Issue: Group III Written Notice with Termination (violation of drug/alcohol policy); Hearing Date: 12/17/14; Decision Issued: 01/27/15; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10502; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DECISION OF THE HEARING OFFICER

In the matter of Case Number 10502

Case Heard: December 17, 2014
Decision Issued: January 27, 2015

PROCEDURAL HISTORY

The Grievant is employed at the agency. On June 19, 2014, the Grievant received a Group III Written Notice for Offenses #99: Agency's Drug & Alcohol Testing Policy. The Grievant initiated the Employee Grievance Procedure on July 8, 2014 by completing Grievance Form A. After completion of the first and second resolution steps, the grievance was qualified for hearing. On November 17, 2014, the hearing officer was assigned to hear the case.

A telephonic pre-hearing conference was held on November 18, 2014. The hearing was set for December 17, 2014, and was subsequently heard on that date. The Grievant=s Exhibits 1-26 and the Agency's Exhibits 1-14 were entered into evidence without objection. The Grievant also asked to include some testing information of drug testing done some months after the Group III Written Notice was issued. This was excluded as irrelevant. Six witnesses, including the Grievant, testified. The four-hour hearing was recorded on a digital recorder and stored on a compact disk.

APPEARANCES

Grievant
Representative for Agency
Witnesses for Agency:

- #1 Lab manager
- #2 Medical Review Officer
- #3 Safety Resource Manager for Agency
- #4 Medical Coordinator for Agency
- #5 District Manager for Agency

Witness for Grievant: Grievant

ISSUE

Whether to sustain, modify or revoke the Group III Written Notice and suspension issued to the Grievant on June 19, 2014, for Offense #99: Agency's Drug & Alcohol Testing Policy. The

Agency described the alleged offenses in the Written Notice as follows: "On May 19, 2014 you were selected for random testing under [Agency's] Drug & Alcohol Testing Policy. On May 29, 2014 local management was advised that it was determined that the test was a verified refusal to test because of adulteration (Safety & Health notification letter attached). The MRO discussed the test results with you on May 23, 2014 in which you had the opportunity to present evidence of (1) "The employee has the burden of proof that there is a legitimate medical explanation," and (2) "The employee must present information meeting this burden at the time of the verification interview." (49 CFR, Part 40.145) You did not provide such information. In addition, you were provided 72 hours to request a split sample review of the original test; you did not request the split sample. This violation is affirmed as a verified refusal to test because of adulteration. Thus, this is a direct violation of Agency and Commonwealth policy and the Standards of Conduct will be applied."

BURDEN OF PROOF

In disciplinary actions and dismissals for unsatisfactory performance, the burden of proof is on the Agency to show by a preponderance of the evidence that its action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. (Grievance Procedure Manual). This case is a disciplinary action. The burden of proof is on the agency.

The Agency must prove that it is more likely than not that the Grievant violated the Agency's Drig & Alcohol Testing Policy when he failed a random drug testing in May, 2014. The Agency must show that its action against the Grievant was warranted and appropriate under the circumstances. In this case the action against the Grievant was the issuance of a Group III Written Notice.

FINDINGS OF FACT

1. The Grievant was hired by the Agency in 1999 and worked as Senior Survey Technician for the agency. According to the Grievant's Employee Work Profile, a valid Commercial Driver's License (CDL) was required for this position, unless medically exempt, to assist with emergency operations. The Grievant possessed a CDL.[1] When hired, the Grievant received information regarding the Commonwealth of Virginia's Policy on Alcohol and Other Drugs that was in effect at the time he was hired in 1999.[2] An e-mail regarding the update of the Agency's policy was sent to the Agency's employees by Human Resources on October 4, 2010.[3]
2. The Agency's Safety Policy requires all employees holing a CDL to be subject to random

1 Agency Exhibit 5, p. 1
2 Grievant Exhibit 4
3 Grievant Exhibit 11, p. 1, Testimony of Safety Resource Manager

drug testing.[4] Federal regulations also require all holders of CDLs to be subject to random drug testing. Under the federal regulations, one-half of the CDL holders must be subjected to random drug testing annually.[5]

3. The Agency's Medical Coordinator testified that she oversees the random drug testing program. To assure that the selection is random, all the names of CDL holders of the Agency are sent to an outside vendor in Washington, DC, which then generates a quarterly selection list. The Grievant was on the selection list in May, 2014, and was tested on May 19, 2014 by providing a urine sample.[6]
4. The lab manager of the lab that analyzed the test results testified that the urine sample was tested according to proper procedures. The urine sample when collected was poured into two containers, called a "split sample." Both containers and the "Federal Drug Testing Custody and Control Form" verifying the chain of custody of the sample were sent to the lab by the collector. The lab then tested the urine in one of the containers. The second sample was set aside so that the Grievant could request at a later date that the second sample be sent to another lab to be tested. The results of the first test were then reported to a Medical Review Officer. The Medical Review Officer then reported the results of the testing to the Agency's Medical Coordinator who then sent the results to Human Resources.[7] The Grievant never requested that the split sample be tested.[8]
5. According to federal regulations, the urine specimen must subjected to validity testing to determine whether certain adulterants or foreign substances were added to the urine, if the urine was diluted, or if the specimen was substituted. One of the validity tests is to determine the pH of the specimen.[9]
6. The validity testing for pH on the Grievant's sample showed a pH of 2.79. A second sample was tested which showed a pH of 2.80. The normal range for pH on urine sample is 4.5 to 8.9. If the sample is 3.0 to 4.4 or 9.0-10.9, it is categorized as abnormal. If the sample is less than 3.0 or more than 11.0, it is categorized as adulterated. The Grievant's sample was categorized as adulterated. This was verified by the Medical Review Officer (MRO).[10]
7. According to Agency's Safety Policy, "All urine specimens verified by the MRO as an adulterated or substituted drug test result shall be treated as a refusal….A refusal shall be treated as an offense of this policy (similar to a positive test result)."[11]
8. The Grievant expressed concern that the medications that he was taking or the amount of water he drank could alter the pH of the urine. The MRO discussed the results of the test

4 Agency Exhibit 6

5 Agency Exhibit 8, p. 6, and Agency Exhibit 7, p. 13

6 Testimony of Safety Resource Manager

7 Testimony of lab manager and Medical Review Officer, Agency Exhibit 12, p. 6, Agency Exhibit 14

8 Testimony of lab manager and Grievant

9 Agency Exhibit 8, p. 23

10 Testimony of Lab Manager and Medical Review Officer, Agency Exhibit 12, p. 18 & 30

11 Agency Exhibit 6, p.5

with the Grievant and asked what medications that the Grievant was taking. The MRO testified that the medications and excess water drinking would not cause the pH to test in the adulterated range.[12]

9. Under the policy, employees having a positive (including non-negative) drug test shall be issued a Group III Written Notice under the Standards of Conduct. The Grievant was issued a Group III Written Notice for his adulterated sample.[13]

10. Under the policy, Employees with First Offense of the policy shall be given the opportunity to obtain assistance though the Employee Assistance Program. If the employee refuses to enroll in the program or does not successfully complete the program, the employee must be terminated. The Grievant enrolled in the program and was nearing completion of the program at the time of the hearing.[14] The Grievant has not been terminated.

APPLICABLE LAW AND OPINION

When the Grievant was hired by the Agency in 1999, he was informed that, in his new position, he would need to have a Commercial Driver's License (CDL), unless medically exempt. The Grievant obtained the CDL.

Title 49, Part 40, of the Federal Regulations sets out the "Procedures for Transportation Workplace Drug and Alcohol Testing Programs." These regulations must be followed by the state agencies such as the one in this case where employees are required to have a CDL. §40.91 of Title 49, outlines the validity tests that the laboratories must conduct on the urine specimens in the drug testing of CDL holders. §40.91(b) states, "You must determine the pH of each primary specimen."

In this case, the pH test results were outside the acceptable range.

In Virginia, the agency has a Safety Policy for the detection and deterrence of drug and alcohol abuse. This policy overlaps some of Federal Regulations of Title 49, Part 40.

The Virginia Personnel Act, VA Code ' 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee=s ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid government interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653,656 (1989).

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

Policy Number 1.60: Standards of Conduct.

12 Testimony of Grievant, Medical Review Officer

13 Agency Exhibit 6, p. 11, Agency Exhibit 2, p. 1

14 Agency Exhibit6, p. 11, Testimony of the Grievant

Policy 1.60: Standards of Conduct provides a set of rules governing the professional conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section B.2.c. provides that Group III offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace, or other serious violations of policies, procedures, or laws.

The issue in the present case is whether to sustain, modify or revoke the Group III Written Notice issued to the Grievant on June 19, 2014 for failing a random urine sample under the Agency's Drug & Alcohol Testing Policy. The Agency must prove that it is more likely than not that the Grievant failed the policy when he failed the urine test given on May 19, 2014 and that the Agency's action against the Grievant was warranted and appropriate under the circumstances.

In the Rules for Conducting Grievance Hearings, Section VI., Scope of Relief, B. Disciplinary Actions, section AFramework for Determining Whether Discipline was Warranted and Appropriate@ states as follows:

> The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with the law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).[15]
>
> Using this framework, this Hearing Officer will analyze this case.

(i) Whether the employee engaged in the behavior described in the Written Notice

In the Written Notice, the Grievant was charged with the offense failing the Drug and Alcohol Testing Policy due to having a verified refusal to test because of adulteration. In this case, the Grievant was selected in a random selection of Agency employees with CDLs for drug testing. The urine sample provided by the Grievant when analyzed by the lab had the resulting pHs of 2.79 and 2.80. Both results are in the adulterated range of less than three. This result, verified by the MRO, was found to be adulterated. This hearing officer finds that the Grievant did engage in the behavior described in the Written Notice.

[15]Rules for Conducting Grievance Hearings, VI.B1., Effective Date 7/1/2012.

(ii) Whether the behavior constituted misconduct

The MRO verified the test results as adulterated. Under 6.2.7 of the Safety Policy, "All urine specimens verified by the MRO as an adulterated or substituted drug test result shall be treated as a refusal. … A refusal shall be treated as an offense of this policy (similar to a positive test result)." Under §6.4.2 of the Agency's Safety Policy, employees having a positive (including non-negative) drug test *shall* be issued a Group III Written Notice under the Standards of Conduct. (Emphasis added). Since the Grievant provided a urine sample in the random testing that was found to be adulterated, the Grievant's behavior is misconduct, subject to the Standards of Conduct.

(iii) Whether the disciplinary action taken by the agency was consistent with the law and policy

The disciplinary action taken by the agency was to issue a Group III Written Notice. This action was the level of action required by the Agency's Safety Policy that clearly states that an employee with the first offense non-negative drug test shall be issued a Group III Written Notice. No less restrictive disciplinary action would be consistent with law and policy. The Grievant was not terminated. I find that the disciplinary action taken by the agency was consistent with law and policy.

Mitigating Circumstances

According to the Rules for Conducting Grievance Hearings, AA hearing officer must give deference to the agency=s consideration and assessment of any mitigating and aggravating circumstances. A hearing officer may mitigate the agency=s discipline only if, under the record evidence, the agency=s discipline exceeds the limits of reasonableness.@[16]

In this case, the Agency was bound by the Safety Policy's directive that a first offense violation of the drug policy shall result in a Group III Written Notice, which is exactly the discipline taken by the Agency. This Hearing Officer finds that the agency's discipline of imposing a Group II Written Notice does not exceed the limits of reasonableness. Therefore, the hearing officer may not mitigate the agency's discipline in this case.

DECISION

The Agency has proven that the Grievant violated the drug and alcohol policy. The Agency's action against the Grievant was warranted and appropriate under the circumstances.

The Grievant=s Group III Written Notice is sustained.

[16] Rules for Conducting Grievance Hearings, p. 17

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.[17]
[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed

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

explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

January 27, 2015

Jane E. Schroeder
Jane E. Schroeder, Hearing Officer