Issue: Group III Written Notice with Termination (violation of drug/alcohol policy); Hearing Date: 06/16/11; Decision Issued: 07/09/11; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 9593; Outcome: No Relief – Agency Upheld.

**DECISION OF HEARING OFFICER**
**IN RE: CASE NO. 9593**
**HEARING DATE: June 16, 2011**
**DECISION ISSUED: July 9, 2011**

## PROCEDURAL HISTORY

On February 25, 2011, Grievant was issued a Written Notice for Virginia Department of Corrections Offense Code #31, Violation of Policy 1.05, "Alcohol and Other Drugs". The first step resolution was expedited. The second step resolution was completed on March 24, 2011. The matter was qualified for hearing on April 13, 2011. This Hearing Officer was appointed May 2, 2011. A pre-hearing conference call was scheduled for on May 6, 2011 and the hearing was set by agreement for June 16, 2011 at 1:30pm. The delayed date was due to vacation conflicts of counsel for the parties. The location was later decided and held at the [agency's facility].

## APPEARANCES

Agency Representative
Agency Advocate
3 Agency Witness
Grievant
Grievant's Counsel
3 Grievant Witnesses

## ISSUES

1. Did Grievant engage in the behavior described in the Written Notice?
2. Did Grievant's behavior constitute misconduct warranting termination?

## BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate

under the circumstances.[1] A preponderance of the evidence is evidence which shows that what is sought is to be proved is more probable than not.[2] It is incumbent on Grievant to show that the relief sought by Grievant is applicable to Grievant's case.[3] Also, Grievant has the burden of proving any affirmative defenses raised by Grievant.[4]

## FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Grievant was employed as an R.N. nurse with the Department of Corrections (DOC). Grievant acknowledged she did have orientation and signed the orientation sheet on March 25, 2010[5] that referenced DOC operating procedure 130.2 pertaining to alcohol and drug use.[6] On February 16, 2011, Grievant was called for a random oral drug screening test. Grievant complied and signed the documentation which accompanied her saliva sample.[7] Grievant admitted to a conversation with the Medical Review Officer (MRO) who advised her that her test was positive for cocaine. Grievant told the MRO of her prescribed medications. The MRO found no reason why any of the reported prescriptions would interfere with the positive cocaine test results. Grievant was told she could have the saliva retested at her expense and declined to do so. The MRO then sent the results on to Grievant's employer.[8] In accordance with policy, Grievant was dismissed from employment and issued a Group III reprimand.[9] Four days after her original test, without

[1] Grievance Procedure Manual (GPM) § 5.8.
[2] GPM § 9.
[3] GPM § 5.9(a).
[4] GPM §4.1(b).
[5] Agency Exhibit F
[6] Agency Exhibit E
[7] Agency Exhibit B
[8] Agency Exhibit A
[9] Agency Exhibit K

approval of the Agency, Grievant had her hair sample evaluated which showed no evidence of cocaine in Grievant's hair sample.[10]

The Agency failed to acknowledge Grievant's February 20, 2011 hair sample test as DOC procedure 130.2, IX,B(1)[11] requires an employee request permission before doing an independent test. Further, the MRO stated that hair affected on February 16, 2011 could not grow to a sufficient length from the scalp in order to be tested on February 20, 2011. Neither the oral sample nor hair sample provided competent chain of custody evidence.

Grievant denied drug use. Her three witnesses stated they never believed her to be under the influence of drugs. Agency's advocate elicited testimony from all three witnesses that they did not have experience with cocaine users so as to make a comparison with normal behavior.

Chain of custody of the saliva collected from Grievant became an issue the hearing. The DOC had a designated person in their employ to collect the random drug screen sample. An independent lab processed the saliva for evaluation. Subsequently, an independent MRO evaluated the results, called the employee and evaluated any mitigating circumstances of the employee which might affect the outcome. Upon determining there was no new relevant information, he reported the results to the Agency.[12]

The person who collected the sample verified Grievant signed the sample, but was unable to account for the label "460185T" attached to the form.[13] The MRO received a chain of custody package after litigation was anticipated. The physician was quite adamant when questioned by Grievant's counsel that it was not his job to verify the method used in drug detection, nor to verify the chain of custody. The Agency had no witness to verify the chain of custody report.

[10] Grievant Exhibit A
[11] Agency Exhibit E
[12] Testimony of various witnesses at hearing
[13] Agency Exhibit B

Grievant's counsel made several objections to the chain of custody litigation package by the following objections:[14]

1. The litigation package (Exhibit C) was not sent in a timely manner as it was received two days passed the exchange of evidence deadline designated by the Hearing Officer.
2. The identification number assigned to Grievant's specimen was not clearly visible on at least one page of the report.
3. The package contained 90+ pages when received by the MRO and only 87 pages when copied to Agency's representative.
4. The Agency's representative originally produced only some of the 87 pages at hearing.
5. Grievant's counsel could not evaluate 87 pages during the time of the hearing.
6. No witness that could answer to the contents of the litigation package was produced to provide Grievant with the opportunity for cross-examination.
7. No person could provide a link from the DOC, where the sample was collected, to the MRO who evaluated the results.

The timeliness in supplying the information issue was overruled by the Hearing Officer. The lack of receiving the complete document was overruled when Agency's representative provided Grievant with all 87 pages. The lack of time to review 87 pages was overruled and Grievant's counsel was given a recess to review the document and/or request that the hearing be postponed to a future time. The Hearing Officer noted that it was true that a number purporting to be Grievant's identification number was unclear in the document. Grievant's counsel finally objected that there was no one to cross-examine about the document. This objection was granted and the Exhibit was not admitted over Agency representative's objections.

## APPLICABLE LAW AND POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe

[14] Grievant's counsel's statments in testimony not quoted verbatim

nature that a first occurrence normally should warrant termination."[15] DOC Operating Procedure #130.2, effective January 1, 2010 provides for random drug testing of DOC employees and proscribes the consequences at § IV(b)4.[16] DOC Operating Procedure #135.1 § XII Group Three Offense D10 and B32 both provide for immediate termination of employment.[17] Grievant's Written Notice Offense Code was "31" violation of Policy 1.05.[18] The policies are consistent in their requirements and discipline.

Hearing Officers are bound by the provisions of the Virginia Code § 2.2-3000 et. seq. and the Grievance Procedure Manual. The Manual states that formal rules of evidence do not apply to hearings.[19] However, the Manual provides that Hearing Officers may exclude evidence.[20]

## OPINION

In this case, Agency must prove its allegations by a preponderance of the evidence. Agency presented a finding of Grievant having tested positive for cocaine. Grievant provided a subsequent test finding she did not have cocaine in her system for some time. Neither party had competent chain of custody information presented at the hearing. While document evidence may not be subject to presentation by a custodian as in a court of law, the evidence of chain of custody is essential to a drug test case. Grievant was denied the opportunity to question the document in any way. Agency presented the MRO by telephonic conference and could easily have contacted lab personnel via the same method. Neither the collector nor the MRO who evaluated Grievant's situation could attest to the labeling and testing of Grievant's sample.

[15] The Department of Human Resources Management (DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.
[16] Agency Exhibit E
[17] Agency Exhibit J
[18] Agency Exhibit K
[19] GPM § 5.8(5)
[20] GPM § 5.7(7)

Grievant's counsel had several objections to the lab's "litigation package" which purported to establish chain of custody. The Hearing Officer agrees presenting this document in the manner chosen by Agency deprived Grievant of a fair opportunity to question the competency of that evidence.

As the evidence stands, Agency has the result of an oral swab test that is positive with no proper custodial chain and Grievant has the result of a hair sample test that is negative that also has no laboratory personnel to verify its validity. The evidence shows that Grievant's hair test could not detect cocaine use from the four days earlier time period that Agency tested Grievant. Further, by Operating Procedure Rule #130.2,IX,B(1) Agency would not need to recognize Grievant's test results unless Grievant requested permission in advance to have independent testing. Thus, Agency has, by a preponderance of the evidence presented, proved its case. The termination is in keeping with stated policy.

## DECISION

For the above reason, Agency's disciplinary action is **UPHELD**.

## APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review.[21] Once the administrative review phase has concluded, the hearing becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three (3) 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 are the basis for such a request.

[21] 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 and EDR Consultant.

2. A challenge that the hearing decision is inconsistent with state policy 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:

   Director, Department of Human Resources Management
   101 N. 14th Street, 12th Floor
   Richmond, VA 23219

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the 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:

   Director, Department of Employment Dispute Resolution
   600 East Main Street, Suite 301
   Richmond, VA 23219

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 original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with 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 following the issuance of the decision). 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 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 grievance arose.[22] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Sondra K. Alan, Hearing Officer

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