Issue: Group III Written Notice with Termination (violation of drug/alcohol policy); Hearing Date: 06/29/11; Decision Issued: 07/11/11; Agency: VDOT; AHO: Lorin A. Costanzo, Esq.; Case No. 9631; Outcome: No Relief – Agency Upheld.

Commonwealth of Virginia
DEPARTMENT OF TRANSPORTATION

DECISION OF HEARING OFFICER

In the matter of: Case No: 9631

Hearing Date: June 29, 2011
Decision Issued: July 11, 2011

PROCEDURAL HISTORY

Grievant was issued a Group III Written Notice with termination March 4, 2011 for violation of the Safety and Performance Management Division "Drug & Alcohol Testing Policy". The *Nature of Offense and Evidence* indicated:

> … In order to return to work from an absence of 30 calendar days or more [Grievant] was required to take a urine test. This was administered on February 15, 2011. The results indicated that [Grievant] had a confirmed positive drug test for marijuana. This is a second confirmed positive drug test for marijuana.[1]

Following failure to resolve the matter at the resolution steps, the grievance was qualified for hearing on May 5, 2011. On June 8, 2011, the Department of Employment Dispute Resolution assigned this matter to the Hearing Officer. Hearing was held on June 29, 2011 beginning at 9:00 A.M. at the Conference Room [of the facility] with Grievant and his counsel present at hearing.

APPEARANCES

Grievant (who was also a witness)
Counsel for Grievant
Wife
Agency Party Representative (who was also a witness)
Agency Presenter
Medical Review Officer (who testified via speakerphone)
Lab Representative (who testified via speakerphone)
Maintenance Manager
Transportation Operations Manager

ISSUES

Whether issuance of a Group III Written Notice with termination was warranted and appropriate under the circumstances?

[1] Agency Exhibits Tab 1. pg. 12.

FINDINGS OF FACT

After reviewing the evidence admitted in this cause and observing the demeanor of the witnesses, the Hearing Officer makes the following findings of fact:

01. Grievant filed a timely appeal from a Group III Written Notice with termination issued on March 4, 2011 for violation of the Safety and Performance Management Division "Drug & Alcohol Testing Policy".[2]

02. Grievant has been employed with Agency since November of 1987. Grievant is a "Crew Member" and holds a Commercial Drivers License.[3]

03. On October 24, 2007 Grievant took a random urine drug test required by Agency. Grievant had a confirmed positive test for marijuana for this urine drug test.[4]

04. On October 31, 2007, as a result of the random urine test being positive for marijuana, Grievant was issued a Group III Written Notice for violation of the *Office of Employee Safety & Health Drug and Alcohol Testing Policy*. Since this was a first offense, Grievant, was issued a Group III Written Notice and was given the opportunity to get assistance under the EAP provision of the *Office of Employee Safety & Health Drug and Alcohol Testing Policy* and not be terminated.[5]

05. In lieu of dismissal for the 2007 positive marijuana drug test, Grievant entered into a Substance Abuse Program (SAP) and was subject to random drug testing and follow-up testing. An Agency Fitness for Duty Coordinator recommended that Grievant's case be closed if there are no further violations of the DOT Drug and Alcohol Rule and he comply with the Fitness for Duty Program recommendations during the 60 month follow-up period.[6]

06. Grievant was recommended by his SAP evaluator on 1/25/08 to participate in a random urine screening protocol in the VDOT Fitness for Duty Program for five years.[7]

07. Grievant signed a *Fitness for Duty Program Compliance Agreement* on 11/19/07 indicating , among other matters, he would comply with rehabilitation recommendations given by Fitness for Duty Coordinator, demonstrate successful compliance with Rehabilitation Plan, and perform follow-up alcohol and/or drug testing as directed by director. Grievant indicated he understood failure to comply with requirements would result in termination.[8]

08. On October 19, 2010 Grievant had an accident at work that led to his being off work from October 20, 2010 until February 14, 2011.[9]

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[2] Agency Exhibits Tab 2. and Tab 3.
[3] Agency Exhibits Tab 3. pg. 3.
[4] Agency Exhibits Tab 2. pg. 2, and pg. 25.
[5] Agency Exhibits Tab 2. pg. 25.
[6] Agency Exhibits Tab 2. pg. 10 and pg. 25 & 26.
[7] Agency Exhibits Tab 2. pg. 1.
[8] Agency Exhibits Tab 2. pg. 15.
[9] Testimony.

09. On December 6, 2010 management requested Grievant be removed from the random drug testing pool. Grievant was removed from the random testing pool as he was expected to be on an extended absence from work of 30 days or more. Notification was to be provided to restore his name to the random testing pool upon his return to work.[10]

10. On February 15, 2011, after returning to work, Grievant took a pre-employment urine drug test. A specimen was collected this date for testing due to Grievant having been removed from the random drug testing pool for 30 days or more.[11]

11. On February 21, 2011 the certified laboratory that conducted the testing reported to the Medical Review Officer (MRO) a positive THC result for cannabinoids in both the screening test and in the confirmation tests conducted on Grievant's 2/15/11 urine sample. Confirmation testing was positive for delta-9-tetrahydrocannabinol ("THC"), a metabolite of marijuana.[12]

12. On February 22, 2011 the Medical Review Officer (MRO) notified Grievant and Agency that Grievant's pre-employment drug test was positive for marijuana. Furthermore, Grievant was notified by the MRO that he had a period of 72 hours to request a split sample test be conducted on his urine sample taken 2/15/11.[13]

13. On February 22, 2011 Agency placed Grievant in a "safety stand down" status until the 72 hour window expired.[14]

14. On March 3, 2011 Grievant met with Agency management. Grievant was given notification of the Agency's intent to issue him a Group III Written notice for violation of Agency's Drug & Alcohol Testing Policy due to his having tested positive for marijuana. Additionally, Grievant was given 24 hours to provide his response.[15]

15. On March 28, 2011 the request was made for laboratory to send Grievant's split urine specimen to another certified lab for testing. The split specimen testing resulted in a reconfirmed positive THC result.[16]

16. Grievant took three urine drug tests in March and April of 2011 which gave negative results for marijuana/THC/Cannabinoid:[17]

a. On 3/08/11- Drug Screen 9, Unconfirm Urine (UDS9U) --- negative test result. [18]

b. On 3/29/11- Drugs of Abuse Screen- SAMHA --- negative test result.

c. On 4/07/11- Drug Screen 8, Unconfirm Urine (UDRGR) --- negative test result.

17. Grievant's 2/15/11 pre-employment urine drug sample was tested by two separate Department of Health and Human Services certified laboratories. The confirmation tests utilized

[10] Agency Exhibits Tab 1. pg. 1.
[11] Agency Exhibits Tab 1. pg. 3 and Tab 3. pg. 19 & 28.
[12] Agency Exhibits Tab 3. pg. 19 and testimony of MRO.
[13] Agency Exhibits Tab 1. pg. 5 and testimony of MRO.
[14] Agency Exhibits Tab 1. pg. 5.
[15] Agency Exhibits Tab 1. pg. 12.
[16] Agency Exhibits Tab 3. pg. 19-20.
[17] Grievant Exhibits 2 & 3.
[18] Agency Exhibits Tab 3. pg. 12-13.

chromatography/mass spectrometry ("GC/MS") which indicated that Grievant's testing was positive for delta-9-tetrahydrocannabinol ("THC"), a metabolite of marijuana.

a. The first lab reported a positive THC result for cannabinoids in both the screening and confirmations tests.

b. At the request of Grievant, a second lab was sent the split of Grievant's 2/15/11 urine specimen for testing. The second DHHS certified laboratory conducted independent testing and a reconfirmed positive THC result of the split specimen was found and reported.[19]

18. The MRO determined that the 2/15/11 urine specimen of Grievant was collected following standard protocols in accordance with applicable USDOT Regulations, 49 CFR Parts 40.31-40.73 and that the specimen was sent to laboratory which was certified by the Department of Health and Human Services to conduct Department of Transportation urine drug testing. [20]

19. MRO reviewed the laboratory results and chain of custody form on which the specimen was collected and found no errors in the collection procedure. He conducted two interviews with Grievant on 2/22/11 and identified no legitimate medical reason for the presence of THC in Grievant's urine. On 2/22/11 the MRO reported the positive test result (positive THC result for cannabinoids) to Agency. The MRO further determined that the reconfirmed positive THC result of the split specimen (reported to him on 4/1/11) was appropriately reported to Agency.[21]

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that the disciplinary action taken was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.[22]

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 *et seq*., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes,* 237 Va. 653, 656 (1989*).*

Code Section 2.2-3000(A) sets forth the Virginia grievance procedure and provides, in part:

> "It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints .... To the extent that

[19] Agency Exhibits Tab 3. pg. 19-21 & 31.
[20] Agency Exhibits Tab 7. pg. 1-2.
[21] Agency Exhibits Tab 7. pg. 1-2.
[22] Department of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 5.8 and 9.

such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes which may arise between state agencies and those employees who have access to the procedure under Section 2.2-3001."

Standards of Conduct [23]

Pursuant to § 2.2-1201 of the Code of Virginia the Department of Human Resources Management promulgated the *Standards of Conduct*, Policy No. 1.60 to establish procedures on standards of conduct and performance for employees of the Commonwealth of Virginia. The *Standards of Conduct* provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The *Standards of Conduct* serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

To assist management in the assessment of the appropriate corrective action, the *Standards of Conduct* organizes offenses into three groups according to the severity of the misconduct or behavior. *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 nature that a first occurrence normally should warrant termination.[24]

Section B. 2. c. of the *Standards of Conduct* provides that the active life a Group III Written Notice is, "Four years from its date of issuance to the employee."

Section B. 2. of the *Standards of Conduct* provides:

> *Examples of offenses, by group, are presented in Attachment A. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense* ***not specifically enumerated*** *that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.*

Section E. of the *Standards of Conduct* provides:

> **1. Advance Notice of Discipline to Employees**
>
> Prior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.
>
> **2. Employee Response and "Reasonable Opportunity to Respond"**
>
> Employees must be given a reasonable opportunity to respond after receiving notification of pre-disciplinary or disciplinary actions. *Normally*, a 24 hour

[23] Agency Exhibits Tab 10. - DHRM Policies and Procedures Manual, Policy No. 1.60, effective April 16, 2008, "Standards of Conduct".
[24] Agency Exhibits Tab 10. - DHRM Policies and Procedures Manual, Policy No. 1.60, effective: April 16, 2008, "Standards of Conduct".

> period is a sufficient period of time, however, a "reasonable opportunity to respond" should not be based solely on the quantity of time provided but also on the nature of the offense, which may or may not require more or less time to refute or mitigate the charge.

Drug and Alcohol Testing Policy [25]

Agency has adopted, "Drug and Alcohol Testing Policy" (SPP# 01 - 004). As set forth therein:

> This safety policy and procedure is established in accordance with 49 CFR 29, 40. 98, 382, 383, 390, 391, 392, 393, 395, 396, 397 399 of the United States Department of Transportation (USDOT), the Federal Motor Carrier Safety Administration (FMCSA) and Standards of Conduct Policy 1.60, and Alcohol and other Drugs Policy 1.05, issued by the Department of Human Resources Management DHRM).

SPP# 01-004 provides in Section 4.0:

> Recognizing that drugs and alcohol hinder an individual's ability to perform job tasks safely and effectively, VDOT instituted this substance abuse policy for employees engaged in activities related to public safety and the safety of themselves and co-workers.

Agency's *Drug and Alcohol Testing Policy* provides, in pertinent part, as follows:

6.2.2.2 Drug Testing:

> Testing of an individual's collected urine specimen shall check for the presence of the following drugs, except as noted, by a certified laboratory:
>
> - Amphetamines
> - Cocaine
> - Marijuana
> - MDMA (Ecstasy)
> - Opiates
> - Phencycloidine (PCP)
> - Alcohol (except pre-employment)

6.2.2.3 Laboratory:

> Any laboratory performing specimen analysis for drugs shall be certified by the Department of Health and Human Services and shall meet the requirements set forth in 49 CFR Part 40.
>
> All positive tests shall be forwarded to the MRO for final review. A positive test result does not automatically identify an employee/applicant as having used drugs in violation of DOT regulations or this policy. It is the responsibility of the MRO to review, interpret and verify a test as positive or declare the test as negative.

[25] Agency Exhibits Tab 5 - VDOT- Safety and Performance Management Division- "Drug and Alcohol Testing Policy" (SPP# 01 - 004) September 30, 2010.

6.2.2.10 Results Consistent with Legal Drug Use

If the MRO determines there is a legitimate medical explanation for the positive test result, the MRO shall report the test result as negative.

6.2.3.1 Pre-Employment Testing provides in pertinent part:

Every individual accepted for employment in a position operating a commercial motor vehicle shall be covered by this policy and shall pass a drug test as part of the pre-employment physical as a condition of employment.

Employees promoted, demoted, or transferred from a position not covered by this policy to a position covered by this policy on a temporary or permanent basis shall be required to pass a test for drugs prior to assuming the duties of the position operating a commercial motor vehicle. *When an existing employee has been removed from the random testing pool for 30 days or more, the covered employee will be required to pass a pre-employment drug test prior to assuming the duties of the position operating a commercial motor vehicle.* ***(emphasis added)***

6.2.4.2 Drug Offenses provides in pertinent part:

First Offense

- Employees having a positive drug test shall be issued a Group III Notice under the Standards of Conduct.
  Employees shall be given the opportunity to obtain assistance as outlined in the section titled "Employee Assistance Program." Employees shall also be subject to increased unannounced follow-up testing for a period up to 60 months.
  Employees refusing assistance shall be terminated
  Employees not successfully completing the employee assistance program must be terminated.

Second Offense

- Employees shall be issued a Group III Notice under the Standards of Conduct and terminated.[26]

Pre-Employment Testing

Safety and Performance Management Division, Regulatory Analysis: Inclusion of "Extended Absence from Work" Drug and Alcohol Testing Policy provides, in pertinent part:

Once that individual is employed, there are circumstances that may remove them from work for 30 days or more:
Injury (on the job)
Injury (off the job)
Leave:

When an existing employee has been removed from the random testing pool for 30 days or more, the covered employee will be required to pass a pre-employment

> drug test prior to assuming the duties of the position operating a commercial motor vehicle.
>
> When a covered employee has been removed from the random testing pool for a period of 30 days or more, the covered employee will be required to have a pre-employment drug test in order to be restored to the random testing pool. When a covered employee has been absent from work and removed from the random testing pool, the covered employee will be required to have a pre-employment drug test in order to restore them to the random testing pool.[27]

Positive Testing

2007 (first positive test) … On October 31, 2007 Grievant was issued a Group III Written Notice for violation of Policy 1.05, Alcohol and Other Drugs. Grievant had taken a random urine test on October 24, 2007and his test results were positive for marijuana. As this was a first offense, Agency offered Grievant an opportunity to receive assistance under the Employee Assistance Program provision of Policy 1.05 and not be terminated. Grievant elected to accept this and Grievant entered into a Substance Abuse Program (SAP).

On November 19, 2007, Grievant signed a Substance Abuse Program ("SAP") compliance agreement. Grievant acknowledged that if he failed to comply with the SAP program guidelines he would be terminated. [28] Grievant entered a SAP program with a follow-up testing program for a period of 60 months.[29]

2011 (second positive test) … Grievant underwent a pre-employment urine drug collection on February 15, 2011. This was due to his having been removed from the random drug testing pool for 30 days or more while he was out of work from October 20, 2010 until February 14, 2011. On returning to work, Agency required a pre-employment drug as provided in VDOT's "Drug and Alcohol Testing Policy" (SPP# 01-004).[30]

Grievant was positive for marijuana. The MRO discussed the test results with Grievant and discussed Grievant's use of medications with him. The MRO found no legitimate medical explanation for the positive test result.

Upon receipt of the verified positive drug test result from the MRO Grievant was removed from all safety sensitive functions and, as a result of this positive drug test result, the Substance Abuse Professional placed Grievant in a non-compliant status.[31]

A positive THC result for cannabinoids was reported by two separate DHHS certified laboratories. The first DHHS certified laboratory reported a positive THC result for cannabinoids in both the screening and confirmation tests on February 21, 2001 (with paperwork for drug test received by MRO on 2/22/11). On March 28, 2011 the request was made for the laboratory to send Grievant's split urine specimen to another certified lab for testing. The second DHHS

[27] Agency Exhibits Tab 5. pg. 25-26.
[28] Agency Exhibits Tab 2. pg. 25 & 26.
[29] Agency Exhibits Tab 1. pg. 7.
[30] Agency Exhibits Tab 3. pg. 19 & 20. and Tab 5.
[31] Agency Exhibits Tab 1. pg. 7.

certified laboratory conducted independent testing and a reconfirmed positive THC result of the split specimen was reported by the second laboratory on April 1, 2011.[32]

Positive THC result was determined in an initial screening test by the Certified Laboratory. Positive THC result was determined in the confirmation tests conducted by both independent Certified Laboratories. The confirmation testing utilized gas chromatography/mass spectrometry ("GC/MS").[33]

Testing of Grievant's 2/15/11 urine sample resulted in a "positive" result for marijuana. The GC/MS test results indicated that Grievant's testing was positive for delta-9-tetrahydrocannabinol ("THC"), a metabolite of marijuana.

The positive drug test for marijuana metabolite performed on Grievant's 2/15/11 urine sample is a second violation of the U.S. Department of Transportation Drug and Alcohol Testing Regulations and the Virginia Department of Transportation Policy. The initial violation occurred when an October 24, 2007 random urine drug sample tested positive for marijuana metabolite.[34]

Grievant was aware of Agency policy concerning marijuana and drug testing. He had agreed to and entered a SAP after his 2007 positive random urine drug test.

Negative testing

Grievant produced documents and testified as to 3 urine drug tests he took in March and April of 2011 which indicated he tested negative for Marijuana/THC/Cannabinoid.[35]

a. On 3/08/11- Drug Screen 9, Unconfirm Urine (UDS9U) which was negative.
b. On 3/29/11- Drugs of Abuse Screen- SAMHA which was negative.
c. On 4/07/11- Drug Screen 8, Unconfirm Urine (UDRGR)) which was negative.

The tests of 3/8/11 and 3/29/11 indicated that the Drug Screen is intended only for Medical management of the patients and the result should not be used for Medicolegal purposes. In all 3 negative tests, the specimen was collected and processed without documentation of the chain of custody.

The time span between the positive and negative test results was given consideration. There was a significant lapse of time between the date the urine sample was taken that resulted in positive test results and the date each of the samples were taken that resulted in negative test results. The time span between the 2/15/11 urine collection date (positive test results) and the collection dates for each of the three negative tests (i.e. 3/8/11, 3/28/11, and 4/04/11) is approximately:

21 days after the 2/15/11 sample for the 3/08/11 urine sample;
41 days after the 2/15/11 sample for the 3/28/11 urine sample; and
51 days after the 2/15/11 sample for the 4/04/11 urine sample.

Agency has admitted a document entitled "Drugs of Abuse Reference Guide" indicating for Marijuana/Cannabinoids the detection time in urine is approximately 2 to 7 days re single

[32] Agency Exhibits Tab 3. pg. 19-20.
[33] Agency Exhibits Tab 8.
[34] Agency Exhibits Tab 1. pg. 7 & 8.
[35] Grievant Exhibits 2 & 3.

use and 1 to 2 months re prolonged use. The timeline is presented as a general guideline and it is noted on the guideline that many variables may affect duration of detectability.[36]

MRO indicated that it is not possible to speculate on how much marijuana was used on the basis of testing results or how long it would test positive thereafter. MRO testified that how long marijuana stays in the system is variable and based on how much and how long the person has been using. MRO indicated a person using frequently and having long term use may take weeks or months to for the marijuana to metabolize away. A person with short term use may have the marijuana metabolized away in as little as three days.

The evidence indicates that marijuana was present in Grievant's 2/15/11 specimen. There is insufficient evidence to indicate that any of the three negative test results for specimens taken 21 to 51 days after February 15, 2011 are inconsistent with the 2/15/11 specimen testing positive.

MRO

Agency's Drug and Alcohol Testing Policy provides for a Medical Review Officer ("MRO") which is defined as a licensed physician who is responsible for receiving and reviewing laboratory results generated by an employer's drug testing program and evaluation medical explanation for certain drug test results.[37]

On 2/15/11 Grievant underwent a pre-employment urine drug test collection for VDOT. Laboratory reported a positive THC result for cannabinoids in both the screening and the confirmation tests to the MRO on 2/21/11.

After receipt of all of the paperwork for Grievant's drug test MRO reviewed the laboratory results and chain of custody form on which the specimen was collected and found no errors in the collection procedure.

MRO conducted two interviews with Grievant on 2/22/11 and identified no legitimate medical reason for the presence of THC in Grievant's urine. MRO indicated that he discussed with Grievant his medications and determined Grievant was not on Marinol or Dronabinol, (which may provide a legitimate medical explanation) for the positive test).

The confirmation test in this case utilized chromatography/mass spectrometry ("GC/MS") and the GC/MS test results indicated that Grievant's testing was positive for delta-9-tetrahydrocannabinol ("THC"), a metabolite of marijuana.

A two step testing is used due to concerns as to false positives. MRO indicated that no medications would cause a false positive on a confirmation GC/MS test. MRO testified concerning false positives and addressed the Grievant's use of Indocin and false positives. MRO testified that while Indocin can cause a false positive on some screening tests it would not cause a false positive on the GC/MS confirmation testing.

On 2/22/11 the MRO informed Grievant of his right to request a split of his specimen to be sent to another DHHS-certified laboratory to be tested in the event he believes the test result

[36] Agency Exhibits Tab 6. pg. 1.
[37] Agency Exhibits Tab 5.

was incorrect. The MRO informed Grievant he had 72 hours from the time of his interview to call the MRO and request the split be run.

MRO determined that the urine specimen was collected following standard protocols in accordance with applicable USDOT Regulations, 49 CFR Parts 40.31-40.73 and the specimen was sent to laboratory which was certified by the Department of Health and Human Services ("HHS") to conduct Department of Transportation ("DOT") urine drug testing.

On 2/22/11 MRO reported the positive test result (positive THC result for cannabinoids) to Agency.

Grievant indicated he attempted to reach the MRO within the 72 hour period allotted to request that his split specimen be tested. MRO indicated he did not hear from Grievant and did not order a test of his split specimen within the 72 hour period. However, subsequently it was brought to the MRO's attention that Grievant wanted his split to be run and that he had indicated he was unable to reach the MRO within the 72 hour period.

On 3/28/11 MRO allowed Grievant the opportunity for his split specimen to be tested. MRO honored Grievant's request even though outside the 72 hour period as Grievant had indicated he was unable to reach the MRO within the allotted 72 hour period.

On 3/28/11 laboratory was requested to send Grievant's split specimen to another certified lab. The reconfirmed positive THC result of Grievant's split specimen was reported to the MRO on 4/1/11 and the reconfirmed positive split specimen result was reported to VDOT.[38]

Notice and Opportunity to Respond

Policy Number 1.60, Section E. provides for an advance notice of discipline to employees prior to the issuance of a Written Notice and provides that the employee must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

Management and Grievant met, on March 3, 2011, prior to issuance of the Group III Written Notice with termination, to discuss matters and Grievant was provided an opportunity to respond. At this time Grievant was given notification of the Agency's intent to issue him a Group III Written Notice for violation of Agency's Drug & Alcohol Testing Policy due to his having tested positive for marijuana a second time if he didn't have compelling evidence to change the intended action. Grievant indicated, at this time, the test was wrong. Grievant was given 24 hours to provide any response. He again met with management on March 4, 2011 and stated the test was wrong and he didn't do it. [39]

The evidence indicates that, prior to the issuance of the Group III Written Notice, Grievant was given oral notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond and present mitigating factors or denial of the charge

[38] Agency Exhibits Tab 7. pg. 1.
[39] Agency Exhibits Tab 1. pg. 12.

Mitigation

§ 2.2-3005.1 of the Code of Virginia authorizes hearing officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action". § 2.2-3005 of the Code of Virginia charges the hearing officer with considering evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Department of Dispute Resolution.[40]

§ VI.B.1. of the Department of Employment Dispute Resolution *Rules for Conducting Grievance Hearings* provides,

> **Mitigating and Aggravating Circumstances:** The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. ….

Consideration was given to the nature of the offense in this case. This was a second offense and a second positive confirmed test for marijuana. In 2007 Grievant had a prior positive confirmed test for marijuana. The prior Group III issued on 10/31/07 is active. Agency did mitigate in 2007 and did not terminate Grievant in the Group III issued 10/31/07.

The evidence indicates that Agency gave consideration to mitigating and aggravating circumstances. The evidence does not indicate that the Agency's discipline exceeds the limits of reasonableness.

Review De Novo

The hearing officer is charged with determining whether the agency has proved by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine:

(i) whether the employee engaged in the behavior described in the Written Notice;
(ii) whether the behavior constituted misconduct,
(iii) 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) and, finally,
(iv) whether there were mitigating circumstances justifying a reduction or removal

[40] § 2.2-3005 of the Code of Virginia.

of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

Furthermore, in reviewing any agency-imposed discipline, the hearing officer must give due consideration to management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operation.[41]

CONCLUSION

For the reasons stated above, based upon the evidence presented at hearing, Agency has proven, by a preponderance of the evidence, that:

1. Grievant engaged in the behavior described in the Written Notice
2. The behavior constituted misconduct.
3. Agency's discipline was consistent with law and policy.
4. Mitigating circumstances justifying a reduction or removal of the disciplinary action are not found.
5. The disciplinary action of issuing a Group III Written Notice with termination was warranted and appropriate under the circumstances.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice with termination is hereby ***UPHELD***.

APPEAL RIGHTS

You may file an Administrative review request within **15 calendar days** from the date the decision was issued.

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 are 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.

[41] Section VI.B. of the Department of Employment Dispute Resolution, Rules for Conducting Grievance Hearings.

Requests should be sent to: Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219.

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: Director, Department of Employment Dispute Resolution, Main Street Centre, 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 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 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. You must give a copy of your notice of appeal the Director of the Department of Employment Dispute Resolution.

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Lorin A. Costanzo, Hearing Officer