Issue: Group III Written Notice with Termination (violation of drug/alcohol policy); Hearing Date: 10/13/16; Decision Issued: 10/22/16; Agency: DBHDS; AHO: Thomas P. Walk, Esq.; Case No. 10865; Outcome: No Relief - Agency Upheld.

VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: CASE NO. 10865

DECISION OF HEARING OFFICER

HEARING DATE: OCTOBER 13, 2016
DECISION DATE: OCTOBER 22, 2016

I. PROCEDURAL BACKGROUND

The grievant commenced this matter by filing her Form A on August 18, 2016. The Office of Employment Dispute Resolution appointed me as Hearing Officer on September 6, 2016. After repeated unsuccessful attempts to contact the grievant by telephone and e-mail to hold a prehearing conference, I set the matter for hearing on October 13. I issued a prehearing Order on September 14. I e-mailed a copy of the Order to the parties. Additionally, copies of the Order and my cover e-mail were mailed to the grievant on September 15. She received the certified mail on September 27.

I conducted the hearing on October 13 as scheduled. The grievant appeared and participated fully in the hearing.

II. APPEARANCES

The agency was represented by a lay advocate. A member of the facility Human Resources Office was present throughout the hearing as the representative of the agency. Four witnesses testified for the agency. An exhibit notebook was proffered by the agency in accordance with the prehearing Order. The notebook consisted of six sections, some sections

having numerous subsections. No objection to the exhibits being made by the grievant, the notebook was accepted into evidence.

The grievant represented herself. She testified on her behalf. She presented no additional witnesses or exhibits. She cross-examined some the agency witnesses.

III. ISSUE PRESENTED

Whether the agency acted properly in issuing the grievant a Group III Written Notice on July 22, 2016 and terminating her from employment?

IV. FINDINGS OF FACT

The agency in this case is a large statewide agency. The grievant worked at an agency facility located in Southwest Virginia. She commenced working for the agency in March, 2014. The agency classified her position as being a "safety sensitive" position.

A Registered Nurse working at the facility observed the grievant behaving oddly on December 17, 2015. The grievant was on duty at the time she was observed by the nurse. The nurse suspected the grievant was under the influence of either alcohol or medication. Upon the reasonable suspension provided by the nurse's observations and those of other facility employees, a drug test was performed on her at the facility. The grievant stated she was taking medication for a headache and a sinus infection. Testing performed by an independent laboratory yielded positive results for methamphetamine, opiates, hydrocodone, and amphetamine. The agency issued the grievant a Group III Written Notice on January 4. She was suspended for fifteen work days. As a partial response to the investigation, the grievant admitted she had been self-medicating. She did not file a grievance to that discipline.

Pursuant to Departmental Instruction No. 502(HRM)06, the agency further required the grievant to sign a Return to Work Agreement. This Agreement was to be in effect for five years, required the grievant to seek aftercare, and provided she would be terminated for a further positive drug test while the Agreement was in effect. The grievant resumed working and received aftercare treatment. On June 23 the agency performed a random oral drug test on the grievant. Testing by an independent laboratory of the oral sample showed a positive result for methamphetamine-D. The grievant claimed the positive result was caused by prescribed cold medication she had been taking. The aftercare counselor verified on July 14 the grievant had passed a drug screen on July 11 for certain substances. The agency issued the grievant a Group III Written Notice on July 22 for the second violation of the agency drug policy. The agency terminated the grievant from employment on that date.

V. ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a *Grievance Procedure Manual* (*GPM*). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the *GPM* provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It also has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The *GPM* is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules for Conducting Grievance Hearings*. These Rules state that in a

disciplinary grievance (such as this matter) a hearing officer shall review the facts *de novo* and determine:

I. Whether the employee engaged in the behavior described in the Written Notice;

II. Whether the behavior constituted misconduct;

III. Whether the discipline was consistent with law and policy; and

IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

I will discuss these considerations in the order presented.

The Director of the laboratory which tested the June 23, 2016 sample testified by telephone. He described briefly the chain of custody of the sample once it was received at the laboratory. He further provided brief testimony as to the testing performed. His written certification as to the sample testing positive for methamphetamine was included in the exhibits introduced by the agency. A copy of his curriculum vitae was also included in the exhibits. He has approximately 30 years experience in forensic toxicology and is Board Certified in that field.

The grievant's theory is that the testing result is a "false positive" caused by the cold medication she was taking. The agency included in its exhibits medical literature provided to it by the grievant as part her response to the disciplinary process. The literature, however, does not do more than raise a possibility of the result here being a false positive. One submission by the grievant deals with urine drug screens for amphetamines. Here, the sample taken from the grievant was obtained orally. No evidence presented established that a problem with false positives from urine screens is as likely to occur with oral samples.

The second article submitted by the grievant is an abstract of an article from May, 2012.

It also dealt with urine drug screens for amphetamine. Also, the article deals with a medical case described as "first case published in the English-language literature that describes the clinical occurrence of apparent amino assay cross-reactivity of methamphetamine in phenylephrine that resulted in a false-positive UDS for methamphetamine." The grievant's theory was reflected in her cross-examination of the laboratory director. He testified the laboratory had a zero percent error rate and that the results here could not have been a false positive. Although these assertions by the Director may be slightly suspicious, no other evidence was presented to contradict his testimony as to the results in this case. I view the Director's testimony to be uncontradicted and not inherently incredible. Therefore, under Virginia law I must give it substantial weight in determining the facts. *Cheatham v. Gregory*, 227 Va. 1, 313 S.E.2d 368 (1984).

The grievant told her agency in December, 2015 the drug screen results and her actions were caused by the cold medicine she was taking. In her testimony she asserted that she had not used methamphetamine since December. I cannot ignore this drastic contradiction by the grievant in assessing her credibility as to the June, 2016 drug testing. In short, I cannot find any significant basis to conclude other than the agency has met its burden of proof that the grievant did test positive for methamphetamine in June.

Section 7 of the subject agency policy (502), requires terminating from employment an employee who "receives a positive test result for alcohol or drugs when he has previously received a Standards of Conduct Group II or Group III Written Notice for a positive alcohol or drug test." The grievant does not dispute a positive drug test can qualify as a Group III Written Notice. The facility Standards of Conduct, Instruction (106), includes as offenses supporting a Group III discipline "serious violations of policies." The agency properly classified the subject event, the positive drug screen in June, 2016, as a Group III offense.

Departmental Instruction No. 502 (HRM) 06 is somewhat contradictory. In Section 7 is a subsection labeled "Disciplinary Action-Drugs." That section mandates non-probationary employees be issued a Group III and suspended for a minimum of 15 work days upon a positive drug test. That was the discipline given to the grievant in January, 2016. The next following section provides "the Department shall terminate from employment any employee who has been issued two Standards of Conduct Group II or Group III Written Notices for a positive drug test." This policy is unclear under what circumstances an employee should be given a Group II Written Notice. The grievant did not challenge her initial Group III Written Notice and I am required to presume it was appropriate. In any event, the section provides an employee testing positive for alcohol or drugs shall be given a Group III and terminated when he has previously received a Standards of Conduct Group II or Group III Written Notice by a positive alcohol or drug test.

This agency Instruction is not overly broad as applied to the grievant's situation. It does not put any time limitation as to when a prior positive test and discipline has to have occurred to mandate termination after a subsequent positive test. This is not a situation where logic would call into question a policy requiring termination for a second positive test occurring well after a prior discipline becomes inactive. Here, the agency is entitled to rely on a second positive test within seven months. There is no basis for me to find that applying this policy to the grievant is inconsistent with any applicable law or regulation. The grievant has not argued that she has been subject to discrimination or otherwise raised any argument as to why she has been treated unfairly or in violation of law.

The agency did not recite any consideration of mitigating circumstances in the Written Notice. Under the Departmental Instruction, none were to be considered. The grievant has presented no sufficient argument to support mitigation, other than satisfactory work performance

during her time at the facility. Such performance is not a sufficient reason for mitigation for an employee of approximately twenty-six months.

VI. DECISION

For the reasons stated above, I uphold the issuance if the Group III Written Notice on July 24, 2016 and the termination of the grievant from employment with the agency.

VII. 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.[a]

[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].

RENDERED this October 22, 2016.

/s/Thomas P. Walk______________
Thomas P. Walk, Hearing Officer