment through the appropriate personnel, and applying the Commonwealth's policy of progressive discipline, decided that termination of the grievant's employment was warranted and appropriate under the circumstances. Such a decision was entirely appropriate and justified. The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The gravity of the violation in the context of a juvenile correctional facility precludes a lesser sanction. The hearing officer agrees.

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in removing the grievant from his employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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.

ENTER:

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by Certified Mail, Return Receipt Requested, U.S. Mail, e-mail transmission and facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8599

Hearing Officer Appointment: April 30, 2007

Hearing Date: May 25, 2007

Original Decision Issued: June 4, 2007

Review Decision Issued: July 3, 2007

PROCEDURAL HISTORY AND ISSUES

In his Grievance Form A concerning this proceeding (the "Form A"), the grievant requested a hearing to challenge the termination of his employment by the Department of Correctional Education (the "Department" or the "Agency") and is seeking the relief requested in his Grievance Form A, including reinstatement and record clearance.

In this proceeding the agency bore the burden of proof and had to show by a preponderance of the evidence that the termination was warranted and appropriate under the circumstances.

The agency was represented by an attorney who is the Department's Director of Legal and Internal Affairs and the Agency drug coordinator. The grievant represented himself. Following a pre-hearing conference held by telephone on May 4, 2007, the hearing officer issued a Scheduling Order entered on May 4, 2007, which is incorporated herein by this reference.

Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely Agency Exhibits 1 through 11 and Grievant Exhibits 1 through 2. The parties did not request from the hearing officer any orders for witnesses or documents.

The hearing officer who rendered the decision was appointed on April 30, 2007. The hearing officer issued his decision on June 4, 2007, within the period of "35 calendar days after the date shown on the appointment letter, allowing for an additional three days from the date of appointment for mailing." DEDR Rules for Conducting Grievance Hearings (the "Rules"), Section III(B).

As the Agency recounts in its Motion to Deny Reconsideration and Rehearing, which is incorporated herein by this reference, the original hearing date was scheduled for May 22, 2007

and was postponed by Virginia Department of Employment Dispute Resolution, Hearings Program Director, because the appointed hearing officer for that date resigned.

The Rules provide that the hearing officer's decision issued on June 4, 2007 is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision (Rules, Section VII). The two types of review raised by the grievant in this proceeding are as follows:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request; and

2. **A challenge that the hearing decision does not comply with the grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capital Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (804) 786-0111.

If multiple requests for administrative review are pending, a hearing officer's decision on reconsideration or reopening should be issued before any decisions are issued by the EDR Director. Rules, Section VII.

The hearing officer should issue a written decision on a request for reconsideration or reopening within 15 calendar days of receiving the request. Rules, Section VII.

In this proceeding, the grievant never sent his "request to reconsider a decision or reopen a hearing" to the hearing officer or the Agency. Instead, together with the grievant's "challenge that the hearing decision does not comply with grievance procedure" it was sent only to the Director of EDR by facsimile transmission on June 15, 2007. In turn, EDR faxed it to the hearing officer on June 19, 2007, the last day of the administrative review period pursuant to the Rules. Upon receipt, the hearing officer faxed the grievant's requests to counsel for the Agency, also on June 19, 2007. The hearing officer received the Agency's response to the grievant's requests on June 19, 2007.

To the extent that any further decision is due by the hearing officer, the deadline for such decision would be July 5, 2007. While there may be some question in this regard, under the circumstances, the hearing officer is treating the grievant's request for reconsideration or reopening of the hearing as timely and properly made. Of course, the grievant's "challenge that the hearing decision does not comply with grievance procedure" does not fall within the jurisdiction of the hearing officer but, pursuant to the Rules, is within the purview of the Director of EDR once the hearing officer has issued his decision concerning review.

DECISION

In his request to reconsider the decision or to reopen the hearing, the grievant has not offered any probative newly discovered evidence. Similarly, the grievant has not presented probative evidence of any incorrect legal conclusions by the hearing officer as the basis for such a request. The medical and other evidence presented by the Agency at the hearing was credible and compelling. For the reasons provided herein and in the Agency's Motion to Deny Reconsideration and Rehearing, the hearing officer hereby denies the grievant's request for review directed to him and hereby affirms his decision that the Agency has met its burden of proving by a preponderance of the evidence that the termination of the grievant's employment was warranted and appropriate.

APPEAL RIGHTS

The hearing officer attaches hereto and incorporates herein Section VII of the Rules.

ENTER:

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by Certified Mail, Return Receipt Requested, U.S. Mail, e-mail transmission and facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).