

Issue: Group III Written Notice with Termination (violation of drug policy);
Hearing Date: 07/01/13; Decision Issued: 07/18/13; Agency: DOC; AHO:
Ternon Galloway Lee, Esq.; Case No.10087; Outcome: Full Relief.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10087

Hearing Date: July 1, 2013

Decision Issued: July 18, 2013

SUMMARY OF DECISION

The Agency had found Grievant violated its drug policy by testing positive for cocaine. The Agency then issued Grievant a Group III Written Notice with termination. The Hearing Officer determined that the Agency could not sustain its burden and rescinded the Agency's discipline.

HISTORY

On March 18, 2013, the Agency issued Grievant a Group III Written Notice with termination for testing positive for cocaine. Grievant timely filed her grievance to challenge the Agency's action. On April 29, 2013, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal.

The Hearing Officer held a telephonic prehearing conference ("PHC") on May 22, 2013. The parties agreed to this date. A scheduling order was issued on May 24, 2013, setting the hearing for June 20, 2013, a date that had previously been agreed to by the parties. Thereafter, by motion the Agency Advocate requested the hearing be rescheduled due to a conflict she developed with the hearing being held on June 20, 2013. By order issued on June 29, 2013, the hearing was rescheduled for July 1, 2013.¹

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Officer. Several were presented. The Grievant's Advocate sought to have admitted its proposed exhibits 21 through 24 that were disclosed after the deadline for exchanging exhibits. The Agency's Advocate objected to exhibits 23 and 24 – a Virginia Employment Commission decision and a polygraph test result. The objections were sustained. Grievant's Advocate also requested that the polygraph examiner be allowed to testify. The Agency's Advocate's objection was sustained.

The Agency's Advocate requested that a Medical Review Officer that was not previously disclosed, be allowed to testify in lieu of a prior Medical Review Officer timely disclosed as a witness. There was no objection and the request was granted.²

¹ Due to the conflict in the Agency Advocate's schedule, this became the first date both parties were available for the hearing. Also, the June 29, 2013 order, confirmed that the parties's time to submit disclosures had previously been extended *ore tenus* to June 21, 2013.

² During the hearing, the Agency Advocate requested an individual from the testing lab be allowed to

The Hearing Officer admitted the Agency's Exhibits 1 through 7. Grievant's Exhibits 1 through 22, and the Hearing Officer's Exhibit.

At the hearing both parties were given the opportunity to make opening and closing statements and to call the witnesses as noted above. Each party was provided the opportunity to cross examine any witness presented by the opposing party.

During the proceeding, the Agency was represented by its advocate and the Grievant was represented by her advocate.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (2)
Grievant
Witnesses for Grievant (1, Grievant)

ISSUE

Was the discipline warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8(2). 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 all the evidence presented and observing the demeanor of each witness who testified in person, the Hearing Officer makes the following findings of fact:

1. Grievant had been employed for the Virginia Department of Corrections ("DOC") for at least eleven years. The last one and a half years she worked for the Agency as a probation officer and family counselor. (Testimony of Grievant; A Exh. 2, p. 1).
2. Grievant has multiple chronic health conditions to include, hypertension, hepatitis C, and diabetes. (Testimony of Grievant; G Exh. 9).

testify as a rebuttal witness. Grievant objected stated that witness had not been disclosed. The Hearing Officer sustained the objection. The Agency's Advocate did proffer that the proposed witness would be able to describe the testing and what action is taken when a drug test is positive. The Hearing Officer finds the proffered testimony would not have affected her decision as the expected testimony would not have cured the Agency's inability to follow its own procedure and allow Grievant to challenge the positive test result.

3. On or about February, 2013, Grievant was selected by the Agency for a random drug screen which was conducted on February 14, 2013. (G Exh. 2)

This testing consisted of the Agency obtaining a swab of saliva from Grievant's mouth for drug testing. It was then sent to an independent lab and examined. Testing results were positive for cocaine. The lab sent the results to the Doctor Review Service where the Medical Review Officer/Doctor ("MRO") examined the results. The MRO telephoned Grievant to determine if there was any medical reason that the drug test would be positive for cocaine. After conferring with Grievant, the MRO determined the results should not be unchanged. The MRO then reported the positive drug test to the Agency. Grievant was also notified of the result on that date. (Testimonies of MRO, Grievant, and Warden; A Exhs. 1, 3).

4. The drug test report indicates the specimen was confirmed positive for cocaine by LC/MS/MS and negative for cocaine metabolite by LS/MS/MS. (A Exh. 3, p. 1; Testimony of Warden).

5. On or about February 22, 2013, Grievant asked for a retest. Grievant did not have funds to pay for the retest until on or about March 5, 2013. Thus, she provided payment for it then. The retest was supposed to involve another state lab retesting the same saliva collected for the first test. However, retesting of the sample could not be performed because the sample was insufficient. (Testimonies of Warden and Grievant; G Exh. Chronology G; A Exh. 3, p. 4).

6. In addition to asking for a retest, on February 22, 2013, Grievant also had a drug test of her own performed by LabCorp. (A Exh. 2, p. 1). It involved the lab cutting a piece of Grievant's hair and screening it for illegal drugs. The test offered a window of 90 days to detect drug usage prior to the test date. The results were negative, showing no trace of cocaine in the Grievant's system. LabCorp's screening period included the period for which the Agency had screened for drug usage. (G Exh. 21 1-2; G Exh. 22; Testimony of Grievant).

7. Grievant consistently reported that she has never used cocaine. (Testimonies of Warden and Grievant). However, Grievant reports that she did have sinus surgery about 15 years ago and the attending physician injected cocaine in her eye during the surgery. (Testimony of Grievant).

8. Grievant has been receiving health care from a certain family practice provider for many years. In April 2013, a new practitioner with the provider reported that she had recently treated Grievant, Grievant had numerous medical problems and the positive drug test result for cocaine may have been a false positive. (G Exh. 9; Testimony of Grievant).

POLICY AND DEFINITIONS

9. Agency Policy 130.2 ("Policy 130.2) addresses alcohol and drug testing. (G Exh. 14).

10. Under Policy 130.2, the DOC expresses it has the responsibility to protect public safety. Further the policy notes that its employees have the right to work in an environment where DOC's in-house security is not compromised by employees who use illegal/unlawful drugs or are under the influence of alcohol. Thus, DOC expects its employees to remain free of illegal or unlawful drugs or the usage of them. As such, DOC's policy subjects employees, applicants, and volunteers to drug screening. That screening may be breathalyzer, urine or oral fluid/saliva testing or other appropriate screening mechanisms. (G Exh. 14, p. 1). The policy provides for, among other types of testing, random drug screening. (G Exh. 14, p. 4, 7-8).

11. As noted above, the method used to screen Grievant for drug usage on February 14, 2013, was oral fluid/Saliva testing. (G Exh. 2).

Under Policy 130.2, the process for testing of saliva samples to screen for specific illegal drug concentration is as follows:

The collection process may be conducted on site by designated training Department personnel or by a trained third-party collector and sent to a SAMHSA Certified Laboratory for testing. Oral fluid samples are first screened in the laboratory using enzyme immunoassay technology, proven reliable for routine drug testing. Any samples testing positive in the screening process and then subjected to gas chromatography/mass spectrometry/mass spectrometry (GC/MS/MS) the gold standard in drug confirmation technology.

(G Exh. 14).

12. Policy 130.2 (IV) (A) (4) prohibits an employee from having a verified drug test result. (G Exh. 14, p. 6).

13. Under Policy 130.2(III), "verified test results" is defined as follows:

Urine or oral fluid/saliva test results from a [Substance Abuse and Mental Health Services Administration] ("SAMHSA") certified laboratory that have undergone review and final determination by the Medical Review Officer.

(G Exh. 14, p. 6).

14. Under Policy 130.2(III) a confirmatory drug test is defined as follows:

A second analytical procedure performed on a urine specimen or oral fluid/saliva specimen to identify and quantify the presence of alcohol or a specific other drug or drug metabolite.

(G Exh. 14, p. 3).

15. Policy 130.2(IX)(B) permits an employee who tests positive for drug usage to challenge the result by requesting a retesting of the specimen. (G Exh. 14, p. 16).

To effectuate this challenge, the employee must within 72 hours of notification of the positive test results, make a request directly to the MRO that the employee's specimen be retested by another laboratory that is independent. If the retest results are negative for drug usage, the employee is considered negative for unlawful or illegal drugs and the results of the first test must be expunged and the employee reinstated. (G Exh. 14, p. 16).

16. The employee is responsible for paying for the retest. (Testimonies of Warden and Grievant; G Exh. 14).

17. Agency Policy 130,2(III) defines MRO as follows:

A licensed physician with toxicology and substance abuse expertise who functions independently of the testing laboratory and is responsible for receiving laboratory test results generated by the drug and alcohol testing program. The MRO is responsible for interpreting and evaluating an individual's positive test results together with his or her medical history and any other relevant biomedical information. The department contracts with a consortium/third-party administrator (C/TPA) to provide the services of a MRO. (G Exh. 14, p. 4).

18. Grievant timely challenged her positive test results pursuant to policy. But the Agency was unable to retest because the sample taken was insufficient. (Testimonies of Warden and Grievant). (A Exh. 3).

19. On March 18, 2013, the Agency issued Grievant a Group III Written Notice with termination for violation of DHRM Policy 1.05 and DOC Policy 130.2 because she tested positive for cocaine. (A Exh. 1).

20. Grievant has been licensed by the Commonwealth of Virginia as a Substance Abuse Provider, and she has conducted drug testing and laboratory testing. Also, she studied substance abuse at Rutgers' University. (Testimony of Grievant).

DETERMINATIONS AND OPINION

The General Assembly enacted the *Virginia Personnel Act*, VA. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides 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/her rights and to pursue legitimate grievances. These dual goals reflect a valid

governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.³

The Commonwealth of Virginia Department of Corrections Operating Procedure sets forth the Commonwealth's Standards of Conduct and disciplinary process that the Department of Corrections ("DOC") must employ to address unacceptable behavior, conduct, and related employment problems in the workplace.⁴

These standards provide that Group I offenses are acts of misconduct that are less severe in nature, but warrant correction in the interest of maintaining a productive and well-managed work force. Group II offenses are acts and behavior that are more than minor misconduct.⁵ Group III offenses are usually so severe in nature that a first occurrence normally warrants dismissal.⁶ The violation of Agency Policy 130.2, Alcohol and Other Drug Testing is a Group III Offense.

Agency management issued Grievant a Group III Written Notice on March 18, 2013, with termination for testing positive for cocaine usage. The Hearing Officer examines the evidence to determine if the Agency's discipline was warranted and appropriate under the circumstances.

I. Analysis of Issue before the Hearing Officer

**Issue: Whether the discipline was warranted
and appropriate under the circumstances?**

**Did the employee engage in the behavior described in the Group III
Written Notice? If so, did that behavior constitute misconduct?**

³ Grievance Procedural Manual §5.8

⁴ Virginia Department of Corrections Operating Procedure 135.1

⁵ Virginia Department of Corrections Operating Procedure 135.1(V) (C).

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

In essence, the Agency contends Grievant failed a drug test for illegal substances in violation of agency policy. An examination of the evidence shows that Grievant's saliva specimen tested positive for cocaine. Agency Policy 130.2 permits an employee to challenge a positive test result. By policy, the employee must make a request within 72 hours of being notified of the positive drug screen to have the specimen retested. If the retest results are negative for drug usage, the employee's prior positive testing is expunged from his/her records and the employee is returned to work.

The undisputed facts show Grievant timely requested another test. But none was conducted because the specimen was deficient. Accordingly, the Hearing Officer finds that in the face of Grievant's challenge to the positive drug result, the Agency had no way to confirm, by an independent lab retesting, the accuracy of the original test result. Thus, without the level of validation required when an initial test result is challenged, the Hearing Officer finds the Agency is unable to show Grievant engaged in the misconduct alleged. Thus, Grievant could not violate Agency Policy 130.2. Likewise, there was no violation to DHRM Policy 1.05.

Moreover, Grievant has consistently contended she does not use cocaine. For several reasons, the Hearing Officer finds Grievant's position convincing.

First, after receiving the news of the positive drug test, Grievant had a hair follicle specimen tested by LabCorp for illegal drug usage. Usage was tested for a 90 day period prior to the test. This period included the timeframe that was tested on behalf of the Agency. The results were negative. Also, undisputed evidence indicated that the hair follicle testing was more reliable than the saliva one. Further, the evidence shows that Grievant has several health conditions that may cause a false positive test result. In addition, the Hearing Officer had the opportunity to observe Grievant and found her credible.

The Hearing Officer also notes that the evidence shows that the Agency has placed great confidence in its personnel assigned to either take the saliva sample or supervise the taking of such. Since the Agency's policy allows retesting at an independent lab, it is reasonable to find that the referenced personnel would or should have obtained enough of a specimen for such reexamination. Yet in this case, the evidence shows that the sample was insufficient for this purpose. That said, the Hearing Officer is cognizant of the Agency's vigorous argument that the lab conducting the initial test did internally confirm the positive drug result. This process however, fails to satisfy the Agency's own policy requiring a retest if the initial testing result is challenged. That is, forwarding the specimen to a second independent lab so it can be reexamined. In effect, the Agency bids the Hearing Officer to ignore its own policy and inability to afford Grievant the right to challenge the severely punitive test results. The Hearing Officer declines to do so. And she affirms her finding that the Agency has failed to meet its burden and show Grievant engaged in the conduct. Thus, the discipline action against Grievant cannot be upheld.

II. Attorney Fees

The Virginia General Assembly Virginia Code § 2.2 – 3005.1 (A) providing, “[i]n grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover unreasonable attorney’s fees, unless special circumstances would make an award unjust.” Grievant has substantially prevailed on the merits of the grievance because she is to be reinstated as set forth below in the decision section. There are no special circumstances making an award of attorney’s fees unjust. Accordingly Grievant’s attorney is advised to submit an attorney’s fee petition to the Hearing Officer within 15 days of this decision. The petition should be in accordance with the *Grievance Procedural Manual* §7.2(e).

III. Decision and Order

The Hearing Officer has considered all the evidence of record whether specifically mentioned or not. Having done so, for the reasons noted here, the Agency’s issuance to Grievant of a Group III Written Notice with termination is rescinded. The Agency is ordered to take the following action:

1. rescind the Group III Written Notice with termination;
2. pay full back pay for the period Grievant has been separated from her job; however, back pay is to be offset by any interim earnings;
3. appropriately restore other benefits and seniority;
4. reinstate Grievant to her former position or, if occupied, to an equivalent position.

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
Departmental of Human Resource Management
101 N. 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 N. 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.⁷

Entered this 18th day of July 2013.

Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate
Agency Representative
Grievant
Director of EDR

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.