Issues: Group III Written Notice (positive drug test), and Termination; Hearing Date: 07/09/08; Decision Issued: 07/25/08; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8871; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: DHRM Admin Review request received 08/11/08; Outcome: Filed with wrong agency – referred to EDR (08/26/08); Administrative Review: EDR Admin Review request received 08/28/08; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8871

Hearing Date: July 9, 2008
Decision Issued: July 25, 2008

PROCEDURAL HISTORY

On April 2, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for testing positive for a prohibited substance.

On April 14, 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 May 22, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 9, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
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 employed Grievant as an FST I until her removal effective April 2, 2008. She had been employed by the Agency for 29 years and nine months.

On June 15, 2007, Grievant was randomly selected for a drug test in accordance with Agency policy. She tested positive for a prohibited substance. She was issued a Group III Written Notice with a 15 work day suspension on June 22, 2007.[1] Grievant was referred to the Employee Assistance Program. As part of her participation in that program she was subject to additional random drug testing.

On June 22, 2007, Grievant signed a Returned to Work Agreement with the Agency. The agreement stated:

> 1. If it should be determined that I am abusing any illegal substance (including narcotics for which I have no valid prescriptions; narcotics for which I have a valid prescription but for which condition I am not currently being treated; and narcotics for which I have a valid prescription, but for which I am not in compliance with my physician treatment plan), I will be immediately terminated.

[1] Agency Exhibit 10.

2. If it should be determined that I am using any illegal substances, I will be immediately terminated.

3. I agree to cooperate in any random alcohol/drug tests requested by the [Agency] and/or my rehabilitation program. The results will be sent to the Medical Review Officer and/or [the Agency]. If I have a verified positive test result, I will be terminated immediately from employment at the [Agency].

4. I agree to follow the prescribed program of aftercare, as determined by the rehabilitation program which I attend or the physician who is treating me. I will be responsible for providing documentation of attendance to the rehabilitation program and/or proof of treatment if asked. If I do not comply, either in attendance and/or documentation, my unemployment will be terminated immediately.

On March 7, 2008, the Agency notified Grievant that she had been randomly selected for a follow-up drug test. Grievant went to the Lab and provided two specimens held in separate bottles. She signed a Urine Chain of Custody Form stating:

> I authorize the collection of this specimen for the purpose of a drug screen. I acknowledge that this specimen container(s) was/were sealed with tamper-proof seal(s) in my presence; and that the information provided on this form and on the label(s) affixed to the specimen container(s) is correct. I authorize the laboratory to release the results of the test to the company identified on this form or its designated agents.[2]

On March 8, 2008, the Lab performed an Initial Test on one of the two specimens with a cut off level of 300 NG/ML. Since the Initial Test was positive for cocaine, the Lab conducted a more precise Confirmation Test with a level of 150 NG/ML.[3] The Confirmation Test was positive for cocaine.

The Urine Chain of Custody Form contains the signatures of other Lab employees who were involved in the testing.

The Lab forwarded the results of the drug test to the Medical Review Officer. On March 17, 2008, the Medical Review Officer spoke with Grievant. The MRO asked Grievant about factors that might have caused a false positive such as undergoing surgery and the taking of other medications. For example, if a person undergoes ear, nose, or throat surgery and receives certain medication as part of that treatment, that person may generate a false positive for cocaine. Grievant told the MRO that she had

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[2] Agency Exhibit 7.

[3] One witness employed by the Lab testified that the instrument used by the Lab for the Confirmation Test represented the "Gold Standard" in the industry for drug testing.

not had recent surgery. She did not provide information about any other circumstance on her part that could generate a false positive.

On March 17, 2008, the Medical Review Officer verified that the sample showed positive for cocaine.[4]

On March 18, 2008, the Human Resource Manager sent Grievant a memorandum stating, in part:

> The facility has been advised of a problem with your recent drug test. As a current, non-probationary classified employee, you have been afforded the opportunity to meet with me to discuss the situation and have been advised of your right to request the analysis of the split-sample. Please note that the split-sample was part of your initial sample. Requesting analysis will simply show whether or not the laboratory analysis of the original sample was accurate. Requesting split-sample analysis does not provide you with the opportunity to submit another sample for analysis.

On March 21, 2008, Grievant informed the Agency that she wanted additional testing. She wrote, "I request that another test be performed by another independent lab."[5]

The Lab sent another bottle of the specimen to the Second Lab located in another state.[6] The Second Lab tested the second specimen and found that Grievant had tested positive for cocaine. The Second Lab reported this information to the MRO who called Grievant to inform her of the results.

On March 31, 2008, the Director of Food Operations sent Grievant a letter stating, in part:

> As you are already aware, [the MRO] has notified us that your split sample drug test was positive, thereby confirming the original test results. As you were informed during our meeting on 3/18/08, a positive spit sample test will result in disciplinary action. Therefore, the facility will proceed with disciplinary action and you will be subject to a Group III Written Notice with termination ….[7]

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[4] The normal time for cocaine to leave the body is between 48 and 72 hours.

[5] Grievant Exhibit 1.

[6] The Agency charged Grievant $150 for the cost of testing the second bottle. The Agency's practice is consistent with 49 CFR 40.173(C) which provides "As the employer, you may seek payment or reimbursement for all or part of the cost of the split specimen from the employee …."

[7] Grievant Exhibit 2.

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."[8] 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

Departmental Instruction 502-7 provides that:

The Department shall issue a Group III Written Notice under the Standards of Conduct and terminate an employee when:

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> The employee receives a positive test result for alcohol or drugs when he previously received a Group II or Group III Written Notice for a positive alcohol or drug test.

On June 22, 2007, Grievant received a Group III Written Notice for testing positive on a drug test. On March 17, 2008, Grievant received a positive test result for cocaine. Accordingly, the Agency has presented sufficient evidence to support its issuance to Grievant of a Group III Written Notice for violation of its drug policy. Upon the issuance of a Group III Written Notice, an Agency may remove an employee. Grievant's removal must be upheld.

Grievant denies consuming cocaine. By submitting the Urine Chain of Custody Form, the Agency has established that it was Grievant's specimen that was tested by the Lab. The Agency presented sufficient evidence that Grievant's specimen was property tested by the Lab and that it showed Grievant had cocaine in her body at the time of testing.

Grievant argued that the Agency failed to establish that the second specimen was properly tested because it failed to provide the chain of custody and other documentation supporting that split test. The MRO testified that the Second Lab tested the second specimen and concluded it tested positive for cocaine as well. The Agency has met its burden of proof by providing the chain of custody form and related testimony to support its allegation that Grievant's first specimen tested positive for cocaine. That evidence is sufficient for the Agency to meet its burden of proof that Grievant's body contained cocaine on the day the specimen was collected. Having the second bottle tested served to provide even greater confidence in the results of the first test. The split test was not essential to the Agency's case. This is true because the test by a second

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

lab is optional and in many cases an agency may never request a split test by a second lab.

Grievant argues that she was taking a prescription medication called Donnatal which contains an ingredient called Atrophine and that this may have resulted in a false positive. She argues that she consumed over-the-counter medications that may have caused a false positive reading. In addition, Grievant argues she had eaten bread containing poppy seeds and may have consumed energy drinks thereby resulting in a false positive drug test.

Based on the testimony of the Medical Review Officer, it is clear that Atrophine, over-the-counter medications, poppy seeds, and energy drinks were not likely to have caused Grievant to test positive for cocaine. The test threshold levels are sufficiently high as to exclude over-the-counter medications, poppy seeds, energy drinks, and "secondhand" exposure.

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…."[9] 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 her length of service. She is within a few months of qualifying for retirement. The Agency refused to mitigate the disciplinary action. The EDR Director has not defined whether a length of service approaching the time necessary for retirement would independently constitute a basis for mitigation. Grievant as given clear warning in 2007 that the consequences of another positive drug screen would result in termination. Under the facts of his case, the Agency's Group III Written Notice with removal 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

[9] *Va. Code § 2.2-3005.*

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.

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.[10]

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

[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