Issue: Group III Written Notice with Termination (refusal to take drug test); Hearing Date: 05/16/12; Decision Issued: 05/17/12; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9806; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9806

Hearing Date: May 16, 2012
Decision Issued: May 17, 2012

PROCEDURAL HISTORY

On February 14, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for refusal to submit to a drug test.

On March 14, 2012, 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 April 11, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 16, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Department of Behavioral Health and Developmental Services employed Grievant as a Direct Service Associate II until his removal effective February 14, 2012. He began working for the Agency in 1987. Grievant's position was a Safety Sensitive Position within the Agency. Grievant had prior active disciplinary action. On October 8, 2010, Grievant received a Group III Written Notice for failure to comply with Departmental Instruction 502 for failing to submit to an alcohol test.

On an annual basis, the Agency's Central Office randomly selects 3% of the workforce holding safety sensitive positions at the Facility for drug testing. Central Office staff provided the Facility staff with a list of employees to be sent to a local lab for drug testing. On February 6, 2012, Grievant was one of 30 employees randomly selected for drug testing.

On February 13, 2012 at approximately 3:15 p.m., the Administrative Office Specialist III called Grievant to come to her office. When he arrived, she told Grievant that she was sending Grievant for a random drug screen. Grievant replied that he does not do drug screens. She asked him what he meant by that response and he said that since he was hired prior to 1996 that he did not have to do drug screens. She asked him what his being hired prior to 1996 had to do with a drug screen. Grievant stated that he did not sign anything that he would submit to drug screen. She told Grievant that no one else had done so either but that Departmental Instruction 502 requires all employees in safety sensitive positions to submit to random drug screens. Grievant stated he was not going to take a drug test. She told Grievant that his refusal to do so was considered a positive test for drugs. Grievant continued to refuse to take the test. The Administrative Office Specialist III called the Human Resource Manager and told her of Grievant's statements. The Human Resource Manager met with Grievant and

told him that his refusal to take the drug test was considered a positive test result and a Group III offense. She told Grievant that because he already had an active Group III Written Notice, a second Group III Written Notice would be cause for termination. Grievant said that he understood the Human Resource Manager but would not take a drug test.

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."

Departmental Instruction No. 502 governs the Agency's Alcohol and Drug Program. The purpose of the policy is to "provide guidance for administering drug and alcohol testing of employees (full-time, part-time, contract, or wage), potential employees, interns, and volunteers." The policy defines "random sample" as "a sample that is drawn from a defined population so that each member of the population has an equal chance of being selected each time selections are made." Employees holding Safety Sensitive Positions are subject to random alcohol and drug testing. Departmental Instruction No. 502 provides:

> Employees who fail or refuse to submit to a required alcohol or drug test are considered to have tested positive and are subject to disciplinary action, a Group III Written Notice, and dismissal.

Grievant held the position of Direct Service Associate II. The appendix to DI 502 lists the position of Direct Service Associate II as a Safety Sensitive Position. Grievant was selected randomly for a drug test. He was advised of his obligation to take the test and the consequences for failing to do so. Grievant refused to do so. The Agency deemed Grievant to have received a "positive" drug test. 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.

DI 502 was binding on Grievant. He had adequate notice of the policy and that it applied to him. DI 502 was first disseminated to employees in 1997. The policy was available to Grievant by accessing the Agency's intranet. The policy was available to Grievant through the Agency's Human Resource office staff. In 2010, Grievant was

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

disciplined for failure to comply with DI 502. During the disciplinary process, Grievant was informed of the terms of DI 502 and that he was subject to the policy.

Grievant argued that because he was hired before 1996, he was not subject to DI 502 which was issued in 1997. Grievant did not identify any State policy that would shield him from the applicability of DI 502 simply because he began working at the Agency prior to the implementation of the policy.

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 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:

[2] Va. Code § 2.2-3005.

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].

_____
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.