Issues: Group III Written Notice (violation of drug/alcohol policy) and Termination; Hearing Date: 01/04/10; Decision Issued: 01/07/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9239; Outcome: Full Relief; **Administrative Review: AHO Reconsideration Request received 01/22/10; Reconsideration Decision issued 02/12/10; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 01/22/10; EDR Ruling #2010-2522 issued 03/29/10; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 01/22/10; DHRM Ruling issued 05/21/10; Outcome: Remanded to AHO; Remand Decision issued 07/08/10; Outcome: Decision Reversed; Administrative Review on Remand Decision: EDR Ruling Request received 07/23/10; EDR Ruling #2011-2720 issued 09/17/10; Outcome: Referred to Circuit Court; Judicial Review: Appealed to Chesapeake Circuit Court on 10/14/10; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9239

Hearing Date: January 4, 2010
Decision Issued: January 7, 2010

PROCEDURAL HISTORY

On April 15, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for Violation of DHRM Policy 1.05, Alcohol and other Drugs and DOC Policy 5-55 because the results of a drug test were positive for marijuana.

On May 13, 2009, 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 he requested a hearing. On December 9, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 4, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
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 Corrections employed Grievant as a Captain at one of its facilities. The purpose of his position was: "Directs and supervises the work of all assigned subordinates ensuring that they function in a timely and effective manner in compliance with all institutional and Government Agencies."[1] He had been employed by the Agency for approximately 15 years. Grievant had prior active disciplinary action. On April 25, 2006, he received a Group III Written Notice with suspension for being absent in excess of three days without proper authorization or a satisfactory reason. His work performance was otherwise satisfactory to the Agency.

The Agency maintains two lists from which it selects employees for random drug tests. The first list is of those employees holding Commercial Driver's Licenses. The Agency selects fifty percent of those employees for drug tests every year. The Agency only uses urinalysis testing for these employees. The second list is of security employees. A smaller percentage of these employees are tested randomly every year and they can be tested using an oral swab. On October 1, 2007, the Agency began using an oral fluid test for employees without CDLs because doing so was more cost effective and less time consuming for employees.[2]

[1] Agency Exhibit 4.

[2] In a memo dated August 10, 2007, the Human Resource Director informed Organizational Unit Heads that, "Effective October 1, 2007, the Department will begin implementing the statewide use of oral fluid

One of Grievant's interests was bodybuilding. In January 2009, he was taking supplements and drinking approximately two gallons of water per day. Grievant was on the list of employees with CDLs and was selected for a drug test. He went to the vendor lab and followed the requirements to submit a urine sample. The lab tested the sample and the results were sent to the Agency by email dated January 20, 2009. The results showed that Grievant was "Negative, Dilute". This meant that the sample was likely diluted.[3] Under DOC Policy 5-55, Grievant should have been retested shortly after the Agency learned his first test was negative, dilute. Because of management problems in the Facility's Human Resource Office, no one insisted that Grievant immediately repeat the urinalysis testing. Several months later, the Agency's Central Office Human Resource Staff conducted an audit of the Facility's Human Resource Department. During that audit, the human resource auditors realized that Grievant should have been retested but that no urinalysis had been done. Grievant was then instructed to take the oral swab test. On April 8, 2009, a human resource employee showed Grievant how to remove the swab from the protective container, take a saliva sample from his mouth, put the swab in a vial, and seal the swab inside the vial. Grievant had completed the appropriate chain of custody document. Grievant placed the vial and chain of custody document in a bag and sealed it. That bag was placed in another bag and taken to the Facility's warehouse. An overnight carrier picked up the bag and delivered it to the testing lab. Employees at the lab opened the bag and tested the sample. An initial test was positive for marijuana. A confirmation test was also conducted which showed the sample was positive for marijuana. A Medical Review Officer spoke with Grievant regarding what drugs he was taking or other considerations that might affect the accuracy of the test results. The Medical Review Officer concluded that none of the information Grievant provided would explain the test result. On April 13, 2009, the Agency was notified that Grievant tested positive for marijuana. The Agency remove Grievant from employment based on the drug test results.

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."[4] 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

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testing for all Non-DOT drug testing. DOT employees (CDL Holders) will continue to be sent to an approved collection site for urine screening as required by Department of Transportation."

[3] It is reasonable to conclude that Grievant's practice of drinking a lot of water may have resulted in a diluted urine sample.

[4] Virginia Department of Corrections Operating Procedure 135.1(X)(A).

warrant removal."[5] Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[6]

The Agency is responsible for custody of convicted felons including those involved in the use or sale of illegal drugs. The Agency has established a zero tolerance for illegal drug consumption. DOC Operating Procedure 135.1(XII)(B) lists examples of offenses that could be considered Group III offenses. Rather than listing testing positive for drugs as one of those examples, the Agency created a subsection D and listed a positive drug test as the only item in subsection D. The Agency intended to create a prophylactic rule to establish its zero tolerance policy regardless of employee fault. The Agency intended to distinguish positive drug test results from other Group III offenses.

The downside of creating a prophylactic rule to establish a zero tolerance for illegal drug consumption is that the Agency must be held to a strict standard for compliance with its own policy. In this case, the Agency did not comply with its own policies regarding drug testing.[7]

DOC Procedure 5-55 sets forth the Agency's procedures for urinalysis and alcohol testing. Regarding random drug testing, the Procedure provides, "Employees who are confirmed to be positive will be dismissed from the Department of Corrections for, 'Illegal conduct which endangers the public safety, internal security, or affects the safe and efficient operation of the Department.'" DOC Operating Procedure 135.1(XII)(D) states, "An Illegal drug violation of Department Procedure 5-55 *Urinalysis and Alcohol Testing* will result in a Group III offense and termination."

The policy triggering Grievant's removal was DOC Procedure 5-55. This policy addresses urinalysis. It does not address oral fluid testing. The only urinalysis test Grievant took was in January 2009 in the result was negative. Thus, Grievant did not act contrary to DOC Procedure 5-55. Because the result was also "dilute", the Agency had the option of requiring Grievant to take a second test within 15 days of the first test. The Agency failed to do so. Instead, the Agency required Grievant to take an oral fluid test.[8] The Agency has no policy governing the taking of oral fluid tests. There is no

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[5] Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

[6] Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

[7] The Written Notice refers to DHRM Policy 1.05, Alcohol and other Drugs. When the Warden was asked how Grievant violated DHRM Policy 1.05, he testified that Grievant was under the influence of marijuana while working. Testing positive for marijuana means that marijuana has been detected inside Grievant's body; it does not mean that Grievant's behavior was influenced by marijuana. The Agency did not present any witnesses who noticed anything unusual about Grievant on April 8, 2009. The marijuana could have been from use outside of the workplace. There is no reason to believe Grievant was under the influence of marijuana on April 8, 2009.

[8] Grievant denied consuming marijuana and presented expert testimony questioning the reliability of the oral fluid test.

policy permitting the Agency to target a specific individual and require that individual to take an oral fluid test.[9] There is no policy governing how the oral fluid sample is to be collected and processed. There is no policy establishing safeguards to ensure that the accuracy of the oral fluid test can be verified.[10] There is no policy indicating that the Agency can remove an employee who tests positive for an illegal drug following an oral fluid test. The disciplinary action against Grievant cannot be upheld.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **rescinded**. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

You may file an <u>administrative review</u> 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:

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[9] Grievant's selection for urinalysis was random but his selection for oral fluid testing was not random.

[10] For example, under Policy 5-55, an original urine sample can be split in two so that a second portion can be independently tested if the first portion shows positive for illegal drugs.

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
600 East Main St. STE 301
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.[11]

[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

[11] 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: 9239-R

Reconsideration Decision Issued: February 12, 2010

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Much of the evidence relating to a drug test is not available or not reliable. For example, the urine sample is transported but the persons transporting that sample are not available to testify regarding how the sample was transported. The lab technician who opened the sample and conducted the tests is not available to testify. Even if the lab technician was available to testify, it would be surprising if a lab technician who tests hundreds of samples in a week would be able to remember a particular sample and testify regarding how that specific sample was handled. In order to balance the assumptions made regarding the testing of drug samples, Federal regulations and the Agency's DOC Policy 5-55 contain procedural safeguards such as "chain of custody"

processing and permitting a urine sample to be split into a second sample that may be retested by the employee after the first part of the sample is tested positive for an illegal substance. This enables a retest of the split sample to verify the earlier test. The Agency's compliance with procedural safeguards is essential to support enforcement of a zero tolerance.

The Agency's inability to draft clear and precise policy undermines its ability to enforce policy on its employees. This is especially true given that the Agency is attempting to enforce a zero tolerance policy.

In a memo dated August 10, 2007, the Human Resource Director informed Organizational Unit Heads that, "Effective October 1, 2007, the Department will begin implementing the statewide use of oral fluid testing for all Non-DOT drug testing. DOT employees (CDL Holders) will continue to be sent to an approved collection site for urine screening as required by Department of Transportation."

It is clear that the Agency has little understanding of the effect of the August 10, 2007 memo on DOC Policy 5-55. The August 10, 2007 memo does not mention DOC Policy 5-55. DOC Policy 5-55 was issued by the Agency Director. The August 10, 2007 memo was issued by the Human Resource Director. It is unclear what authority, if any, the Human Resource Director had to add to, modify, or reverse policy issued by the Agency Director.[12] The Second Step Respondent wrote that the August 10, 2007 memo "superseded" DOC Policy 5-55. Black's Law Dictionary (5th ed.) defines supersede as "Obliterate, set aside, annul, replace, made void, inefficacious or useless, repeal."[13] On the other hand, the Agency Representative insisted that the August 10, 2007 memo "supplemented" DOC Policy 5-55. When the Hearing Officer inquired of an Agency witness regarding the status of the Agency's policy for oral fluid testing, the witness responded that the policy was in development.

The question arises whether the August 10, 2007 memo supersedes DOC Policy 5-55 or is it an addition to DOC Policy 5-55, or is it the first draft of a separate written policy in development? If the August 10, 2007 memo supersedes DOC Policy 5-55, then DOC Policy 5-55 no longer exists. This means there would not be a provision to trigger Grievant's removal under DOC Policy 5-55. If the August 10, 2007 memo supplements DOC Policy 5-55, the memo would be a part of that policy. The provisions of DOC Policy 5-55 regarding obtaining a divided sample to protect employees would remain in effect. Since the Agency's method would not permit a divided sample, the

[12] Effective May 9, 2005, the Agency began to require re-testing of a urinalysis result of "negative dilute". Employees testing negative dilute were to be retested "as soon as possible" and not within 15 days as stated in the Original Hearing Decision. The Agency's Human Resource Director was the author of the memo implementing the change.

[13] The Agency's representative argues, "Unless a policy or memorandum specifically states that it supersedes a previous policy or memorandum, the Agency may utilize all such policies and memoranda in the aggregate." In contrast, the Second Step Respondent states that the memo supersedes DOC Policy 5-55.

Agency would have failed to comply with a material provision of DOC Policy 5-55 thereby undermining the Agency's position that Grievant should be removed from employment. If the August 10, 2007 memo is the first draft of a separate written policy, then the memo stands on its own. It does not contain a provision authorizing disciplinary action of removal. In short, there is no clear policy of which Grievant had notice that would justify his removal for a positive oral fluid drug test.

The Agency contends the Hearing Officer mistakenly concluded that Grievant did not violate DOC Policy 5-55. To establish that Grievant acted contrary to DOC Policy 5-55, the Agency would have to show that Grievant tested positive under a urinalysis test. Grievant's urinalysis test was negative dilute.[14] It was not positive, and, thus, Grievant did not act contrary to DOC Policy 5-55. There is no basis to remove Grievant under DOC Policy 5-55.

The Agency contends DHRM Policy 1.05 prohibits the unlawful or unauthorized use of drugs in the workplace and that a positive drug test indicates such use. On the day of Grievant's oral fluid test, he was not in possession of marijuana and had not used marijuana while at work. A positive oral fluid test does not show use of marijuana in the workplace on the day of the test, it merely shows that trace chemicals remain in one's body from prior marijuana use.[15] Grievant did not violate DHRM Policy 1.05. A positive drug test is not a violation of DHRM Policy 1.05.

The Agency argues that the methods used by the third party lab are nationally accepted methods for oral swab tests. The Agency contends the third party lab tested the oral fluid swab following its established procedures and safeguards.

Grievant presented expert testimony to rebut the claim that the Agency properly tested his oral fluid sample. The Hearing Officer did not address the merits of Grievant's oral fluid test because it is not necessary to address that issue. The Agency's inability to articulate a policy that defines the consequences of a positive oral fluid test prohibits the Agency from disciplining employees who fail to oral fluid test.

The Agency argues that the Hearing Officer cannot require the Agency to revise its policy. The Agency's argument assumes that it has a clear policy. The Hearing Officer is not revising the Agency's policy but rather is applying DOC Policy 5-55 as it is written. DOC Policy 5-55 specifically states that it applies to urinalysis. Grievant did not act contrary to DOC Policy 5-55 because he did not have a positive urinalysis result for an illegal substance.

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[14] If receiving a negative and dilute result was a basis to discipline an employee, it would not be necessary to require the employee to take a second test.

[15] Grievant disputed the accuracy of the oral fluid test.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied.**

APPEAL RIGHTS

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.

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Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Corrections

May 21, 2010

The agency has requested an administrative review of the hearing officer's decision in Case No. 9239. The agency is challenging the hearing officer's decision on the basis that it is contrary to the Department of Corrections (DOC) policy. For the reason stated below, we are remanding this decision to the hearing officer in order for him to reconsider his decision in accordance with the DHRM Policy No. 1.05. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has asked that I respond to this request for an administrative review.

FACTS

The Department of Corrections employed the grievant as a Corrections Captain until he was issued a Group III Written Notice and dismissed for "Violation of DHRM Policy 1.05 Alcohol and other Drugs: On April 8, 2009 a drug test was administered to you. On Monday April 13, 2009, the results of the test came back positive for Marijuana. According to Department of Corrections (DOC) Policy 5-55, Urinalysis and Alcohol Testing, "Employees who are confirmed to be positive will be dismissed from the DOC for Illegal conduct which endangers the public safety, internal security, or affects the safe and efficient operation of the Department." Based on the agency's application of Policy 5-55, the agency terminated the grievant. The hearing officer's **Findings of Facts** state, in part, the following:

> The Department of Corrections employed Grievant as a Captain at one of its facilities. The purpose of his position was: "Directs and supervises the work of all assigned subordinates ensuring that they function in a timely and effective manner in compliance with all institutional and Government Agencies." He had been employed by the Agency for approximately 15 years. Grievant had prior active disciplinary action. On April 25, 2006, he received a Group III Written Notice with suspension for being absent in excess of three days without proper authorization or a satisfactory reason. His work performance was otherwise satisfactory to the Agency.
>
> The Agency maintains two lists from which it selects employees for random drug tests. The first list is of those employees holding Commercial Driver's Licenses.

The Agency selects fifty percent of those employees for drug tests every year. The Agency only uses urinalysis testing for these employees. The second list is of security employees. A smaller percentage of these employees are tested randomly every year and they can be tested using an oral swab. On October 1, 2007, the Agency began using an oral fluid test for employees without CDLs because doing so was more cost effective and less time consuming for employees.

One of Grievant's interests was bodybuilding. In January 2009, he was taking supplements and drinking approximately two gallons of water per day. Grievant was on the list of employees with CDLs and was selected for a drug test. He went to the vendor lab and followed the requirements to submit a urine sample. The lab tested the sample and the results were sent to the Agency by email dated January 20, 2009. The results showed that Grievant was "Negative, Dilute." This meant that the sample was likely diluted. Under DOC Policy 5-55, Grievant should have been retested shortly after the Agency learned his first test was negative, dilute. Because of management problems in the Facility's Human Resource Office, no one insisted that Grievant immediately repeat the urinalysis testing. Several months later, the Agency's Central Office Human Resource Staff conducted an audit of the Facility's Human Resource Department. During that audit, the human resource auditors realized that Grievant should have been retested but that no urinalysis had been done. Grievant was then instructed to take the oral swab test. On April 8, 2009, a human resource employee showed Grievant how to remove the swab from the protective container, take a saliva sample from his mouth, put the swab in a vial, and seal the swab inside the vial. Grievant had completed the appropriate chain of custody document. Grievant placed the vial and chain of custody document in a bag and sealed it. That bag was placed in another bag and taken to the Facility's warehouse. An overnight carrier picked up the bag and delivered it to the testing lab. Employees at the lab opened the bag and tested the sample. An initial test was positive for marijuana. A confirmation test was also conducted which showed the sample was positive for marijuana. A Medical Review Officer spoke with Grievant regarding what drugs he was taking or other considerations that might affect the accuracy of the test results. The Medical Review Officer concluded that none of the information Grievant provided would explain the test result. On April 13, 2009, the Agency was notified that Grievant tested positive for marijuana. The Agency removed Grievant from employment based on the drug test results.

In his **Conclusions of Policy**, the hearing officer stated, in part, the following:

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

The Agency is responsible for custody of convicted felons including those involved in the use or sale of illegal drugs. The Agency has established a zero tolerance for illegal drug consumption. DOC Operating Procedure 135.1(XII) (B)

lists examples of offenses that could be considered Group III offenses. Rather than listing testing positive for drugs as one of those examples, the Agency created a subsection D and listed a positive drug test as the only item in subsection D. The Agency intended to create a prophylactic rule to establish its zero tolerance policy regardless of employee fault. The Agency intended to distinguish positive drug test results from other Group III offenses.

The downside of creating a prophylactic rule to establish a zero tolerance for illegal drug consumption is that the Agency must be held to a strict standard for compliance with its own policy. In this case, the Agency did not comply with its own policies regarding drug testing.

DOC Procedure 5-55 sets forth the Agency's procedures for urinalysis and alcohol testing. Regarding random drug testing, the Procedure provides, "Employees who are confirmed to be positive will be dismissed from the Department of Corrections for, 'Illegal conduct which endangers the public safety, internal security, or affects the safe and efficient operation of the Department.'" DOC Operating Procedure 135.1(XII) (D) states, "An Illegal drug violation of Department Procedure 5-55 *Urinalysis and Alcohol Testing* will result in a Group III offense and termination."

The policy triggering Grievant's removal was DOC Procedure 5-55. This policy addresses urinalysis. It does not address oral fluid testing. The only urinalysis test Grievant took was in January 2009 and the result was negative. Thus, Grievant did not act contrary to DOC Procedure 5-55. Because the result was also "dilute," the Agency had the option of requiring Grievant to take a second test within 15 days of the first test. The Agency failed to do so. Instead, the Agency required Grievant to take an oral fluid test. The Agency has no policy governing the taking of oral fluid tests. There is no policy permitting the Agency to target a specific individual and require that individual to take an oral fluid test. There is no policy governing how the oral fluid sample is to be collected and processed. There is no policy establishing safeguards to ensure that the accuracy of the oral fluid test can be verified. There is no policy indicating that the Agency can remove an employee who tests positive for an illegal drug following an oral fluid test. The disciplinary action against Grievant cannot be upheld.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is beyond reasonableness, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to

review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

On April 13, 2009, the grievant was issued a Group III Written Notice of disciplinary action with removal for violation of DHRM Policy 1.05, Alcohol and other Drugs and DOC Policy 5-55 because he tested positive for marijuana use. He challenged the disciplinary action by filing a grievance. When he did not get the relief he sought, he requested and received a hearing before an administrative hearing officer. In his decision, the hearing officer rescinded the disciplinary actions and granted full reinstatement of the grievant to his position.

The agency requested administrative reviews from the Department of Employment Dispute Resolution and the Department of Human Resource Management. In a ruling dated March 29, 2010, the Director of the Department of Employment Dispute Resolution upheld the decision of the hearing officer. In her decision, she identified some issues that, perhaps, DHRM needs to address. Those issues are identified and addressed below.

The relevant policy regarding disciplinary action, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states, "It is the policy of the Commonwealth to promote the well-being of its employees in the workplace by maintaining high standards of work performance and professional conduct." The policy states as its purpose, "The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness. Attachment A, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive. In addition, the provisions of DHRM's Policy No. 1.05, Alcohol and other Drugs, and DOC Procedure No. 5-55, Urinalysis and Alcohol Testing, are applicable here.

The DOC dismissed the employee for the following:

> Violation of DHRM Policy 1.05 Alcohol and other Drugs: On April 8, 2009, a drug test was administered to you. On Monday April 13, 2009, the results of the test came back positive for Marijuana. According to Department of Corrections (DOC) Policy 5-55 Urinalysis and Alcohol Testing "Employees who are confirmed to be positive will be dismissed form DOC for "Illegal conduct which endangers the public safety, internal security, or affects the safe and efficient operation of the Department."

The agency asserts that "[t]he AHO proceeds to add his interpretation of the policies and procedures where potentially the policy is silent." In accordance with a March 29, 2010, ruling issued by the Director of the Department of Employment Dispute Resolution,

> "… interpreting state and agency policies, even where a policy is silent, is unquestionably a hearing officer responsibility. A hearing officer is bound to make an initial determination of whether an agency's actions are consistent with

law and policy, with the DHRM Director having the final authority to interpret policy. When policy is silent or ambiguous, it is entirely appropriate and, indeed, necessary for the hearing officer to interpret policy in order to properly apply it to the particular facts of a case, subject to administrative review by the DHRM Director."

The DHRM concurs that, while it is the role of the hearing officer to decide the grievance on the bases of the evidence, it is necessary for the hearing officer to apply and to interpret the relevant policy in order to arrive at a proper conclusion.

The EDR March 29, 2010 ruling continues;

> A second witness, an expert witness for the grievant, testified that "I still say it does cast, cast a doubt on the reliability of the result."[16] The hearing officer did not reach any conclusions regarding the reliability of the grievant's particular test or the credibility of the two expert witnesses because he found for the grievant on other grounds. However, if this matter is remanded to the hearing officer by either the DHRM Director or the circuit court (should it be appealed to the court), the hearing officer shall address the agency's position that it properly tested the grievant's oral sample and the grievant's apparent position that reasons exist to call into question the reliability of his test.[17]
>
> As to the agency's asserted compliance with the vendor's instructions regarding oral swab testing, that issue becomes moot in light of the hearing officer's conclusion that the agency was not permitted to test the grievant through oral testing, being bound under Procedure 5-55 to follow-up with urinalysis.[18] That conclusion is subject to review by the DHRM Director on the basis of policy, and possibly the circuit court on the basis of law.
>
> Concluding that Procedure 5-55 did not authorize the grievant's discharge under the instant facts, the hearing officer <u>was required</u> to determine whether the only other policy cited on the Written Notice-DHRM Policy 1.05-supported the termination.[19] His policy interpretation that trace chemicals in one's body is not tantamount to use or impairment in the workplace, and thus not a violation of Policy 1.05 may be administratively reviewed by the DHRM Director.[20]

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[16] Hearing recording at 1:53.

[17] The hearing officer is authorized to make "findings of fact as to the material issues in the case" (Va. Code § 2.2-3005.1(C)) and to determine the grievance based "on the material issues and grounds in the record for those findings" (*Grievance Procedure Manual* § 5.9). Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

[18] See Note 15 above.

[19] April 15, 2009 Written Notice, Agency Exhibit 1.

[20] Policy 1.05 expressly prohibits the following: I. unlawful or unauthorized manufacture, distribution, dispensation, possession, or use of alcohol and other drugs in the workplace; II. impairment in the workplace from the use of alcohol or other drugs, (except the use of drugs for legitimate medical purposes); III. criminal conviction for: (i) a

We find that the hearing officer exercised no improper judgment in deciding this case nor did he improperly disregard supplemental memoranda. As we recognized in the discussion regarding Objection 1, a hearing officer is required to consider all applicable policies when deciding a case. As previously discussed, we have concluded that the hearing officer did so. Again, his interpretations of state or agency policy are subject to review by the DHRM Director.

As to the point that the grievant did not request to retest, according to the agency's own argument, the grievant had no right to a retest given that he did not have a "positive" test result. Moreover, while the hearing officer found in his original Hearing Decision that the agency had the option of requiring the grievant to retest within 15 days, he recognized in Footnote 1 of the Reconsideration Decision that Memorandum HR-2005-02 requires the agency to retest "as soon as possible," not within 15 days. The larger issue regarding Memorandum HR-2005-02 relates to the type of testing contemplated by that memo, which would appear to be urinalysis. Memorandum HR-2005-02 lists a single cross reference: "Procedure 5-55" which is the agency's urinalysis and alcohol testing policy.[21] Furthermore, HR-2005-02 describes outcomes for cases where subsequent tests are also "diluted," a form of adulteration seemingly avoided by oral testing. Thus, Memorandum HR-2005-02 could arguably support the hearing officer's conclusions that: (1) the agency had no policy that authorized the agency to have the grievant take an oral swab test as a follow-up to the original urine test; and (2) having created a drug testing policy, the agency must strictly comply with its own policy. In any event, however, a hearing officer's policy interpretations are reviewable only by the DHRM Director.

In its appeal to DHRM, the Agency stated the following:

The Grievant received an initial random urine screening in January, 2009. The results were "negative dilute." The Agency Memorandum HR-2005, dated May 9, 2005, stipulates that the Agency "will require all applicants and employees whose drug test results are reported as "negative and diluted" should receive a second test. Agency procedure does not dictate a specific time frame for retesting, however, Memorandum HR-2005-02 indicates a second test should be administered "as soon as possible." Due to management issues in the Human Resource office at the facility, a second test was not administered until the Agency discovered the oversight two months later, when they corrected the mistake by re-testing the Grievant. For convenience of the Grievant, an onsite oral swab test was administered. The Grievant did not refuse to take the second test and clearly

violation of any criminal drug law, based upon conduct occurring either on or off the workplace, or (ii) a violation of any alcoholic beverage control law, or law which governs driving while intoxicated, based upon conduct occurring in the workplace; and IV. failure to report to their supervisors that they have been convicted of any offense, as defined in III above, within five calendar days of the conviction. Agency Exhibit 5.

[21] HR-2005-02, Agency Exhibit 5.

understood the Agency's position on drug use as evidenced by his signatures on several documents upon hire:…

The Agency stated that the second drug test returned a positive result for the illegal drug marijuana. It was based on this positive test that the DOC terminated the Grievant as testing positive use of an illegal drug. Therefore, the issue is whether the provisions of DOC Policy 5-55, Urinalysis and Alcohol Testing, can be applied to terminate employees in instances where they test positive for marijuana using the swab test. The evidence supports that while the swab test resulted in a positive test for marijuana, the Written Notice indicated that the grievant was terminated by applying the provisions of DHRM Policy No. 1.05 and DOC Policy 5-55, Urinalysis and Alcohol Testing, when in reality the urinalysis test resulted in a "negative and diluted" result. The only positive test was obtained through the swab test and there are no disciplinary sanctions for having a positive result. In addition, the hearing officer could find no evidence that the grievant committed any of the violations as listed in DHRM Policy No. 1.05. DHRM Policy No. 1.05, Commonwealth of Virginia Policy on Alcohol and Other Drugs.

The Commonwealth of Virginia's Policy No. 1.05 on Alcohol and Other Drugs states that the following acts by employees are prohibited:

1. the unlawful or unauthorized manufacture, distribution, dispensation, possession, or use of alcohol and other drugs in the workplace;
2. the impairment in the workplace from the use of alcohol or other drugs, (except the use of drugs for legitimate medical purposes);
3. action that results in the criminal conviction for a:
   a. violation of any criminal drug law, based upon conduct occurring either on or off the workplace, or
   b. violation of any alcoholic beverage control law, or law which governs driving while intoxicated, based upon conduct occurring on the workplace; and,
4. the failure to report to his or her supervisor the employee's conviction of any offense, as required in Report Convictions.

Included under this policy are all employees in Executive Branch agencies, including the Governor's Office, Office of the Lieutenant Governor, and the Office of the Attorney General.

The workplace consists of any state owned or leased property or any site where state employees are performing official duties. Any employee who commits any violation, as described above, shall be subject to the full range of disciplinary actions, including discharge, pursuant to applicable disciplinary policies, such as Policy 1.60, Standards of Conduct.

After a careful review of the facts in this case**,** the DHRM concurs with the hearing officer's interpretation of the DOC Policy 5-55. However, the DHRM disagrees with the hearing officer's findings that "… hearing officer could find no evidence that the grievant committed any of the violations as listed in DHRM Policy No. 1.05." The intent of the DHRM Policy No. 1.05 is to ensure the Commonwealth's compliance with the federal Drug Free Workplace Act and to ensure a drug free workplace. The use of illegal drugs, inherently, is a violation of the policy and it is indisputable that the grievant tested positive for marijuana, an illegal drug. In the instant case, DHRM Policy No.1.05 should have been the prevailing policy, and as such was included in

the Written Notice. Moreover, the hearing officer acknowledges that DOC officials regarded its drug policy as a "zero tolerance" policy. Absent information to demonstrate that the DOC applied disciplinary actions in a disparate manner, taking the most severe disciplinary action is consistent with a "zero tolerance" policy. Thus, we are remanding this decision to the hearing officer in order that he may reconsider his decision in light of the provisions of DHRM Policy No. 1.05.

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Ernest G. Spratley

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9239-R2

Reconsideration Decision Issued: July 8, 2010

SECOND RECONSIDERATION DECISION

The Director of the Department of Human Resource Management remanded this case to the Hearing Officer for further consideration in accordance with her ruling dated May 21, 2010. The DHRM Director wrote:

> After a careful review of the facts in this case, the DHRM concurs with the hearing officer's interpretation of the DOC Policy 5-55. However, the DHRM disagrees with the hearing officer's findings that "… hearing officer could find no evidence that the grievant committed any of the violations as listed in DHRM Policy No. 1.05." The intent of the DHRM Policy No. 1.05 is to ensure the Commonwealth's compliance with the federal Drug Free Workplace Act and to ensure a drug free workplace. The use of illegal drugs, inherently, is a violation of the policy and it is indisputable that the grievant tested positive for marijuana, an illegal drug. In the instant case, DHRM Policy No.1.05 should have been the prevailing policy, and as such was included in the Written Notice. Moreover, the hearing officer acknowledges that DOC officials regarded its drug policy as a "zero tolerance" policy. Absent information to demonstrate that the DOC applied disciplinary actions in a disparate manner, taking the most severe disciplinary action is consistent with a "zero tolerance" policy. Thus, we are remanding this decision to the hearing officer in order that he may reconsider his decision in light of the provisions of DHRM Policy No. 1.05.

The DHRM Director's ruling means that for the purpose of this case, a positive test for an illegal drug is a violation of DHRM Policy 1.05. Because Grievant tested positive for marijuana, he acted contrary to DHRM Policy 1.05 as interpreted by the DHRM Director in her May 21, 2010 ruling. The Agency's zero tolerance standard is

consistent with a Group III offense thereby justifying the Agency to issue a Group III Written Notice of disciplinary action. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant presented evidence from an expert witness who asserted that the Agency's method of collection and laboratory testing of Grievant's oral fluid sample had numerous flaws so as to render the test results unreliable. The Agency countered with an expert witness who asserted that the laboratory testing of Grievant's oral fluid sample was in accordance with all regulations and industry practices. When the evidence from these two witnesses is considered as a whole, Grievant has raised some doubt and some possibility that the result from his oral fluid test was inaccurate. The standard of evidence, however, is a preponderance of the evidence. In this case, the Agency has presented credible testimony from witnesses involved in the collection process and an expert involved in the testing process to show that it is more likely than not that Grievant's test result of positive for marijuana was accurate.

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…."[22] 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.

Although the Agency has presented sufficient evidence to support its case in chief, the question becomes whether Grievant had adequate notice that testing positive for marijuana would result in his removal. The Rules for Conducting Grievance Hearings state, in part:

> Examples of "mitigating circumstances" include:
>
> Lack of Notice: The employee did not have notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with it. However, an employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee. Proper notice of the rule and/or its interpretation by the agency may also be found when the rule and/or interpretation have been communicated by word of mouth or by past practice. Notice may not be

[22] *Va. Code § 2.2-3005.*

> required when the misconduct is so severe, or is contrary to applicable professional standards, such that a reasonable employee should know that such behavior would not be acceptable.

DHRM Policy 1.05 does not mention that testing positive for an illegal drug would result in disciplinary action. This policy states, in part:

> Each of the following constitutes a violation of this policy:
>
> A. The unlawful or unauthorized manufacture, distribution, dispensation, possession, or use of alcohol or other drugs in the workplace;
>
> B. Impairment in the workplace from the use of alcohol or other drugs, except from the use of drugs for legitimate medical purposes;

Grievant did not manufacture, distribute, disperse, possess, or use marijuana in the workplace. Grievant was not impaired in the workplace from the use of marijuana. The Agency argued that Grievant was in possession or using marijuana in the workplace because he tested positive for marijuana as part of a drug screen conducted in the workplace. There is a difference between marijuana which consists of many elements and can be held in one's hand and the unique chemical in one's bloodstream that may indicate prior possession and use of marijuana. One may be a subset of the other, but they are not the same. By analogy, if an individual possesses a steak, consumes it, and has his or her blood tested sometime later for chemicals consistent with the consumption of a steak, it would be untenable to argue that the individual was in possession of a steak at the time of the blood test. The individual may be in possession of some of the ingredients of a steak at the time of the blood test, but the individual would not be in possession of a steak. The Agency is essentially arguing that there is no difference between marijuana and some of the trace elements that show prior use of marijuana. The Agency's argument is untenable.

A reasonable employee reading DHRM Policy 1.05 would have to speculate to conclude that DHRM Policy 1.05 established a basis to take disciplinary action for testing positive for illegal drug that was consumed outside of the workplace. The DHRM Director's ruling in this case is a case of first impression. DHRM Policy 1.05 did not form a basis to place Grievant on notice that testing positive for marijuana would result in his removal.

The Drug Free Workplace Act regulates both federal contractors and federal grantees. Presuming that the Commonwealth of Virginia is a "federal grantee" under the Act would require the Commonwealth as an "employer" to ensure compliance by requiring a drug free workplace. A "drug free workplace" is defined as:

> a site for the performance of work done in connection with a specific grant or contract described in section 701 or 702 of this title of an entity at which employees of such entity are prohibited from engaging in the unlawful

> manufacture, distribution, dispensation, possession, or use of a controlled substance in accordance with the requirements of this Act.[23]

No language in the Act requires or authorizes drug testing, and there is nothing in the legislative history that indicates Congress intended to impose additional requirements beyond the language of the Act. According to *Harris v. Aerospace Testing Alliance*,

> [n]o section of the Drug-Free Workplace Act requires drug testing, nor does any section set out a procedure for conducting drug testing. Rather, the requirements both for recipients of grants and contractors are threefold. First, a recipient of government money must publish a statement prohibiting the illegal use of any controlled substance. Second, the recipient must establish a drug-free awareness program, and notify each employee of both the statement and the program. Third, when an employee is convicted of a criminal drug offense the recipient of funds must either sanction that employee or require the employee to participate in a drug abuse assistance rehabilitation program. The language of the statute does not support the theory the act requires or regulates drug screening.[24]

Therefore, drug testing is not regulated by the Department of Labor or subject to the provisions of the Drug Free Workplace Act. Instead, entities are given latitude in implementing drug testing subject to other applicable state and federal regulations. [25] However, the Department of Labor "strongly recommends that before any drug-testing program is implemented, an employer have a written policy that is shared with all employees and clearly outlines why drug-testing is being implemented, prohibited behaviors and the consequences for violating the policy."[26] DHRM Policy 1.05 does not satisfy that aspiration.

DOC Procedure 5-55 sets forth the Agency's procedures for urinalysis and alcohol testing. Regarding random drug testing, the Procedure provides, "Employees who are confirmed to be positive will be dismissed from the Department of Corrections for, 'Illegal conduct which endangers the public safety, internal security, or affects the safe and efficient operation of the Department.'" This policy clearly places Grievant on notice that if he tested positive for marijuana, he would be dismissed from the Agency. Although the Agency did not comply with DOC Procedure 5-55, the Agency's failure to

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[23] 42 U.S.C. §701 (2006)

[24] Harris v. Aerospace Testing Alliance, 2008 U.S. Dist. LEXIS 1185 (E.D. Tenn. 2008).

[25] Drug Free Workplace Act of 1988, Frequently Asked Questions, U.S. Department of Labor, http://www.dol.gov/elaws/asp/drugfree/screenfq.htm (last visited May 25, 2010).

[26] Harris v. Aerospace Testing Alliance, 2008 U.S. Dist. LEXIS 1185 (E.D. Tenn. 2008).

comply with that policy is rendered immaterial by the DHRM ruling. With respect to mitigation under the EDR Rules for Conducting Hearings, the question is whether the employee had notice of the rule and not whether the Agency complied with a particular policy. In this case, Grievant knew that the Agency had a rule that if he tested positive for marijuana he would be dismissed. Accordingly, there is no basis to mitigate the disciplinary action against Grievant for lack of notice of the rule.

The Group III Written Notice with removal given to Grievant must be **upheld**. The Original Hearing Decision is modified to reflect this order.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. 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.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer