

Issue: Group III Written Notice with Termination (violation of drug/alcohol policy);
Hearing Date: 12/14/15; Decision Issued: 12/30/15; Agency: VDOT; AHO: Carl
Wilson Schmidt, Esq.; Case No. 10706; Outcome: Partial Relief. **Attorney's Fee
Addendum issued on 01/21/16 awarding \$2,436.60.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10706

Hearing Date: December 14, 2015
Decision Issued: December 30, 2015

PROCEDURAL HISTORY

On September 24, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for leaving work without permission, violation of DHRM Policy 105, Alcohol and Other Drugs, and abuse of State time.

On October 13, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 26, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 14, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 Projects Control Engineer at one of its Facilities. His typical work shift began at 8 a.m. and ended at 5 p.m. He sometimes worked beyond his normal work shift when necessary to complete his work assignments. No evidence of prior active disciplinary action was introduced during the hearing.

On several occasions, Grievant reported to work after having consumed alcohol. On February 3, 2014, Grievant received a written counseling regarding sending inappropriate emails to a co-worker. Grievant indicated he did not recall sending the emails and was working with the Employee Assistance Program for alcohol use. On March 12, 2014, Grievant received a written counseling regarding a conversation in which his speech was slurred, he had difficulty completing sentences, and he could not recall the conversation the following day. He admitted he had a problem with alcohol. Grievant was offered assistance using the Employee Assistance Program but he declined claiming he had researched the EAP and did not want to utilize that service because he was concerned future employers would ask about his seeking counseling for psychological issues.

On September 14, 2015 at approximately noon, Grievant left his work place and travelled to his nearby home to have lunch. He regularly left work to take his lunch break at home. He consumed several beers. He did not return to the office before the end of his lunch break. He remained at his home until approximately 4:00 p.m. He

intended to complete the rest of his shift into the evening. He had not requested leave or sought the Supervisor's approval to alter the hours of his shift on that day.

At approximately 4:55 p.m., the Supervisor was leaving the workplace when Grievant called to him and asked "[h]ave you got a minute?" The Supervisor approached Grievant in the construction trailer where Grievant's office was located. Grievant asked the Supervisor questions about a project. The Supervisor smelled alcohol from Grievant's breath as Grievant spoke. Grievant's appearance was normal to the Supervisor except Grievant's eyes were slightly bloodshot. Grievant stood a little bit closer to the Supervisor as he spoke than he usually did when speaking with the Supervisor. Grievant's behavior appeared normal to the Supervisor. Grievant's motor skills appeared normal to the Supervisor. The conversation ended at approximately 4:58 p.m., and Supervisor left Grievant's office. The Supervisor notified the Manager and asked her to speak with Grievant to confirm the Supervisor's observations. The Manager confirmed the Supervisor's observations. The Manager and Supervisor left the construction trailer and stood outside.

The trailer had a walkway in the front of the trailer from one end to the other end. The walkway stood approximately one foot above the ground. A ramp connected the walkway to the ground. The ramp was approximately twenty feet long.

The Manager and Supervisor stood on the ground near the bottom of the ramp. As they stood there, Grievant walked out of the trailer, across the trailer walkway and down the ramp to the ground where he spoke to them. While on the walkway, one of his feet slightly scrapped the ground. As he walked down the ramp, one of his feet slightly scraped the ramp.¹ He did not stumble or lose his balance. He did not reach for the railing to steady himself. His steps would be best described as stutter steps that did not affect or alter his path to the Supervisor and Manager. Grievant's conversation with the Supervisor and Manager was work related and coherent.

The Supervisor spoke with the Safety Resource Manager regarding what actions to take. The Safety Resource Manager told the Supervisor he should take Grievant to the Hospital Emergency Room for alcohol testing. The Supervisor and Manager approached Grievant and told him they had a reasonable suspicion to believe that he was under the influence of alcohol and that they were going to take him to the Hospital for testing. Grievant looked at the Supervisor with a "blank stare." The Supervisor asked Grievant if he understood what he was saying and Grievant responded he understood. The Supervisor asked Grievant if he had been drinking and Grievant responded he had been drinking. The Supervisor and Manager drove Grievant to the Hospital Emergency Room. They arrived at approximately 6:35 p.m.² The Safety Resource Manager met them at the Hospital and handled the processing requirements

¹ The Supervisor described Grievant has having one of his feet get in the way of the other or that his feet hit each other as he walked.

² The delay in testing was a result of the Agency's actions, not Grievant's action.

with the Hospital staff. At approximately 6:54 p.m., Grievant completed a breathalyzer test showing his alcohol content to be .019. He presented the results to the Safety Resource Manager who told him that he was not in violation of the Agency's or DHRM's alcohol policy since the reading was below .02, a threshold set forth in the Agency's alcohol policy. She further explained that the matter was now a human resource issue.

Agency managers including the Agency's Human Resource Manager at the Central Office discussed the appropriate level of disciplinary action to take. They sought legal counsel from the Office of the Attorney General. They elected not to take disciplinary action pursuant to the Agency's alcohol policy because Grievant's test did not show a .02 alcohol level.³ Agency managers decided to take disciplinary action under the DHRM Policy 1.05, Alcohol and Other Drugs,⁴ and DHRM Policy 1.60, Standards of Conduct.

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."⁵ 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."

DHRM Policy 1.05 governs Alcohol and Other Drugs. Violations of DHRM Policy 1.05, Alcohol and Other Drugs, can be a Group I, Group II, or Group III offense depending on the nature of the violation. This policy provides:

It is the Commonwealth's objective to establish and maintain a work environment free from the adverse effects of alcohol and other drugs. The effects of alcohol and other drugs in the workplace could undermine the productivity of the Commonwealth's workforce, one of Virginia's greatest assets. The adverse effects of alcohol and other drugs create a serious threat to the welfare of fellow employees and to Virginia's citizens. The

³ Agencies are permitted to draft separate policies governing subjects otherwise addressed by DHRM policies as long as the Agency's policies are consistent with the DHRM policies. Because Grievant did not violate the Agency's alcohol policy, the Agency decided to sanction Grievant under the DHRM Alcohol and Drug policy. The Agency initiated the alcohol testing using the Agency's policy. It is arguable that upon activating the Agency's alcohol policy, the Agency could not disregard that policy and rely exclusively on the DHRM Alcohol policy. It is not necessary for the Hearing Officer to resolve that issue because Grievant did not violate DHRM Policy 1.05, Alcohol and Other Drugs.

⁴ The Hearing Officer will not address whether Grievant violated the Agency's alcohol policy because the Agency elected not to make such an allegation.

⁵ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Commonwealth, therefore, adopts the following policy and procedures to address alcohol and other drug problems in the public work force. ***

[T]he following constitutes a violation of this policy: ***

Impairment in the workplace from the use of alcohol or other drugs, except from the use of drugs for legitimate medical purposes;

DHRM Policy 1.05 does not define "impairment." Webster's II New Revised Dictionary defines "impair" as, "to diminish in strength, value, quantity, or quality: harm." Impairment is the state of being impaired.

There is a difference between having consumed alcohol, being impaired by alcohol, and being intoxicated by alcohol. An individual who is intoxicated by alcohol is also impaired by alcohol and has consumed alcohol. An individual who is impaired by alcohol may not be impaired to the state of intoxication but will have consumed alcohol. An individual who has consumed alcohol may not be impaired or intoxicated simply because he or she has consumed alcohol. In order to meet its burden of proof, an agency must show more than that an employee has consumed alcohol before coming to or returning to work. In this case, the Agency has established that Grievant consumed alcohol during his lunch break, but has not established that the consumption resulted in his impairment.

The degree of impairment can be measured by comparing an employee's typical behavior when he or she has not consumed alcohol with such behavior after the employee has consumed alcohol. An agency must show a material difference between the two.

An agency may show a violation of DHRM Policy 1.05 if an employee's mental function is impaired and/or if an employee's physical function is impaired. In this case, the Agency has not established that Grievant's mental function was impaired by alcohol. The evidence showed that Grievant discussed business matters with the Supervisor and Manager in the same manner he would have done so without having consumed alcohol.

The Agency's evidence that Grievant was physically impaired by alcohol consists of: (1) Grievant's breath smelled of alcohol, (2) Grievant's eyes were slightly bloodshot, (3) he got closer to the Supervisor when speaking to the Supervisor, and (4) Grievant had two stutter steps when walking from the trailer to speak with the Supervisor and Manager. An odor of alcohol and bloodshot eyes reflect the consumption of alcohol but do not in themselves show impairment. Grievant's action of getting very close to the Supervisor to speak may have resulted from his inability to hear well as much as because of the consumption of alcohol. How Grievant walked could show impairment only if the walking was materially different from how he walked when he had not consumed alcohol. The evidence showed that Grievant's two stutter steps were not materially different from how he normally walked. Indeed, if the Supervisor had not

been focused on Grievant's behavior at the time, it is possible that the Supervisor would not have noticed how Grievant walked. The Agency has not established a basis for disciplinary action based on Grievant's consumption of alcohol.

The Agency's frustration with Grievant is understandable. He has demonstrated a pattern of behavior showing he has a "drinking problem" but has made little or no effort to address his problem. The Agency, however, has not established that Grievant was impaired by alcohol in the workplace.

The Agency argued that Grievant should be disciplined for leaving with workplace without permission and for abuse of State time. Leaving the workplace without permission is a Group II offense. Abuse of State time is a Group I offense.⁶ Grievant did not leave the workplace without permission. He left the workplace to have lunch at his home as was his customary practice. Grievant returned to work at 4 p.m. and planned on working later in the evening to "make up" the time he was away from work during his shift. Grievant failed to inform the Supervisor that he was absent from work for approximately three hours and that he intended to work beyond the end of his shift to make up the time. Grievant should have informed the Supervisor of his plans and his failure to do so constitutes unsatisfactory work performance, a Group I offense.

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"⁷ 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In 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 reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. He was represented by an experienced and highly competent attorney licensed in Virginia. There are no special circumstances making an award of

⁶ See, Attachment A, DHRM Policy 1.60.

⁷ *Va. Code § 2.2-3005.*

attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

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 **reduced** to a Group I Written Notice for unsatisfactory work performance. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 10706-A

Addendum Issued: January 21, 2016

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.⁹ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.¹⁰

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's Attorney presented a petition showing he devoted 18.6 hours assisting Grievant. At the EDR allowed hourly rate of \$131, Grievant should be awarded \$2,436.60.

AWARD

Grievant is awarded \$2,436.60 as attorney's fee.

⁹ Va. Code § 2.2-3005.1(A).

¹⁰ § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*. § VI(D) *EDR Rules for Conducting Grievance Hearings*.

APPEAL RIGHTS

If neither party petitions the DHRM Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the DHRM Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer