



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11414**

Hearing Date: November 18, 2019

Decision Issued: December 9, 2019

#### **PROCEDURAL HISTORY**

On June 20, 2019, Grievant was issued a Group III Written Notice of disciplinary action with a fifteen workday suspension for a positive drug test result.

On July 17, 2019, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On September 3, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 18, 2019, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Department of Behavioral Health and Developmental Services employs Grievant as a Psychiatric Technician III at one of its facilities. He began working for the Agency in November 2014. No evidence of prior active disciplinary action was introduced during the hearing.

On November 10, 2014, Grievant received a summary of the DHRM Policy 1.05 governing Alcohol and Other Drugs.

On May 28, 2019 at approximately 11:50 a.m., the Patient became combative. Grievant and approximately ten other staff responded to a call for assistance. The Patient was taken to the floor. Grievant was near the Patient's feet. The Patient kicked Grievant at least four times causing him injury. On May 29, 2019, Grievant noticed that his hand was swollen. He contacted Ms. W, a human resource employee. Ms. W told Grievant to go for medical attention at the office of a "workers' compensation doctor."

Grievant held a safety-sensitive position. The Agency required Grievant to be tested for illegal drugs for the reason "post accident" according to the Human Resource Director.

Grievant went to a workers' compensation doctor for treatment. The doctor "took [Grievant] out of work." Grievant was instructed to receive physical therapy. A

Collection Site was located at the workers' compensation doctor's location. At the Agency's insistence, Grievant submitted urine samples at the Collection Site. On May 29, 2019 at approximately 2:40 p.m., Grievant completed a "Drug Testing and Custody and Control Form." The Collector certified, "I certify that the specimen identified on this form was given to me by the donor named at the top of this form and that it was collected, sealed, and prepared for transport to the laboratory."<sup>1</sup> The sample was sent to a Laboratory for testing.

The Laboratory completed the test and it was reviewed by a Medical Review Officer who contacted Grievant. The MRO issued a Drug Test Report on June 10, 2019 indicating:

This is to confirm that the urine drug test done on the above individual is:

POSITIVE

Positive for: MARIJUANA METABOLITE

Upon learning of the positive test result, the Agency took disciplinary action against Grievant.

### **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."<sup>2</sup> 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."

Departmental Instruction 502 governs Alcohol and Drug Program. This policy provides:

Any employee in a safety sensitive position ... who is involved in an on-the-job accident or incident under the following circumstances shall be tested for alcohol and drugs as soon as practicable following the accident or incident: \*\*\*

The accident or incident resulted in time lost from work beyond the day of the injury.

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<sup>1</sup> Agency Exhibit 1.

<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

A State employee may be required to complete a drug test only if a State or Agency policy permits such screening. The Agency was authorized to require Grievant to be drug tested because Grievant held a safety-sensitive position and the incident resulted in time lost from work beyond the day of the injury.

DI 502 provides:

The Department shall terminate and deny employment in any safety-sensitive position for a period of one year to any employee in the probationary period or wage and contract employees who test positive for drugs. For all other employees who test positive for drugs, the Department shall take the following actions:

- Issue a Standards of Conduct Group III Written Notice and suspend the employee for a minimum of 15 work days.

Grievant tested positive for Marijuana, an illegal drug. The Agency's policy sets the minimum discipline for a positive drug test as a Group III Written Notice with a 15 workday suspension. Accordingly, the Agency's issuance to Grievant of a Group III Written Notice with a 15 workday suspension is upheld.

Grievant argued he did nothing wrong and presented a negative drug test he completed on June 27, 2019. Grievant did not present sufficient evidence to show that the negative drug test he obtained provided that the May 29, 2019 drug test was in error.

Grievant argued that the level of discipline was excessive. The Agency's policy justified the Agency's decision to issue Grievant a Group III Written Notice with a fifteen day suspension.

Grievant argued that the Agency did not notify him of his ability to have a second test of the original urine sample. Although the Agency should have notified Grievant of his right to have a second drug test of his original sample as a best practice, nothing in policy required the Agency to do so. Unless the Agency having failed to comply with policy, the Hearing Officer cannot reverse the Agency's disciplinary action.

*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 ...."<sup>3</sup> 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-

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<sup>3</sup> Va. Code § 2.2-3005.

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 the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a fifteen workday suspension is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.<sup>[1]</sup>

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

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer



**COMMONWEALTH of VIRGINIA**  
**Office of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 11414-R**

Reconsideration Decision Issued: February 24, 2020

**RECONSIDERATION DECISION**

EDR Ruling 2020-5034 remanded this matter to the Hearing Officer. On January 30, 2020, the Hearing Officer ordered the Agency to retest the remaining split urine sample and to pay for the cost of the retest. A retest was completed and showed:

This is to confirm that the urine drug test done on the above individual is:  
**POSITIVE**  
Positive for: MARIJUANA METABOLITE

The original drug test is confirmed by the retest and supports the Agency's basis for disciplinary action.

Grievant asserted:

First of all sir my request was not to retest the same batch. My concern was, again going forward the employee should have the option to be immediately retested if specimen came back with a positive. Retesting the same batch would be a waste of time, money, and effort.

The Agency's policy does not require the Agency to allow an employee to create a subsequent sample and have that sample tested.

The Hearing Officer will not order the Grievant to pay for the cost of the second test.

Accordingly, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a fifteen workday suspension is **upheld**.

## APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer