

Issue: Group III Written Notice with Suspension (violation of drug/alcohol policy);  
Hearing Date: 02/03/14; Decision Issued: 02/05/14; Agency: DBHDS; AHO: Carl  
Wilson Schmidt, Esq.; Case No.10249; Outcome: No Relief – Agency Upheld.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10249**

Hearing Date: February 3, 2014

Decision Issued: February 5, 2014

#### **PROCEDURAL HISTORY**

On October 7, 2013, Grievant was issued a Group III Written Notice of disciplinary action with a 15 workday suspension for violation of Departmental Instruction 502, Alcohol and Drug Program.

On November 5, 2013, 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 January 6, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 3, 2014, 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 employs Grievant as a Direct Service Associate II at one of its Facilities. Grievant's position is a "safety sensitive" position. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was alleged to have engaged in client abuse at the Facility. Grievant was instructed to submit an oral fluid sample so that it could be tested for drugs and alcohol as required by the Agency's Departmental Instruction 502 following an allegation of client abuse.<sup>1</sup> On September 25, 2013, Grievant submitted an oral fluid sample and completed a chain of custody form. Grievant's sample was tested in a laboratory and showed positive for, "cocaine oral fluid/ benzoylecgonine oral fluid."<sup>2</sup> Grievant spoke with the Medical Review Officer and stated that the result could have been inaccurate because Grievant took Tylenol with codeine. The Medical Review Officer told Grievant that codeine would not result in a positive result for cocaine.

### **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

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<sup>1</sup> The Agency determined that Grievant had not engaged in client abuse.

<sup>2</sup> Agency Exhibit 5.

disciplinary action.”<sup>3</sup> 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 502 governs the Agency’s Alcohol and Drug Program. The policy authorizes the Agency to require employees in safety sensitive positions to provide oral fluid/saliva samples to be tested by a qualified laboratory for alcohol and drugs. The Agency complied with the policy’s provisions regarding the collection, testing, and verification of Grievant’s oral fluid sample.<sup>4</sup> Although Grievant initially questioned the accuracy of the test and denied being a drug user, the evidence is sufficient to conclude that he tested positive for cocaine thereby acting contrary to DI 502. No credible evidence was presented to show that Grievant’s use was unintentional.

DI 502 provides that for “employees who test positive for drugs, the Department shall take the following actions: Issue a Group III Written Notice and suspend the employee under the Standards of Conduct, for a minimum of 15 work days; and provide the employee the opportunity for assistance through the EAP.” The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. The Agency was authorized to suspend Grievant for up to 15 days. Accordingly, the Agency’s disciplinary action must be upheld.

Grievant argued that the Agency’s disciplinary action was too harsh. Once the Agency meets its burden of proof, the Hearing Officer cannot reduce the disciplinary action without a finding of mitigating circumstances. *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 ....”<sup>5</sup> 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

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<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>4</sup> It is unclear whether the Agency tested Grievant within eight hours of the filing of an abuse/neglect allegation form. When the Agency initiated testing would only be of significance with respect to the abuse investigation. Grievant was not disciplined for client abuse.

<sup>5</sup> *Va. Code § 2.2-3005.*

action was free of improper motive. The harshness of discipline is not, in itself, a basis to mitigate disciplinary action when the level of discipline is specifically set forth in an Agency's policy as is case here. In light of the standard set forth in the Rules, 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 a 15 day suspension 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

Or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>6</sup>

[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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.