

Issue: Group III Written Notice with Termination (violation of drug/alcohol policy);
Hearing Date: 01/09/19; Decision Issued: 01/10/19; Agency: DVS; AHO: Carl
Wilson Schmidt, Esq.; Case No. 11286; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11286

Hearing Date: January 9, 2019
Decision Issued: January 10, 2019

PROCEDURAL HISTORY

On October 11, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for violation of Alcohol and Other Drug Policy.

On October 17, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 5, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On January 9, 2019, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Veterans Services employed Grievant as a Certified Nursing Assistant. She had been employed by the Agency for approximately two years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant's work performance was otherwise satisfactory to the Agency. She received an overall rating of Contributor on her 2018 annual performance evaluation. Grievant enjoyed her job and was well liked by the residents.

Grievant suffered from migraine headaches. While not at work, she experienced a severe migraine headache. She received a Tylenol 3 pill from a friend to relieve her pain. She consumed the medication while knowing it had been prescribed for her friend.

Tylenol 3 is a controlled substance that must be prescribed by a medical professional. One cannot purchase Tylenol 3 "over-the-counter" without a prescription.

On September 27, 2018, Grievant injured her back while working. She went to the Provider for treatment. Under the Agency's policy, Grievant was to be tested for alcohol and other drugs within 24 hours of a work-related injury. The Provider began the drug screening process. Grievant authorized the Provider to conduct the fluid screening. Grievant completed a chain of custody form for the sample she gave to the

Provider. Grievant tested positive for codeine and morphine. The test was reviewed by a Medical Review Officer who interviewed Grievant to verify the tests results.

Grievant was released by the Provider to return to work on October 5, 2018. Grievant returned to work and performed her normal work duties. The Agency received the tests results on October 11, 2018. The Agency elected to remove Grievant from employment because that action was consistent with how it treated other employees testing positive for drugs.

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.”

Facility Policy HR-08 governs Reporting Workplace Injury. Under this policy, an employee who is injured at work is required “to have a drug test done within 24 hours of injury. *** Any employee who tests positive on a confirmatory drug test (1) may be subject to discipline, up to and including immediate discharge”²

Grievant tested positive for codeine and morphine because she took medication prescribed for another person. Codeine and morphine are controlled substances that cannot be dispensed without a prescription. Grievant took Tylenol 3 that was prescribed for another person. Accordingly, 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 employee may be removed from employment. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that she was honest throughout the process and trusted to work with patients once she returned to work and prior to the Agency receiving the test results. Grievant’s honesty throughout this matter is admirable and reflects her good character, but it does not form a basis to reduce the disciplinary action. The Agency allowed Grievant to perform her work duties until it received official confirmation from the Provider. The Agency’s decision does not affect the Agency’s decision to issue disciplinary action.

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

² Agency Exhibit 3.

This case is unfortunate. It is clear that Grievant was an otherwise valuable employee who suffered a painful migraine headache and sought relief for her pain. The Agency could have implemented a lesser level of disciplinary action given the unlikelihood that she would repeat her mistake, but chose to remove Grievant. The Agency acted within its discretion and the Hearing Officer cannot disregard the Agency's decision.

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 Human Resource Management"³ 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 request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

³ *Va. Code § 2.2-3005.*

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.