

Issue: Group III Written Notice with Termination (violation of drug/alcohol policy);
Hearing Date: 08/22/11; Decision Issued: 08/23/11; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 9666; Outcome: No Relief – Agency Upheld;
**Administrative Review: EDR Ruling Request received 09/13/11; EDR Ruling No.
2012-3107 issued 09/20/11; Outcome: No ruling – request untimely.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9666

Hearing Date: August 22, 2011
Decision Issued: August 23, 2011

PROCEDURAL HISTORY

On April 21, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for testing positive for an illegal drug.

On May 11, 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 August 2, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 22, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representatives
Agency Party Designee
Agency Advocate
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 Corrections Officer at one of its Facilities for approximately 15 years until his removal effective April 21, 2011. The purpose of his position was to, "provide security and supervision of adult offenders at this facility." No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency wanted to stop employees and visitors from bringing contraband into the Facility. On April 9, 2011, the Agency assigned staff to search every vehicle entering the Facility parking area. The Agency also utilized a drug detection dog to search vehicles. Grievant drove his vehicle into the Facility parking area. The drug detection dog gave an alert to the Canine Officer to indicate that the dog detected the odor of an illegal drug coming from Grievant and his vehicle. Agency employees searched Grievant's vehicle but did not find any illegal drugs. Grievant was strip searched but no illegal drugs were found on his person.

After the strip search, Agency employees attempted to contact the Personnel Analyst so that she could implement the Agency's drug collection procedure. Because Agency employees were unable to speak with the Personnel Analyst immediately, the Lieutenant obtained a drug testing kit from the Human Resource office. The Lieutenant had received training regarding how to administer the drug testing kit. He read the directions contained with the kit prior to giving it to Grievant. Grievant opened the kit, took the swab, inserted it into his mouth to obtain saliva, put the swab into a vial, sealed the vial, initialed the seal, and placed the vial in a plastic bag. Grievant also completed a

chain of custody form. The Personnel Analyst received a message to come to the Facility and did so after Grievant had placed the vial in the plastic bag. Grievant placed the plastic bag in a white envelope provided by the Personnel Analyst. The white envelope, including the chain of custody form, were picked up by a package delivery company and delivered to the Laboratory. The Laboratory completed an initial screening of the oral fluid sample. The initial screening was positive for an illegal drug. The Laboratory conducted a second analysis of the oral fluid sample and concluded that Grievant's sample tested positive for marijuana.

The Laboratory notified the Medical Review Officer of its findings. The Medical Review Officer called Grievant and informed him of the Laboratory's result. The Medical Review Officer asked Grievant what other drugs he might be taking in order to determine if Grievant was taking another drug that might result in a false positive for marijuana. The Medical Review Officer concluded that Grievant was not taking any drugs that could explain the positive test result for marijuana. The Medical Review Officer informed Grievant that he could have any remaining part of his original fluid sample tested at another laboratory at his own expense. Grievant did not request that the original sample be sent to another laboratory for testing. The Medical Review Officer told Grievant that he would report to the Agency that Grievant tested positive for marijuana. The Medical Review Officer notified the Agency of his findings and the Agency began its process to remove Grievant from employment.

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."¹ 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."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

Group III offenses include "any violation of Operating Procedure 130.2. Operating Procedure 130.2, Alcohol and Other Drug Testing, provides:

[e]mployees and volunteers of the Department must be free of illegal or unlawful drugs at all times and cannot be under the influence of alcohol while at work or in a correctional facility. Under the conditions of this procedure, applicants, employees, or volunteers may be asked to submit

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

² Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

to appropriate substance abuse screening (breathalyzer, urine or oral fluid/saliva testing or other appropriate screening mechanisms.)

Oral fluid/saliva testing is defined as:

Testing of saliva samples to screen for specific illegal drug concentration. The collection process may be conducted on site by designed trained Department personnel or by a trained third party collector and sent to a SAMHSA Certified Laboratory for testing. Oral fluid samples are first screened in the laboratory using enzyme immunoassay technology, proven reliable for routine drug testing. Any samples testing positive in the screening process are then subjected to gas chromatography/mass spectrometry/ mass spectrometry (GC/MS/MS) the gold standard in drug confirmation technology.

Section IV(B)(4) provides that a, "positive drug test will result in termination."

Grievant was tested for illegal drugs. The Laboratory test results showed that he tested positive for marijuana, an illegal drug. The Agency has presented sufficient evidence to support 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.

Grievant argued that the Agency lacked his consent to search his vehicle. The Agency presented Agency Exhibit 7 which states:

By my signature, I indicate my understanding that any vehicle on state property, including my personal vehicle, is subject to search at any time per Department of Corrections procedures.

Grievant signed the document on May 10, 2004. If the Hearing Officer assumes for the sake of argument that the Grievant did not consent to having his vehicle searched, the outcome of this case does not change. No illegal drugs were found in Grievant's vehicle and he was not disciplined as a result of the vehicle search.

Grievant argued that the he did not consent to the strip search. The Agency presented testimony that Grievant completed a form to consent to a strip search. If the Hearing Officer assumes for the sake of argument that Grievant did not consent to a strip search, the outcome of this case does not change. Grievant was not disciplined as a result of the strip search. No illegal drugs were found on his body.

Grievant argued the Agency did not have the authority to conduct an oral fluids test and that the Agency failed to comply with its policy governing oral fluid testing. Operating Procedure 130.2 authorizes a drug test when there is a reasonable suspicion. A reasonable suspicion exists under the policy when there is a "canine alerting". On April 9, 2011, the canine alerted on Grievant showing that it detected the odor of an

illegal substance. Thus, the Agency was authorized to conduct an oral fluid test. The Agency complied with procedures required by Operating Procedure 130.2. The chain of custody form showed that Grievant's sample was tested. The Laboratory results show that Grievant's sample was positive for marijuana. The Agency complied with the appropriate policy provisions.

Grievant argued that only Human Resource staff were permitted to collect the oral fluid sample. The policy provides that the supervisor "initiating or approving the reasonable suspicion alcohol or other drug test should not be involved in the collection process (unless there are no other trained administrators at the facility at that time.)" No other administrator was present at the Facility on Saturday April 9, 2011 when the collection process was initiated. The Personnel Analyst arrived after the sample had been collected and ensured that the Agency had complied with the appropriate procedures.

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..."⁴ 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. 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:

⁴ Va. Code § 2.2-3005.

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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.