Issues: Group III Written Notice (positive drug test) and Suspension; Hearing Date: 07/24/08; Decision Issued: 07/28/08; Agency: DMHMRSAS; AHO: William S. Davison, Esq.; Case No. 8907; Outcome: Full Relief; **Administrative Review: AHO Reconsideration Request received 08/12/08; Reconsideration Decision issued 08/21/08; Outcome: Original decision affirmed; Administrative Review: DHRM Admin Review Request received 08/12/08; Outcome pending.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8907

Hearing Date: July 24, 2008
Decision Issued: July 28, 2008

PROCEDURAL HISTORY

The Grievant received a Group III Written Notice on March 26, 2008 for:

> **Violation D.I.502, Alcohol and Drug Program:** The MRO verified the random drug test conducted on 3/14/08 as "positive." You will be allowed to participate in the Employee Assistance Program and return to work after you have attended a minimum of four treatments/visits/sessions, participate in a treatment program, test negatively for alcohol/drugs and sign a *Return to Work Agreement**.

Pursuant to the Group III Written Notice, the Grievant was suspended from March 26, 2008 through April 15, 2008, subject to her participation in the Employee Assistance Program and producing a negative test for alcohol and drugs. On April 16, 2008, the Grievant timely filed a grievance to challenge the Agency's actions. On July 2, 2008, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On July 24, 2008, a hearing was held at the Agency's location.

APPEARANCES

Grievant
Agency Party
Agency Representative
Witnesses

ISSUE

1. Whether or not the Grievant violated Section D.I.502, Alcohol and Drug Program in testing positive during a random drug test.

2. Whether the Grievant's actions justified the issuance of the Group III Written Notice and subsequent suspension.

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 Agency provided the Hearing Officer with a notebook containing eight (8) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1. The Grievant provided the Hearing Officer with a notebook containing eight (8) tabbed sections and that notebook was accepted in its entirety as Grievant's Exhibit 1.

The evidence presented to the Hearing Officer, both by witnesses at the hearing and by Agency Exhibit 1 and Grievant Exhibit 1, is uncontroverted. Both the Grievant and the Agency agree that on or about March 14, 2008, the Grievant had a prescription for Robitussin DM and her boyfriend had a prescription for Cheratussin AC. Both of these prescriptions were legitimately obtained pursuant to doctor's orders. The Grievant and her boyfriend lived together. During the middle of the night on or about March 14, 2008, the Grievant mistakenly took a dose

of the Cheratussin prescription instead of the Robitussin prescription. On March 14, 2008, the Grievant was administered a random drug test by the Agency. Pursuant to that drug test, the Grievant tested positive for opiates, as the Cheratussin prescription contained codeine.

The entirety of this case is determined by HRM Departmental Instruction 502(HRM)06, Alcohol and Drug Program. [1] The Grievant does not contest the validity of the random drug test, nor does she contest the validity of Departmental Instruction 502. That instruction at 502(HRM)06 states as follows:

> When a drug test is positive for the presence of drugs, the MRO should discuss the results of the test with the employee to determine the reason for the positive test result. A positive test does not necessarily mean that the employee has used drugs in violation of this Instruction or U.S. DOT regulations. If the MRO determines that there is a **legitimate medical explanation** for a positive test result, the MRO shall report the test result as negative and the employee is considered fit for duty and "Safe to Serve." (Emphasis added)

In this case, the drug test was given by First Advantage Occupational Health and a positive result was obtained. [2] The Medical Review Officer ("MRO"), who is an employee of the testing company, contacted the Grievant about the result, as he is directed to do by Policy 502(HRM)06. He asked the Grievant if she knew why she tested positive on the drug test and she told him that she had accidentally taken her boyfriend's prescription instead of her own. She read the labels of both her prescription and her boyfriend's prescription to the MRO and was told that her boyfriend's prescription was the source of the codeine, which then resulted in the opiates being positively tested. The MRO asked her if she had a valid prescription to use her boyfriend's medication and the Grievant candidly told him that she did not. The MRO stated that this matter was out of his hands and it would be up to the Human Resources Department of the Agency to determine what could be done.

The witnesses for the Agency testified that there was no concern whatsoever on the Agency's part that the Grievant had any issues with drug use. The witnesses for the Agency stated that they believed that this was an accidental ingestion of her boyfriends prescription drugs. Further, in the Second Resolution Step, the Agency head offered to rescind the fifteen (15) day suspension and return all lost wages if the Grievant would stop the grieving process at that level. This offer was made as an inducement to stop the grievance process. The Grievant was told that the offer would be rescinded if she pursued the grievance process further. The Hearing Officer does not find any authority for the Agency to make an offer contingent on the Grievant giving up her rights to continue the grievance.

The Agency head stated that he did not have the authority to change the positive test results nor to remove the Group III Written Notice from her file. Pursuant to testimony of Agency witnesses, it is clear that the Human Resources Department for the Agency spent some

[1] Agency Exhibit 1, Tab 4, Pages 1-18
[2] Agency Exhibit 1, Tab 1C, Page 1

effort in determining whether or not the Agency head had the authority to remove the Group III Written Notice and were instructed by DHRM that he did not have that authority.

Upon questioning by the Hearing Officer, a witness for the Agency stated that there was no written policy that could be looked to stating that the Agency head specifically did not have the authority to remove the Group III Written Notice. Rather, it was felt that that was the intent of this Policy.

In summary, the Hearing Officer is presented with a set of facts that both Agency and Grievant agree upon whereby the Grievant accidentally took a prescription drug, tested positive for an opiate, had an MRO who determined that he could find no legitimate medical explanation for such a result and forwarded those results to the Agency head and the Agency head felt he did not have the authority to remove the Group III Written Notice. As stated earlier in this decision, the Hearing Officer reviews the facts de novo and makes a decision independent of the Agency's decision. The Hearing Officer finds that the MRO did have a legitimate medical explanation for the positive drug test result. The language used is 'legitimate medical explanation,' not 'legitimate medical prescription.' The Grievant explained to the MRO that she ingested her boyfriend's medicine, she read the label to the MRO who indicated that that would be a source of the opiates, and yet the MRO deemed that he needed a prescription for her to use the drug. The Hearing Officer finds nothing in the policy that would have required her to have a prescription, it simply requires a legitimate medical explanation.

The head of the Agency feels that he does not have the authority to remove the Group III Written Notice. While it may be unusual, accidents do in fact happen. By way of an example, if the Agency head is correct in his assumption, then if an employee had a prescription that was adulterated when received from the pharmacy, unbeknownst to the employee, and the employee took the prescription, tested positive for opiates, did not know that the drug was adulterated until after the MRO has sent his or her results, then the Agency takes the posture that it can do nothing. Consider a case where the pharmacist merely mis-fills the prescription, either by strength of the prescription or by simply putting the wrong prescription in the bottle for the Agency employee. Again the Agency is taking the position that it has no authority to prevent a Group III Written Notice from becoming a part of the employee's file. The MRO seems to be taking the posture that, unless the employee had a prescription for the drug, he has no authority to report a negative finding on the drug test. The problem is that there can be a significant time lag from the discovery of an adulterated or mis-filled prescription and when the report leaves the MRO's hands.

Pursuant to the authority granted to the Hearing Officer, he finds that this drug was taken accidentally and that the Agency head has inherent powers to see to it that a manifest injustice is not done to the Grievant simply because of perceived procedural road blocks. The Hearing Officer finds that there was a legitimate medical explanation for the positive test and, as previously noted, the Agency acknowledges and admits that there was a legitimate medical explanation for the positive results. Accordingly, this matter should have stopped at the MRO level by his reporting a negative finding on the drug test or the Agency head should have used his inherent authority to prevent a manifest injustice.

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..." [3] 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. The Hearing Officer finds no basis for mitigation in this matter.

DECISION

For reasons stated herein, the Hearing Officer finds that the Grievant did have a legitimate medical explanation for the positive results and/or the Agency head had the inherent authority to remove the Group III Written Notice and he had a positive duty to exercise such authority to prevent a manifest injustice. Accordingly, the Group III Written Notice should be dismissed and removed from the Grievant's file. The Hearing Officer orders that all benefits be reinstated for the time missed, pursuant to the Grievant's suspension, including all pay that the Grievant lost pursuant to this suspension.

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

[3] Va. Code § 2.2-3005

Department of Human Resource Management
101 North 14th Street, 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 Street, Suite 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 your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[4] 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]

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William S. Davidson
Hearing Officer

[4]An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8907

Hearing Date:	July 24, 2008
Decision Issued:	July 31, 2008
Reconsideration Request Received:	August 12, 2008
Response to Reconsideration:	August 21, 2008

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the Hearing Officer. **A copy of all requests must be provided to the other party and to the EDR Director.** 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. [6] (Emphasis added)

OPINION

The Agency seeks reconsideration of the Hearing Officer's decision based on evidence of an incorrect legal conclusion and a conclusion that is inconsistent with State/Agency policies. In the alternative, the Agency requests that the Hearing Officer re-open the hearing to allow the Agency to present new evidence regarding the definition of "legitimate medical explanation" and the Medical Review Officer's ("MRO") responsibility.

In reviewing the fax cover sheet that was sent to the Hearing Officer along with the Agency's Request for Reconsideration, it appears to the Hearing Officer that the Agency only provided notice to the Hearing Officer and to the Department of Human Resource Management ("DHRM"). The Hearing Officer can find no evidence that a copy of the Request for

[6] §7.2(a) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

Reconsideration was sent to the EDR Director or to the Grievant. Accordingly, it would appear that the Agency is out of compliance with Section 7.2(a) of EDR's Grievance Procedure Manual.

The thrust of the Agency's Request for Reconsideration is that it has completely divorced itself of any authority whatsoever regarding drug tests and has given complete authority to the MRO. The Agency relies on the language contained in Departmental Instruction 502(HRM)06 that states as follows,

> "...if the MRO determines that there is a **legitimate medical explanation** for a positive test result, the MRO shall report the test results as negative and the employee is considered fit for duty and 'safe to serve'." (Emphasis added)

The Agency's position is that such language can only be translated to mean that a person must have a legitimate medical prescription in order for the MRO to rule a positive test as a negative test. The Agency cites the Hearing Officer to 49 C.F.R. Section 40.137(b) for an explanation of what the word "legitimate" means. That section apparently states that an MRO is prohibited from considering an explanation, even if the explanation is true, in making the determination as to whether or not to change a confirmed positive to a negative. It goes on to point out that MRO's are unlikely to be able to verify the facts of such passive or unknown explanations and, even if true, they do not provide a legitimate medical explanation.

If that is a correct interpretation, then the Hearing Officer can think of no legitimate medical explanation that is not a legitimate medical prescription. In other words, Departmental Instruction 502(HRM)06 is meaningless. It simply should read, "Unless the Grievant has a prescription for the drug, then there is no explanation that is sufficient for an MRO to take a positive result and report it as negative."

The Agency provided the Hearing Officer with a United States Court of Appeals 6th Circuit case, *Gabbard v. Federal Aviation Administration and the National Transportation Safety Board (July 19, 2008) Case number 07-3977.* In that case, the Petitioner admitted to voluntarily smoking crack cocaine. The Petitioner was a pilot and had flown a plane within a time frame such that cocaine metabolites were still in his system while he was piloting the airplane. The Court restated in its opinion 49C.F.R. Section 40.137(b). However, the Court also stated on page 4 of that opinion as follows:

> Under these circumstances, even if Gabbard is correct that "principles of justice must provide that one who commits any act inadvertently not effectively receive a professional death penalty for it," ... He has not demonstrated eligibility for relief based on those "principles." He may have smoked crack cocaine inadvertently, but he did not fly the jet inadvertently or do so without the knowledge that he had recently smoked crack cocaine. Nor did he inadvertently misrepresent to the medical review officer the potential source of the cocaine metabolites found in his system. The Board thus correctly found Gabbard not credible and rejected his inadvertent-ingestion argument.

In this matter, the Grievant did not take the wrong medicine on purpose. It was taken inadvertently. She came to work not knowing that she had ingested the wrong medicine, unlike the pilot who flew the airplane knowing that he had ingested crack cocaine. The Grievant in this

matter told the MRO the complete truth and did not misrepresent anything. The Grievant in this matter was completely credible and indeed, the Agency offered no evidence that she was not completely credible.

It is interesting to note that, even in its request for reconsideration, the Agency does not dispute at all that the Grievant's testimony was completely factual. The Agency has never contested that the Grievant did not inadvertently ingest her boyfriend's prescription.

AUTHORITY OF HEARING OFFICER

As stated in the original Decision by the Hearing Officer, Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs,* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

Clearly, the Hearing Officer hears this matter de novo and the Hearing Officer may make a decision as to the appropriate sanctions, independent of the Agency's decision. One of the major purposes of a grievance procedure is that a Hearing Officer can hear matters independent of the biases that either the Grievant brings to his or her case or that the Agency brings to its case. In this matter, the Agency and the Grievant completely agree that the Grievant inadvertently ingested her boyfriend's prescription. The Agency takes the posture that, because it has delegated all authority to the MRO, it can make no decision outside of the MRO's decision. The MRO clearly is interpreting "legitimate medical explanation" to only mean "legitimate medical prescription." The Agency admits that even if there is an accidental ingestion of a drug and/or a forced ingestion of a drug, the MRO will have no authority other than to certify a positive result. The Agency then takes the posture that its hands are tied and, while it will greatly sympathize with its employee, there is nothing it can do because it is divested of the ability to look at an individual case and make a reasonable finding based on the facts of that case. The Agency states that it does not want to be in a position of having to weigh the merits of "good stories." The Agency desires that a third party make these decisions so that the Agency will be absolved of having to consider the actual facts involved in each matter.

The problem in this matter is that the Agency admits that the Grievant's story is not only a good story, but a true story. While the Agency feels that it may not have the authority to correct this manifest injustice, clearly the Hearing Officer has that authority. Further, even if the Hearing Officer does not have the authority to correct the Agency's error, the Hearing Officer has the authority to mitigate. In the Hearing Officer's original Decision, mitigation was not reached as

there was no need to mitigate a Decision that the Hearing Officer was overturning in the first place. For purposes of providing a record, if the Hearing Officer's Decision is overturned, then the Hearing Officer must consider mitigation. A Hearing Officer may mitigate the Agency's discipline if, under the record evidence, the Agency's discipline exceeds the limits of reasonableness. [7] Generally the Hearing Officer should not substitute his judgment for the Agency's on what is the best penalty unless the Agency's judgment has exceeded tolerable limits of reasonableness or appears totally unwarranted in light of all of the factors. As above-stated, in this matter the Agency admits that the Grievant accidentally ingested her boyfriend's prescription. The Hearing Officer finds that the Agency has stepped outside of tolerable limits of reasonableness and that a Group III Written Notice is unwarranted in light of all of the facts in this matter. Accordingly, if either DHRM or EDR finds that the Hearing Officer improperly applied either State or Agency policy or did not comply with Grievance Procedures, then the Hearing Officer mitigates this matter by removal of the Group III Written Notice.

DECISION

For the reasons stated herein, the Hearing Officer finds that the Grievant did have a legitimate medical explanation for the positive results. The Hearing Officer finds that, while the Agency may choose to take the position that it does not have authority to prevent a manifest injustice, the Hearing Officer does explicitly have that authority. Accordingly, the Group III Written Notice should be dismissed and removed from the Grievant's file. The Hearing Officer orders that all benefits be reinstated for the time missed pursuant to the Grievant's suspension, including all pay that the Grievant lost pursuant to this suspension. While the Hearing Officer does not believe that he has to reach this issue, if he does, he finds that the Agency is out of compliance in that it did not provide timely notice to the EDR Director or to the Grievant. Further, while the Hearing Officer does not believe that he has to reach this matter, if he does, the Hearing Officer mitigates the Group III Written Notice by ordering its removal and ordering that it be removed from the Grievant's file and that the Grievant be reinstated for the time missed pursuant to the Grievant's suspension, including all pay that was lost relative to this suspension.

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:

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Director
Department of Human Resource Management
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[7] EDR *Rules for Conducting Grievance Hearings* Section VI(B)(1)

Richmond, VA 23219

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You may request a judicial review if you believe the decision is contradictory to law.[8] 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.[9]

[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]

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