Issues: Group III Written Notice with Suspension (positive drug test); Hearing Date: 07/30/07; Decision Issued: 07/31/07; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8649; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: DHRM Ruling Request received 08/15/07; Outcome pending.**

# *COMMONWEALTH of VIRGINIA*

***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8649**

Hearing Date: July 30, 2007
Decision Issued: July 31, 2007

## PROCEDURAL HISTORY

On May 16, 2007, Grievant was issued a Group III Written Notice of disciplinary action with a 15 work day suspension for testing positive on a drug test. On May 21, 2007, 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 3, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 30, 2007, a hearing was held at the Agency's regional office.

## APPEARANCES

Grievant
Agency Representative
Witnesses

## ISSUES

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 employs Grievant as a Licensed Practical Nurse at one of its Facilities. She has been employed by the Agency for approximately 9 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency received an allegation that Grievant had abused one of her patients during her shift. Any time an employee is alleged to have engaged in abuse, the Agency requires that employee to be tested for drugs and alcohol.

Grievant had finished her work shift and left the Facility to return home. An Agency employee called Grievant and told her she was the subject of a patient abuse allegation. Grievant knew that she had not engaged in patient abuse. She began feeling a great deal of stress as a result of the false accusation against her. She developed a migraine headache. She obtained a Tylenol 3 from her fiancé and consumed the pill. Tylenol 3 contains codeine. Codeine (with Tylenol 3) is a drug that may only be dispensed through a prescription. Grievant did not have a prescription to take Tylenol 3.

On May 8, 2007, Grievant provide a urine sample at approximately 10:20 a.m. She signed the chain of custody form and the sample was sent to a lab for testing. An initial screening by the lab identified an improper substance in Grievant's sample. A

second test was performed by the lab and the lab concluded Grievant tested positive for codeine. The Medical Review Officer[1] contacted Grievant and confirmed that Grievant was not taking medication that would result in a false positive. The Medical Review Officer verified the test results on May 14, 2007.

## 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).[2] 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).

Departmental Instruction No. 502 (HRM) 06 provides that, "[n]o employee, intern or volunteer in a safety sensitive position shall: … [u]se drugs that have not been prescribed for him, or use prescription drugs in a manner that is not consistent with his prescription."[3] As a Licensed Practical Nurse, Grievant held a safety sensitive position as listed in Attachment A of the policy. Grievant consumed Tylenol 3 which is a controlled substance requiring a prescription. Grievant did not have a medical prescription authorizing her use of Tylenol 3. Grievant acted contrary to Departmental Instruction No. 502 (HRM) 06.

Departmental Instruction No. 502 (HRM) 06 provides that, "for all other employees who test positive for drugs, the Department shall take the following actions:

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[1] Departmental Instruction No. 502 (HRM) 06 defines the Medical Review Officer as, " a physician with toxicology and substance abuse expertise who functions independently of the testing laboratory and is responsible for receiving and reviewing laboratory results generated by the drug and alcohol testing program."

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

[3] Departmental Instruction No. 502 (HRM) 06 lists six scenarios of prohibited conduct involving the use of alcohol or illegal controlled substances. The first five relate to behavior occurring in the workplace, during work hours, or involving state vehicles. The sixth item is the one with which Grievant failed to comply. The sixth item does not mention the workplace, work hours, or state property. Accordingly, the Hearing Officer interprets this provision to apply to an employee in a safety sensitive position regardless of whether that employee is at work or on state property. Compare this Agency policy with DHRM Policy 1.05 which appears to inappropriate behavior to include the, "unlawful or unauthorized manufacture, distribution, dispensation, possession, or **use** of alcohol or other drugs **in the workplace**." (Emphasis added). Although DI 502 (HRM) 06 and DHRM Policy 1.05 would appear to conflict regarding whether the offensive behavior must occur at the workplace, the DHRM Director gives significant latitude to agencies to adopt supplemental policies. See, DHRM Director's response to Hearing Decision 5610.

- Issue a Group III Written Notice and suspend the employee under the Standards of Conduct, for a minimum of 15 work days; and
- Provide the employee with the opportunity for assistance through the EAP.

The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice. Upon the issuance of a Group III Written notice, and agency may suspend an employee for up to 30 work days. Accordingly, Grievant's suspension for 15 work days is upheld.

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…."[4] 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 she did not have adequate notice of Departmental Instruction 502. This argument fails. An employee is not required to have specific training on every policy in order to have notice of the policy. Nevertheless, Grievant received annual training on the Agency's patient abuse policy, DI 201. As part of that training, Grievant was advised that she would be subject to alcohol and drug testing in the event she was alleged to have engaged in patient abuse. Grievant had adequate notice that she would be subject to alcohol and drug testing.

Grievant contends the disciplinary action should be mitigated because she should not have been tested for alcohol and drugs because she did not engage in patient abuse and her shift had ended without incident prior to the abuse allegations being reported. This argument fails. Grievant did not engage in patient abuse. Grievant's shift had ended and the oncoming shift had accepted its responsibility for patient care prior to the allegations being made. It is understandable that Grievant would be upset after being falsely accused of patient abuse. However, the decision regarding which employees to test for alcohol and drugs depended not on what actually

[4] *Va. Code § 2.2-3005.*

happened, but rather it depended on the allegation itself. The Agency received an allegation that Grievant engaged in patient abuse. It was appropriate for the Agency to require Grievant to be tested for alcohol and drugs in order to investigate that allegation.

Grievant contents the disciplinary action should be mitigated because she took the Tylenol 3 by mistake. Her migraine headache was brought about by the false abuse accusation against her. A Tylenol 3 pill looks the same as a Tylenol pill without codeine, according to Grievant. She thought she was taking regular Tylenol. To the extent this defense is a mitigating factor, it is outweighed by an aggravating factor. In particular, Grievant works as a nurse. She has numerous years of experience in the nursing profession. She is responsible handing out medication to patients and ensuring that the appropriate medication is given to the correct patient. It is reasonable to believe that Grievant has sufficient expertise to enable her to distinguish between pills of similar appearance. Grievant should have relied upon her expertise to carefully examine the pill before consuming it.

Grievant contends that the disciplinary action should be mitigated because the Agency failed to timely request for her to be drug tested. Shortly after the abuse allegation, Grievant received a call from an employee advising her to pick up a package at the office to comply with drug testing. Grievant asked if she had to come in immediately. The employee advised Grievant that she could wait until the following day to pick up the package and begin the testing process. Grievant consumed the Tylenol 3 after that conversation and before returning to work the following day. Grievant argues had she been instructed to come into the office immediately she would not have tested positive for codeine because she would not have had an opportunity to take a Tylenol 3. This argument is without merit. Although the Agency should have acted more timely to have Grievant tested, the likely purpose of having employees tested quickly is to ensure they are tested before alcohol or drugs leave their bodies over time. Immediate testing is not a condition precedent to the issuance of disciplinary action.

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 a 15 work day suspension 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 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.[5]

[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

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