

Issue: Group III Written Notice with Termination (violation of drug/alcohol policy);
Hearing Date: 08/17/11; Decision Issued: 08/18/11; Agency: VDOT; AHO: Carl
Wilson Schmidt, Esq.; Case No. 9663; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9663

Hearing Date: August 17, 2011
Decision Issued: August 18, 2011

PROCEDURAL HISTORY

On January 31, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for having a drug test positive for cocaine.

On February 14, 2011, 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 July 20, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 17, 2011, a hearing was held at the Agency's office. Grievant did not attend the hearing.

APPEARANCES

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 Virginia Department of Transportation employed Grievant as a Transportation Operator II at one of its Facilities. Grievant had prior active disciplinary action. On December 27, 2009, Grievant received a Group III Written Notice of disciplinary action with suspension for having a drug test positive for cocaine.

Following the issuance of disciplinary action in October 2009, Grievant agreed to seek counseling through VDOT's Fitness for Duty Program to avoid termination upon successful completion of the program. On January 13, 2011, Grievant went to the collection site and provided a urine sample under direct observation of an employee at the collection site. A split sample was made so that a second bottle could be sent to a different certified lab at the request of Grievant for reconfirmation analysis if he did not agree with the results of the laboratory analysis for the first bottle.

Grievant signed a chain of custody form to document that (1) he provided his urine sample to the collector, (2) he did not adulterate the sample in any manner, (3) each specimen bottle used was sealed with a temper evident seal in his presence, and (4) that the information provided on the form and on the label affixed to each specimen bottle were correct.

Grievant's urine sample was tested by the lab in accordance with its policies and procedures. The sample was tested using properly calibrated equipment. Grievant's sample was tested with the result that Grievant's urine sample showed positive for cocaine, an illegal drug.

Following the determination of a positive drug test, the lab notified the Medical Review Officer who contacted Grievant to discuss the results and eliminate the risk that the result was in error. The Medical Review Officer informed Grievant of his right to have the split sample tested if he believed the test result was incorrect. Grievant declined to have the split sample tested.

CONCLUSIONS OF 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.”¹ 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.”

Under VDOT Safety Policy and Procedure, employees “shall be issued a Group III Notice under the Standards of Conduct and terminated” upon a second positive drug test. Grievant received a Group III Written Notice with suspension on October 27, 2009. On January 13, 2011, Grievant tested positive for cocaine. The test was in accordance with VDOT policy. This was his second positive drug test thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

During the Step Process, Grievant asserted that the sample was tainted because he dropped the collection cup into the toilet during the sample collection process. No credible evidence was presented to support this allegation. The evidence presented showed that had he dropped the collection cup into the toilet, the person observing Grievant would have observed the cup falling into the toilet. The evidence showed that the toilet was “blued out” meaning that the collection cup would have shown the color blue on it and been obvious to employees attempting to test the sample at the laboratory.

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....”² 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

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² Va. Code § 2.2-3005.

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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 **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
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.³

[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

³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.