

Issue: Group III Written Notice (violation of Drug/Alcohol policy); Hearing Date: 03/18/13; Decision Issued: 03/25/13; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10032; Outcome: No Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10032

Hearing Date: March 18, 2013
Decision Issued: March 25, 2013

PROCEDURAL HISTORY

On December 18, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating the VDOT Drug and Alcohol Testing policy.

On January 4, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 12, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 18, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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. The purpose of his position was to:

Perform a variety of moderately skilled tasks in the construction, maintenance, and repair of roadsides, roadways, bridges and other departmental facilities. Operate and maintain complex heavy equipment, perform preventive maintenance and complete routine mechanical repairs to equipment.¹

Grievant had prior active disciplinary action. On December 14, 2011, Grievant received a Group III Written Notice with a ten workday suspension for refusing to take a random drug test. Because Grievant failed to take the random drug test, the Agency insisted Grievant submit to an additional test. He took the test and the result was negative for illegal drugs. Grievant was not offered substance abuse services by the Agency because he tested negative not positive for illegal drugs.

Grievant was randomly selected for a drug test. On November 8, 2012, Grievant provided a urine sample that was tested by the Laboratory. The initial test result was negative dilute. Because the result was negative dilute, the Agency's policy required that Grievant be retested.

¹ Agency Exhibit 4.

On December 10, 2012, Grievant provided a urine sample to the collection agent and the sample was split into two bottles. A Federal Drug and Testing Control form was completed to establish a chain of custody for the sample. Grievant's urine sample was tested by the lab in accordance with its policies and procedures. Grievant's sample was tested with the result that Grievant's urine sample showed positive for marijuana, an illegal drug. Grievant was informed of the results and spoke with the Medical Review Officer who confirmed that the test was not positive for a reason other than Grievant having consumed marijuana. The Medical Review Officer informed Grievant that he could have the split sample tested by another laboratory and that he had to request the additional testing within 72 hours. Grievant did not ask that the split sample be tested by another lab.

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."² 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 the VDOT Safety Policy, "[e]mployees having a positive drug test shall be issued a Group III Notice under the Standards of Conduct." Grievant tested positive for an illegal drug, marijuana. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Grievant had a prior active Group III Written Notice and upon receiving additional disciplinary action, the Agency has the authority to remove Grievant from employment.

Grievant argued that the Agency failed to provide him with substance abuse assistance after he first refused to take a drug test. Grievant's argument does not affect the outcome of this grievance. The Agency's policy provides, "[e]mployees having a positive drug test ... shall be given the opportunity to obtain assistance as outlined in the section titled 'Employee Assistance Program.'" In 2011, Grievant refused to take a drug test. When he later took a drug test, the result was negative. The Agency's obligation to provide Grievant with "the opportunity to obtain assistance" did not arise.

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

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ *Va. Code § 2.2-3005.*

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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment 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.

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 provide a copy of all of your appeals to the other party, EDR, 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.

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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.