

Issue: Group III Written Notice with termination (positive drug test); Hearing  
Date: 09/09/10; Decision Issued: 09/16/10; Agency: VDOT; AHO: Thomas J.  
McCarthy, Jr., Esq.; Case No. 9400; Outcome: No Relief – Agency Upheld.

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

**In re: Case Number 9400**

**Hearing Date: September 9, 2010**  
**Decision Issued: September 16, 2010**

**APPEARANCES**

Grievant  
Agency Representative  
4 Witnesses for Agency  
1 Witness for Grievant – the Grievant

**ISSUE**

“Was the Group III Written Notice with termination issued to Grievant on May 21, 2010, in violation of the U.S. Department of Transportation Regulations, Code of Virginia for drivers operating a motor vehicle under the influence of drugs and VDOT’s Drug and Alcohol Testing Policy proper?”

**FINDINGS OF FACTS**

1. On May 13, 2010, Grievant was given an unannounced urine test which was found to be positive for marijuana.
2. Grievant, after notice did not ask for a split sample to be evaluated within 72 hours.
3. Grievant testified he had taken protonex to help him sleep.
4. Grievant’s doctor sent a letter admitted at the Grievant’s hearing that protonex could cause a false positive for marijuana.
5. Department personnel testified that protonex would not have registered as highly for marijuana as Grievant’s tests.
6. Two doctors testified that Grievant’s tests were properly done with one of them testifying by telephone that the test sample had been run through a gas chromatograph which would have shown protonex. It did not.

7. Grievant testified that he had not used marijuana and desperately needed his job to support his family.

8. Grievant had an active Group III Written Notice for testing positive for marijuana in violation of the Department's Drug and Alcohol Testing Policy in September of 2009.

### **APPLICABLE LAW OR POLICY AND OPINION**

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4<sup>th</sup> Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4<sup>th</sup> Cir. 1997))].

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)].

Standards of Conduct, Policy 1.60 applies to all sections covered by the Virginia Personnel Act and sets the criteria for Employee Standards of Conduct.

The Grievant had an active Group III Written Notice from May, 2009 in his file. While he convincingly testified that he had not used marijuana, and his doctor submitted a letter that his taking protonex could cause a false positive for marijuana, extremely qualified doctors reviewing the lab procedures and findings did not agree with Grievant and his Doctor that protonex caused the positive readings at the level of the Grievant's specimens.

The Department had no choice but to issue the Group III Written Notice with Termination.

### **DECISION**

The Group III Written Notice with termination was proper and unavoidable with the lack of technical evidence the Grievant presented. Therefore, the Group III Written Notice with termination is sustained.

### **APPEAL RIGHTS**

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

#### **Administrative Review**

This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. 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.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia, 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main, Suite 301, Richmond, Virginia, 23219 or faxes to (804) 786-0111.

A party may make more than one type of request for review. All requests 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**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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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**Thomas J. McCarthy, Jr.**  
**Hearing Officer**