Issue: Group III Written Notice with Termination (violation of drug/alcohol policy); Hearing Date: 09/05/12; Decision Issued: 09/11/12; Agency: Department of Corrections; AHO: Cecil H. Creasey, Jr.; Case No. 9892; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 09/21/12; EDR Ruling No. 2013-3442 issued 10/17/12; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 09/21/12; DHRM letter issued 11/02/12 declining to review.**

COMMONWEALTH of VIRGINIA

Office of Employment Dispute Resolution

Department of Human Resource Management

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 9892

Hearing Date: September 5, 2012
Decision Issued: September 11, 2012

PROCEDURAL HISTORY

Grievant is a security officer for the Department of Corrections ("the Agency"), with two years of service with the Agency as of the offense date. On July 7, 2012, the Grievant was charged with a Group III Written Notice, with job termination, for violation of the Agency's drug and alcohol policy on June 19, 2012. The Grievant had prior corrective counseling memos for performance issues.

Grievant timely filed a grievance to challenge the Agency's disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On August 8, 2012, the Office of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. Through pre-hearing exchanges, the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, September 5, 2012, on which date the grievance hearing was held at the Agency's facility.

Both sides submitted documents for exhibits that were, without objection, accepted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits. At the conclusion of the grievance hearing, the parties were invited to submit authorities addressing the interpretation of the applicable policies, and both sides submitted their positions on September 10, 2012. The Grievant has objected to the Agency's submission as additional exhibits and exceeding the scope of the post-hearing submission. The post-hearing submission was limited to legal authority interpreting the applicable policies. To the extent the Agency has submitted new information specific to this grievance, the Grievant's objection is sustained. The hearing officer has not considered new information specific to the grievance.

APPEARANCES

Grievant
Counsel for Grievant
Advocate for Agency

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?

The Grievant requests rescission or reduction of the Group III Written Notice and applicable relief.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW 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 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).

Code § 2.2-3000 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 the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on its *Standards of Conduct*, Operating Procedure 135.1, which defines Group III offenses to include acts of misconduct of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. 8. An example of a Group III offense is any violation of Operating Procedure 130.2, *Alcohol and Other Drug Testing*.

Among prohibited conduct under OP 130.2 are the manufacture, distribution, possession, or use of unlawful drugs, illegal drugs or controlled substances. Also prohibited is reporting for work or remaining on duty while impaired by alcohol, or having an illegal or unlawful substance in the employee's system. Using prescription drugs that have not been prescribed is also prohibited. OP 130.2, Section IV.A. Agency Exh. 3. The policy provides that a positive drug test will result in termination. OP 130.2, Section IV.B. The policy reiterates the sanction in Section IX,

> Employees who are confirmed positive for unlawful or illegal usage will be dismissed from the Department of Corrections for, "illegal conduct which endangers the public safety, internal security, or affects the safe and efficient operation of the Department."

Agency Exh. 3.

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a security officer, with approximately 2 years of service with the Agency. The Grievant has a record of several performance counseling memos. Agency Exh. 9. Testifying for the Agency were the facility warden, institutional investigator, chief of security, and the human resources officer. On June 19, 2012, the Grievant started her shift at 5:45 a.m., attending muster for approximately 15 minutes standing at attention before starting her post assignments. On the afternoon of Tuesday, June 19, 2012, the Grievant was observed exhibiting unusual behavior, including unsteadiness, slurred speech, and actually dozing off. Inmates and other staff observed the behavior and reported it. All the Agency witnesses testified that the Grievant could not have performed her duties in such a state. The Grievant was ultimately brought to the human resources office, whereupon reasonable cause for a drug test was found and so administered. The drug test was an oral swab, and the human resources officer testified that the Grievant actually dozed off during the test. The drug test was positive for morphine, a controlled substance not prescribed for the Grievant. The Grievant stipulated to the validity of the drug test.

The Grievant advances the cause of her morphine consumption as a mistake. She testified, as did her friend and her friend's mother, that she spent the prior Saturday night, June 16-17, 2012, at her friend's house. When she awakened on Sunday morning, she had sciatica pain and asked her friend for an aspirin. The friend testified that the Grievant complained of a migraine headache. The friend asked his mother for an aspirin, and she directed him to a pill box that also contained her prescribed morphine pills that are a white tablet similar in appearance to a white tablet of aspirin. Grievant's Exh. 3. According to the Grievant, the

friend and the friend's mother, the Grievant must have ingested a morphine pill by accident on Sunday morning.

The warden testified that her Agency is required to terminate an employee who is shown to have violated OP 130.2, and that is the Agency's disciplinary experience with other cases. The only exception is for instances where the violation has a legally sufficient reason. The warden also testified that the facility is a multi-level custody facility that includes the most severe offenders. The inmate population includes a high percentage of drug violators, making for strict enforcement of the Agency's alcohol and drug policies.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

The Grievant argues that her mistaken ingestion of the morphine on Sunday morning did not constitute "use" under the applicable policy. While the policy uses the term "use" of drugs, the policy, OP 130.2, by its terms, does not address a culpability standard or require any level of culpability on the employee's part. By the claimant's testimony, she ingested the drug thinking it was something else (an aspirin). The ingestion, however, was on Sunday morning, June 17, 2012. The claimant started her shift at 5:45 a.m. on Tuesday morning, June 19, 2012, and her intoxicated behavior was observed late in the afternoon of June 19, 2012.

Further, the Grievant essentially is arguing that her condition on June 19, 2012, was an involuntary intoxication and, thus, an exception to the policy requiring discipline for the use of non-prescribed drugs in the workplace. In the criminal law context, there is a defense known as involuntary intoxication. *Johnson v. Commonwealth,* 135 Va. 524, 533, 115 S.E. 673, 676 (1923). "Intoxication is involuntary when drunkenness is produced in a person without his willing and knowing use of intoxicating liquor, drugs, other substance." 2-53 VIRGINIA MODEL JURY INSTRUCTIONS — CRIMINAL INSTRUCTION NO. 53.300 (2006).

Here, assuming the grievant's account of ingesting the substance by accident on Sunday morning is true, and there is no contrary evidence, there is also no evidence to support a conclusion that such mistaken ingestion would render the intoxicating behavior on Tuesday afternoon, more than 48 hours later.

Based on the evidence, I find that the Grievant was under the influence of a non-prescribed drug, and I further find no showing that such intoxication was causally related to the ingestion incident on Sunday, June 17, 2012. The evidence presented is insufficient to show that the intoxicating effects and behavior more than 48 hours later is causally related or explained by the single ingestion of a morphine tablet two days earlier, albeit a mistake.

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing

the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, *even if he would levy lesser discipline*, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id*. A hearing officer does not have the same discretion for applying mitigation as management does.

The Grievant argues, reasonably, that the Agency could have exercised discipline along the continuum short of a Group III Written Notice. However, the Agency asserts it has no discretion because the policy requires a Group III Written Notice and termination. The Agency's Standards of Conduct, when listing examples of <u>other</u> Group III offenses, includes some that are expressly considered Group III offenses "depending upon the nature of the violation." The Agency points out that violation of OP 130.2 has no similar leeway for gradations of offenses. The Agency asserts that it does not have the discretion to elect less severe discipline than a Group III offense. However, alternatively, the Agency asserts that if mitigation were applicable, the Grievant's record of several performance counseling memos weighs against mitigation, rendering termination appropriate.

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 Employment Dispute Resolution…." Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." 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.

Grievant contends the disciplinary action was unwarranted, extreme, or should be mitigated because of the accidental ingestion of the offending morphine. Grievant contends these circumstances should mitigate against termination. Assuming the Grievant's ingestion of morphine on Sunday morning was by accident, I find insufficient evidence of causation related to the conduct and the intoxicated behavior and positive drug test on Tuesday afternoon. Thus, I find that the mistaken ingestion of a morphine tablet more than two days prior to the offending conduct is insufficient for mitigation consideration.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been

charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

The Agency presents a position in advance of its role as guardian of public and institutional integrity regarding the security of the facility. The Grievant's intoxication was severe and the applicable policy, while strict in its application, warrants disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency's important role in safeguarding the public and offenders in its charge, as well as the valid public policies promoted by the Agency and its policies. The applicable standards of conduct provide stringent expectations of corrections officers. Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action regarding the Group III Written Notice outside the bounds of reasonableness.

DECISION

For the reasons stated herein, the Agency's issuance of the Group III Written Notice 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.[1]

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

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

November 2, 2012

RE: **Grievance of [Grievant] v Department of Corrections**
Case No. 9892

Dear [Grievant]

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review within 15 calendar days from the date the decision was issued if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

Concerning item number 2 above, in each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. While you referenced that the hearing officer's decision is inconsistent with DOC's Operational Procedure 135.I, D.2.j, you failed to show the inconsistency. Our review of that policy clearly reveals that any employee who violates that policy is subject to receiving a Group III Written Notice and dismissal from state employment. That policy states, "Any violation of Operating Procedure 130.2, *Alcohol and Other Drug Testing*, including use of alcohol on the job; any/all use, possession, distribution, sale, etc. of illegal drugs or unlawful use of controlled substances will result in termination." Your argument regarding the definition of the term "use" has no merit. Rather, it appears that you are disagreeing with how the hearing officer assessed the evidence and with the resulting decision. We therefore must decline to honor your request to consider further this appeal.

Sincerely,

Ernest G. Spratley
Assistant Director
Office of Equal Employment Services