

Issues: Group II Written Notice (failure to follow drug/alcohol policy), and Suspension;  
Hearing Date: 05/23/08; Decision Issued: 05/27/08; Agency: DOC; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 8850; Outcome: 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: 8850**

Hearing Date: May 23, 2008

Decision Issued: May 27, 2008

**PROCEDURAL HISTORY**

On February 13, 2008, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for reporting to work when impaired by or under the influence of alcohol. On February 19, 2008, 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 April 22, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 23, 2008, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
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 Corrections employs Grievant as a Treatment Program Supervisor at one of its Facilities. The purpose of her position is:

Directs and manages treatment and recreation operations for the Unit.  
Operates in the capacity of an Administrative Duty Officer. Serves as Unit Volunteer Coordinator.<sup>1</sup>

Grievant has been employed by the Agency for approximately 25 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

At approximately 9:20 a.m. on February 11, 2008, Grievant entered the Administration Building at the Facility to begin her workday. The HR Assistant asked Grievant if she could come to the HR Assistant's office. Grievant walked to the HR Assistant's office. The HR Assistant asked Grievant to sign some leave slips. As Grievant was signing the leave slips, Grievant and the HR Assistant talked about the birth of another employee's grandchild over the weekend. They spoke for a few minutes. The HR Assistant smelled alcohol on Grievant's breath. Grievant was speaking coherently and appeared to be walking fine, but her eyes appeared "glassy" to the HR Assistant. The HR Assistant noticed Grievant was talking more than she normally did. The HR Assistant spoke with the Warden and informed him of her observation. The HR Assistant spoke with the Assistant Warden. They concluded that

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<sup>1</sup> Agency Exhibit 6.

a reasonable suspicion existed that Grievant may be under the influence of alcohol. The Assistant Warden ordered that Grievant would be tested.

The HR Assistant contacted a local testing facility and scheduled an appointment for Grievant. At approximately 10:25 a.m., the Major drove Grievant to the testing facility. During the approximately 20 minutes trip, the Major smelled alcohol on Grievant's breath.

Grievant was tested at the local testing facility. Her first test showed that she had a blood alcohol content (BAC) level of .029. Because Grievant's test was positive for alcohol, the local testing facility staff waited 15 minutes and then retested Grievant. The second test showed Grievant's blood alcohol content level to be .027. Because Grievant's test result was .02 or higher, the local testing facility required Grievant to sign an acknowledgment stating:

I certify that I have submitted to the alcohol tests, the results of which are accurately recorded on this forum. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.<sup>2</sup>

### **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."<sup>3</sup> 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."<sup>4</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>5</sup>

Group II offenses include: "violation of DHRM Policy 1.05 Alcohol and Other Drugs (considered a Group II offense, depending upon the nature of the violation, such as reporting to work when imperative by or under the influence of alcohol, or the unlawful use of a controlled drug)."<sup>6</sup> DOC Policy 5-55.10 authorizes an employee to be tested for alcohol when there exists a "reasonable suspicion." DOC Policy 5-55.6

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<sup>2</sup> Agency Exhibit 3.

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>6</sup> DHRM Policy 1.05 authorizes agencies to promulgate supplemental alcohol policies. Those policies may "more strictly regulate alcohol and other drugs in the workplace provided such policies are consistent with this policy." DOC Policy 5-55 is not inconsistent with DHRM Policy 1.05.

defines “reasonable suspicion” to mean “knowledge by management which is sufficient to lead an ordinarily prudent and cautious person to suspect someone of illegal drug use or possession, or of being under the influence of alcohol given the circumstances.” Because the HR Assistant smelled alcohol on Grievant’s breath and Grievant’s eyes appeared “glassy”, there existed a reasonable suspicion to suspect that Grievant may have been under the influence of alcohol. Grievant’s alcohol test showed her BAC at .029 on the first test and at .027 on the second test. Approximately 20 minutes before the first test was taken, Grievant was at work and was under the influence of alcohol. The Agency has established that Grievant was under the influence of alcohol based on several facts. First, the HR Assistant noticed that Grievant’s eyes were “glassy”. Second, the HR Assistant noticed that Grievant talked more than usual. Third, the local testing facility required Grievant to sign a statement acknowledging that she could not drive, perform safety-sensitive duties, or operate heavy equipment because her test results were .02 or greater. The local testing facility’s conclusion that Grievant’s functions should be limited is consistent with Federal Motor Carrier Safety Administration regulation 49 CFR § 382.308(e)(2) which states:

no driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the driver is under the influence of or impaired by alcohol, as shown by the behavioral, speech, and performance indicators of alcohol misuse, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until: (i) An alcohol test is administered and the driver’s alcohol concentration measures less than 0.02.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action to Grievant for being under the influence of alcohol. Upon the issuance of a Group II Written Notice, the Agency may issue a suspension of up to 10 workdays. Grievant’s suspension of five workdays must be upheld.

*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....”<sup>7</sup> 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.

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<sup>7</sup> *Va. Code § 2.2-3005.*

Grievant contends the disciplinary action should be mitigated based on her length of service without prior active disciplinary action and because the Agency did not engage in progressive discipline by first giving her a written warning or counseling. Grievant contends that the disciplinary action is too harsh.

Under the facts of this case, Grievant's length of service without prior active disciplinary action is not sufficient under the *Rules* to mitigate the disciplinary action. Although the Agency is encouraged to engage in progressive discipline, the Agency is not obligated to do so. The Agency may issue a Written Notice about first having issued a written counseling to an employee. The Grievant's opinion that the disciplinary action is too harsh is not a basis for mitigation. Only if the Agency's discipline exceeds the limits of reasonableness, may the Hearing Officer mitigate the disciplinary action. In this case, a Group II Written Notice is authorized by the Agency's Standards of Conduct and does not exceed the limits of reasonableness. 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 II Written Notice of disciplinary action with five workday 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>8</sup>

[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

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<sup>8</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.