



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12142

Hearing Date: October 10, 2024

Decision Issued: December 13, 2024

PROCEDURAL HISTORY

On May 20, 2024, Grievant was issued a Group III Written Notice with termination for violating policies related to alcohol use.¹

On May 23, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On July 1, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. A hearing of this matter was originally scheduled for September 5, 2024. On September 3, 2024, the Agency requested a brief continuance due to a key Agency witness experiencing an unexpected and emergent medical issue. Following a pre-hearing conference on September 4, 2024, the Hearing Officer granted the Agency's request for continuance for just cause and by agreement of the parties set a new hearing date of October 10, 2024. On October 10, 2024, a hearing was held in an office building in Alexandria, Virginia. The Hearing Officer left the record open through the end of the day on October 17, 2024, to allow the Grievant time to submit copies of text messages she had exchanged with her Supervisor and used during her cross-examination of Unit Director.

APPEARANCES

Grievant
Agency Legal Advocate
Agency Party Designee
Witnesses

¹ Agency Ex. at 51-53.

Agency Observer²

ISSUES

1. Whether Grievant engaged in the behavior described in the Group III Written Notice of disciplinary action?
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:

Prior to her dismissal, Grievant was a Probation Officer for the Department of Juvenile Justice. Grievant had been employed by the Agency for approximately 18 years. The Agency's Exhibits included documentation showing that Grievant had an active Group II written notice of disciplinary action.³

The Employee Work Profile for Grievant's position set forth Essential Duties, including the following:

- Public-facing position that requires in-person, face-to-face work with the public involving the screening and processing of domestic and delinquent intake complaints.

² The Agency requested that an Agency employee be allowed to observe the proceeding for training purposes. Because the Grievant did not object to an Agency employee observing the hearing, the Hearing Officer allowed the Agency employee to observe the proceeding for training purposes.

³ Agency Ex. at 74-76. There was no witness testimony and no argument regarding the Group II written notice during the hearing.

- Requires in-person work with juveniles and their families, both in the office and within the community, to include interviewing for social history court reports; application of screening and assessment tools; evaluative decision making, court report writing, case plan development, community probation and parole supervision, counseling and use of cognitive-behavioral interventions, crisis intervention; court coverage and presentations; service referrals, and case management.
- Requires in-person home visits, facility visits, school visits, worksite visits, administration of on-site drug testing; and participation in collaborative/multidisciplinary staff meetings.
- Requires periodic 24-hour on-call intake work, including after-hours (5:00 p.m. to 8:00 a.m.) and weekend duties. After-hour intake work may require office visits to assist law enforcement with intake processes.⁴

Grievant was expected to report to the office for work by 8:00 a.m. each workday.⁵

On April 29, 2024, Grievant sent a text message to her Supervisor at 6:57 a.m. to request to take leave and report to work by 9:00 a.m. Grievant's Supervisor replied to Grievant's text with an indication that she "liked" the text.⁶

On April 30, 2024, at approximately 7:53 a.m., Grievant sent a text message to her Supervisor to inform her that she "hit a patch of traffic" and "should be there in 10 or 15 minutes." Grievant's Supervisor replied to Grievant's text with an indication that she "liked" the text.⁷

On May 1, 2024, Grievant contacted her Supervisor to advise her that she would need to take an hour of leave due to a sinus issue and that she would not arrive to work until 9:00 a.m. At approximately 9:08 a.m., Grievant contacted her Supervisor to advise her that she was going to stop by the School on a work-related matter before reporting to the office.⁸

Grievant did not go to the School before reporting to the office.⁹

Grievant was expected to attend a virtual probation officer meeting that began at 9:30 a.m. on May 1, 2024. Grievant was late to join the meeting.¹⁰

Following the meeting, Grievant's Supervisor reported to Unit Director that she was concerned about Grievant's behavior during the meeting. Unit Director was in the office

⁴ Agency Ex. at 61-67.

⁵ Hearing Recording at 51:17-52:56 and see Agency Supplemental Ex. at 6.

⁶ Grievant's Ex. 1. Grievant's Exhibit 1 is a screen shot of a text message that Grievant sent to the Hearing Officer and the Agency's advocate by email dated October 12, 2024.

⁷ Grievant's Ex. 1.

⁸ Hearing Recording at 51:17-52:26, 2:31:51-2:33:55.

⁹ Agency Ex. at 77.

¹⁰ Hearing Recording at 48:50-51:17.

and went to see Grievant, so that he could observe her behavior. Unit Director found Grievant in the kitchen where she was using the microwave. Unit Director described exchanging pleasantries with Grievant. Unit Director left the kitchen briefly and then doubled-back and upon re-entering the kitchen asked Grievant if she had seen an email that he had sent to her earlier that morning regarding a meeting. Unit Director described Grievant as seeming confused as she tried to respond to him. Unit Director described Grievant as “not presenting her best self.”¹¹ Grievant testified that it took her a moment to try to determine which email Unit Director was referencing because of multiple emails that had been exchanged to try to schedule two meetings that same week.¹²

At some point during the morning, Supervisor contacted an administrator at the School to determine whether Grievant had visited the School consistent with Grievant’s text to Supervisor that morning. At 10:34 a.m., the School administrator sent an email to Supervisor confirming their conversation and his observation that no Unit employees had visited the School as of 10:33 a.m. on May 1, 2024.¹³

Following his conversation with Grievant, Unit Director participated in a conference call with the Agency’s drug testing coordinator and Grievant’s Supervisor to discuss the observations made by Supervisor and Unit Director. Unit Director testified that based on that discussion, the decision was made to send Grievant for drug and alcohol testing.¹⁴

Unit Director completed the referral form for the testing and made the determination that the testing should be observed, meaning that Grievant should be observed when she provided her urine sample for the drug testing.¹⁵

Between approximately 10:45 a.m. and 11:00 a.m., Unit Director instructed Acting Office Services Supervisor to take Grievant to the Contract Lab for alcohol and drug testing.¹⁶

The Contract Lab provided the Agency with documentation showing that the Contract Lab administered a breathalyzer test for alcohol to Grievant on May 1, 2024. The results were positive for alcohol. The first test was identified as a screening test which was performed at approximately 1:20 p.m. The first test indicated a result of 0.063 grams of alcohol per 210 liters of breath. The Contract Lab then performed a second, confirmation test at approximately 1:38 p.m. The second test indicated a result of 0.053 grams of alcohol per 210 liters of breath.¹⁷

A breathalyzer test result of 0.063 grams of alcohol per 210 liters of breath indicates a blood alcohol concentration of 0.063 percent. A breathalyzer test result of

¹¹ Hearing Recording at 53:55-59:34.

¹² Hearing Recording at 2:18:33-2:20:05.

¹³ Agency Ex. at 77.

¹⁴ Hearing Recording at 59:34-1:01:30.

¹⁵ Hearing Recording at 1:01:30-1:03:34 and Agency Ex. at 6.

¹⁶ Hearing Recording at 1:01:30-1:03:34 and Agency Ex. at 6.

¹⁷ Agency Ex. at 7-8 and Hearing Recording at 2:23:40-2:24:13.

0.053 grams of alcohol per 210 liters of breath indicates a blood alcohol concentration of 0.053 percent.¹⁸

There was no evidence that Grievant provided the Agency with any documentation from a medical practitioner regarding her positive test results on the breathalyzer tests pursuant to the Agency's Administrative Procedure for Employee Drug and Alcohol Testing.

CONCLUSIONS OF POLICY

DHRM Policy 1.05, Alcohol and Other Drugs, sets forth the Commonwealth's policy related to alcohol and drug use in the workplace:

It is the policy of the Commonwealth of Virginia to establish and maintain a work environment free from the adverse effects of alcohol and other drugs to include marijuana and marijuana products, cannabis oil and cannabis products, and to ensure the fair and equitable application of policy requirements. The effects of alcohol and other drugs in the workplace could undermine the productivity of the Commonwealth's workforce and create a serious threat to the welfare and safety of fellow employees and to Virginia's citizens.¹⁹

DHRM Policy 1.05 provides that:

Employees may be required to participate in alcohol and/or drug testing when a supervisor or other designated individual determines that reasonable suspicion exists to suggest that the employee is impaired or under the influence of alcohol or drugs while performing their job duties.²⁰

DHRM Policy 1.05 makes clear that it is a violation of policy for an employee to be "[impaired] in the workplace from the use of alcohol, marijuana, cannabis, or other drugs, except from the use of drugs for legitimate medical purposes."²¹

DHRM Policy 1.05 provides that agencies may develop supplemental policies, including alcohol and drug testing policies. Agencies that require alcohol and drug testing shall:

include the required drug testing protocols;
identify the panel of drugs included in the testing; and

¹⁸ The General Assembly has charged the Virginia Department of Forensic Science with ensuring the accuracy of equipment used to test blood alcohol content and with developing procedures for testing blood alcohol content. The Department of Forensic Science defines "Blood alcohol concentration" as "percent by weight of alcohol in a person's blood based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath. 6 VAC 40-20-10.

¹⁹ DHRM Policy 1.05, Alcohol and Other Drugs.

²⁰ DHRM Policy 1.05, Alcohol and Other Drugs.

²¹ DHRM Policy 1.05, Alcohol and Other Drugs.

outline the testing appeals process in their supplemental alcohol and drug testing policy.²²

The Agency adopted Administrative Procedure VOL 1-1.2-10, "Employee Drug and Alcohol Testing"²³ with the stated purpose:

To promote the safety of staff and juveniles in Department of Juvenile Justice (DJJ) programs and safety and security in DJJ facilities, DJJ conducts drug and alcohol testing of employees, applicants, and contract employees as well as DJJ volunteers and interns. This also supports the Commonwealth's goal to establish and maintain a work environment free from the adverse effects of alcohol and other drugs, in accordance with the Department of Human Resources Management (DHRM) Policy 1.05, Alcohol and Other Drugs.²⁴

The Administrative Procedure became effective April 15, 2024, and applies to all full and part-time salaried employees, wage employees, applicants, and contract employees as well as DJJ volunteers and interns.

The Administrative Procedure sets forth the following:

IV. Procedure

A. Voluntary Disclosure and Treatment for Alcohol or Other Drugs²⁵

1. Employees who are subject to random drug testing and who have an alcohol or other drug problem may, before being ordered to report for a random urine drug test, voluntarily disclose the problem to their supervisor, organizational unit head, or Employee Relations Manager or designee.
2. The party receiving a voluntary disclosure shall email notice of the disclosure to the Human Resources (HR) Director or designee. The Drug and Alcohol Testing Coordinator must also be notified immediately of any employees who identify themselves as having a problem with alcohol or other drugs.
 - a. The employee's supervisor or organizational unit head may be notified that the employee has identified themselves as having a problem with alcohol or other drugs.
 - b. An employee who may have a problem with alcohol or other drugs shall be immediately referred to the Employee Assistance Program (EAP) and is encouraged to use their health plan's EAP for evaluation and referral for treatment. Employees may use appropriate leave to participate in treatment programs.
 - c. If the employee seeks treatment, the Drug and Alcohol Testing Coordinator will be asked to remove the self-disclosing employee from the

²² DHRM Policy 1.05, Alcohol and Other Drugs.

²³ Agency Ex. at 29-38.

²⁴ Agency Ex. at 29.

²⁵ Agency Ex. at 30-31.

random drug testing pool for the duration of their treatment and follow-up testing.

d. Such employees must authorize the EAP to report to the agency on the status of their treatment. All information related to the employee's voluntary disclosure and treatment shall be confidentially documented by the Employee Relations Manager or designee and shall be disclosed on a strict need-to-know basis. Employees in treatment and covered under the ADA will be exempted from the random drug test pool only once.

3. As a condition of continued employment, non-probationary employees who voluntarily disclose a problem involving alcohol or other drugs must successfully complete an EAP-recommended treatment program and undergo follow-up testing once a month for two years.

. . .

4. An employee may only self-disclose a drug or alcohol problem once while employed by the agency.

. . .

5. Employees who have not voluntarily self-disclosed an alcohol or other drug problem to management prior to being ordered to report for drug or alcohol testing may not exercise this option and are subject to termination in accordance with DHRM Policy 1.60, Standards of Conduct for violation of this procedure and other applicable DHRM Policies and DJJ procedures. These provisions also include disclosures made during fit-for-duty exams, Virginia Sickness and Disability Program (VSDP) claim process, etc.

B. Drug or Alcohol Testing²⁶

1. The Department will conduct and provide funding for drug or alcohol screening test in the following circumstances: . . . c. Reasonable Suspicion (drug and alcohol – applies to all full and part-time salaried employees, wage employees, contract employees, and DJJ volunteers or interns. See Section IV(E) below.)

. . .

3. Individuals referred for testing shall be given a completed copy of the Urine Drug Screen Collection Form (Attachment #1) and the Non-Federal Four-Part Drug Testing Custody and Control Form (Attachment #2).

4. All individuals subject to drug or alcohol testing are required to provide the specimens necessary to conduct the screening and testing activities provided for in this procedure.

²⁶ Agency Ex. at 32-33.

5. All individuals subject to drug or alcohol testing are required to provide urine samples under conditions established by the contract that provides for employee privacy while reducing the likelihood of a false or an adulterated sample.

6. If initial test results are positive, a second confirmation test will be conducted using an alternate testing procedure that is more sensitive than the initial test.

7. A Medical Review Officer will review all positive drug tests and will contact the individual to review any information on medications taken.

8. If the individual subject to drug or alcohol testing provides a written, legitimate medical explanation for the positive test result from a medical practitioner, the Drug and Alcohol Testing Coordinator shall treat the result as negative.

9. The cut-off level for alcohol testing and confirming the presence of alcohol is established at .02 percent. Any person who has a blood alcohol level .02 percent or above while on duty will be subject to disciplinary action up to and including termination of employment or, in the case of volunteers and interns, dismissal from participation in DJJ activities.

10. Employees whose test results are positive for the presence of a controlled substance will be terminated for "conduct that endangers the public safety, internal security, or adversely affects the safe and efficient operation of the Department" in accordance with DHRM Policy 1.60, Standards of Conduct.

11. An employee, applicant, contract employee, volunteer, or intern whose test results are reported as positive may request within 72 hours that their original specimens be re-tested by a Department-approved laboratory at the individual's expense. The testing contractor will keep enough of the original specimen for this additional test. The split sample is used for drug testing and the first sample is tested twice for screening and confirmation. However, if the employee challenges the result, then the split or second sample is tested. If the results of the re-testing are negative, the employee will be reimbursed the cost of the re-testing, and the results of the first test shall be expunged.

12. Employees who refuse to submit to drug or alcohol testing will be terminated for "failure to follow a direct order related to maintaining the public safety, internal security, or the safe and efficient operation of the Department" in accordance with DHRM Policy 1.60, Standards of Conduct.

. . .

E. Reasonable Suspicion²⁷

1. All full and part-time salaried employees, wage employees, and contract employees (including those working for an outside agency that has a contract with DJJ) as well as volunteers and interns are subject to urinalysis drug and alcohol testing when reasonable suspicion exists to suggest that the individual is impaired or under the influence of alcohol or drugs while performing their job duties.

a. Any above-listed individual who displays physical, behavioral, or performance indicators of possible use of drugs or alcohol shall be given a test for drugs and alcohol.

b. Reasonable suspicion must be directed at a specific person, based on specific facts that can be stated, and on the logical inferences and deductions that can be drawn from the facts.

c. Reasonable suspicion shall be based upon observable phenomena, which may include but is not limited to physical symptoms such as slurred speech, disorientation, a pattern of abnormal conduct, erratic behavior, odor of alcohol, etc., or a detector canine alerting on the individual.

d. The physical, behavioral, or performance indicators are to be observed by two persons, where feasible, preferably in supervisory positions. Such behavior, if exhibited by an employee, shall be recorded in the supervisor's performance record for the employee.

2. The organizational unit head shall order alcohol and drug testing of employees, contract employees, interns, or volunteers when there is sufficient reasonable suspicion based on observable behavior by a member of management to suspect the use of alcohol or a controlled substance. HR should be consulted before ordering the test.

3. The organizational unit head will remove employees, contract employees, interns, or volunteers who are the subject of reasonable suspicion from their workstations or units and from further performance of their duties or activities and provide for their safe and immediate transportation to the appropriate drug or alcohol testing location. The organizational unit will be responsible for the cost of transportation. An employee may be placed on pre-disciplinary leave (with pay) in accordance with DHRM Policy 1.60, Standards of Conduct.

²⁷ Agency Ex. at 35-36. The Administrative Procedure defines "reasonable suspicion" as:

Actions and appearance that would reasonably lead DJJ staff, based upon the totality of the circumstances, to suspect that an individual is impaired or under the influence of alcohol or drugs while performing their duties. Staff must be able to articulate the basis for their suspicion. Factors that may be considered in ascertaining whether reasonable suspicion exists are identified in Section IV(E).... (Agency Ex. at 30.

“Reasonable suspicion” is defined as

Actions and appearance that would reasonably lead DJJ staff, based upon the totality of the circumstances, to suspect that an individual is impaired or under the influence of alcohol or drugs while performing their duties. Staff must be able to articulate the basis for their suspicion. Factors that may be considered in ascertaining whether reasonable suspicion exists are identified in Section IV(E)....²⁸

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

The Agency asserted that Grievant violated the Standards of Conduct and the Agency’s Administrative Procedure VOL 1-1.2-10, Employee Drug and Alcohol, when the results of a breathalyzer performed during work hours showed that Grievant had a blood alcohol concentration of 0.053 percent which is above the blood alcohol content level of 0.02 percent established by the Administrative Procedure for confirming the presence of alcohol.

Reasonable Suspicion

Grievant argued that the Agency did not have “reasonable suspicion” that she was under the influence of alcohol or drugs and that the results of the breathalyzer should thus not be considered to determine misconduct. Requiring a public employee to submit to a breathalyzer or urinalysis drug testing constitutes a “search” within the meaning of the Fourth Amendment.²⁹ Both state policy and Agency policy require the Agency to have reasonable suspicion before it may require an employee to submit to alcohol or drug testing. The Agency has defined “reasonable suspicion” as “[a]ctions and appearance that would reasonably lead DJJ staff, based upon the totality of the circumstances, to suspect that an individual is impaired or under the influence of alcohol or drugs while performing their duties.” Reasonable suspicion must be directed at a specific person based on specific facts and logical inferences.³⁰ Reasonable suspicion is determined based on the facts and information available at the “inception”³¹ of the determination to require alcohol or drug testing.³² “Ordinarily, a search . . . will be “justified at its inception” when there are reasonable grounds for suspecting that the search will turn up evidence

²⁸ Agency Ex. at 30.

²⁹ See *Stone v. City of Seneca* 2009 U.S. Dist. LEXIS 132476 at *17 (S.C. Dist. 2009) (citing *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989)).

³⁰ Agency Ex. at 30 and 35.

³¹ Courts have held that the reasonableness of a search depends on whether the search was justified “at its inception” and whether the search “as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.” See *O’Connor v. Ortega*, 480 U.S. 709, 726 (1987) and *Garrison v. DOJ*, 72 F.3d 1566 (Fed. Cir. 1995), and see *Stone v. City of Seneca* 2009 U.S. Dist. LEXIS 132476 (S.C. Dist. 2009).

³² Courts have held that the reasonableness of a search depends on whether the search was justified “at its inception” and whether the search “as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.” See *O’Connor v. Ortega*, 480 U.S. 709, 726 (1987) and *Garrison v. DOJ*, 72 F.3d 1566 (Fed. Cir. 1995), and see *Stone v. City of Seneca* 2009 U.S. Dist. LEXIS 132476 (S.C. Dist. 2009).

that the employee is guilty of work-related misconduct . . . The search will be permissible in its scope when 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct].'"³³

The Agency argued that there was reasonable suspicion that Grievant was under the influence of either alcohol or drugs when Unit Director made the decision to send Grievant for testing based on the totality of circumstances, including Grievant's late arrival to work on May 1, 2024, and on the preceding two mornings, Grievant's stated plan to go to the School followed by Supervisor's confirmation of Grievant's failure to do so, as well as the observations of Grievant's Supervisor and Unit Director on the morning of May 1, 2024. Grievant's Supervisor was unable to participate in the hearing. Based on Unit Director's testimony, Supervisor contacted Unit Director on the morning of May 1, 2024, because she was concerned about Grievant's behavior that morning. According to Unit Director, Supervisor told him that Grievant had arrived six minutes late to the virtual probation officer meeting that had been scheduled to start at 9:30 a.m. Unit Director testified that Grievant's Supervisor described to him that during the meeting Grievant had been boisterous and "all over the place." Supervisor also described to Unit Director that she had observed during the meeting that Grievant's speech had been slurred, that Grievant seemed to have had a hard time articulating, and that Grievant had been animated and exhibited behavior abnormal for Grievant. Supervisor told Unit Director that Grievant had asked questions that did not make sense and that caused confusion by the other participants in the meeting and that, because of Grievant's questions and participation, the meeting had taken longer than scheduled.³⁴ Unit Director also testified that Supervisor told him that Supervisor had contacted an administrator at the School and determined that Grievant had not stopped by the School as she had indicated to Supervisor she planned to do that morning. Unit Director testified that his observation of Grievant in the kitchen area that morning did not serve to "counter" the concerns raised by Supervisor. Unit Director testified that when he spoke with Grievant in the kitchen, he observed Grievant as appearing "confused" when he asked her about an email he had sent to her.³⁵

Grievant argued that she had reasons for her late arrivals, including sinus issues, and had notified Supervisor in advance when she was running late for work that week. Grievant asserted that Supervisor had not otherwise raised any concerns directly with her regarding her late arrivals that week and had responded that she "liked" Grievant's texts when Grievant had notified her that she would be arriving late. With respect to the information that Grievant had not gone to the School as planned, Grievant asserted that when she arrived outside the School she had trouble finding a place to park and then realized that she would not have sufficient time to park her vehicle and conduct her business at the School in sufficient time to still make it to the probation officer meeting, so she ultimately decided to proceed to the office without ever entering the School.³⁶ With respect to Supervisor's observations of Grievant during the probation officer meeting, Grievant argued that Supervisor's observations were not made in person and were made only through the technology for the virtual meeting because Supervisor was not physically

³³ See *O'Connor v. Ortega*, 480 U.S. 709, 726 (1987).

³⁴ Hearing Recording at 48:50-53:55.

³⁵ Hearing Recording at 53:55-59:34.

³⁶ Hearing Recording at 2:31:51-2:35:26.

in the office that day. Grievant asserted that she had been experiencing issues with her computer that, Grievant suggested, may explain Supervisor's observation that Grievant's speech was slurred. Grievant also provided the testimony of Probation Officer to support her assertions. Probation Officer attended the probation officer meeting and did not recall anything out of the ordinary about the meeting or about Grievant's behavior during the meeting. Probation Officer testified that Grievant asked questions like other participants asked questions. Probation Officer confirmed that the probation officer meeting was a regularly scheduled meeting and that it was not unusual for participants to join the meeting late or for the meeting to run over the scheduled time based on discussion and questions. Probation Officer also testified that it was not unusual for Grievant to ask questions during these meetings. Probation Officer had the opportunity to observe Grievant in person immediately after the probation officer meeting. Probation Officer testified that they discussed some matters that came up during the meeting. Probation Officer testified that he did not observe Grievant's behavior to be out of the ordinary or anything that would have caused him concern. Probation Officer testified that he did not observe Grievant slurring her speech.³⁷

With respect to Unit Director's observations of Grievant's behavior that morning, Grievant argued that there had been multiple emails over a few days that week regarding scheduling two meetings with Unit Director.³⁸ Grievant testified that when Unit Director asked her about the email he had sent that morning, it took her a moment to try to determine which email Unit Director was referencing.³⁹

Grievant also appeared to argue that she has health conditions that may impact her behavior, including that she is under a doctor's care for vitamin D, vitamin C, and vitamin B deficiency and is iron deficient which, may cause fatigue, brain fog, and memory loss, among other health concerns.⁴⁰

Although Grievant provided information that may reasonably serve as an alternate explanation for the circumstances and observations made that morning, Grievant's explanations do not negate the fact that at its "inception" the Agency had a reasonable basis to suspect that Grievant may have been under the influence of alcohol that was sufficient to justify subjecting Grievant to a breathalyzer test.⁴¹ At the time that Unit Director made the decision to send Grievant for the breathalyzer, he had information that: Grievant had been late to work that morning and on two prior occasions that week; Grievant had, that morning, advised her Supervisor she would be going to the School before coming to the office, but had not done so; Grievant had been late to a meeting and then observed by Supervisor as slurring her speech and acting out of character during the meeting by being boisterous and "all over the place." Unit Director also had his own observation that Grievant had appeared confused when he asked her about an email he had sent to her. Taken together the circumstances and observations provided the Agency

³⁷ Hearing Recording at 1:53:26-2:08:39.

³⁸ Hearing Recording 1:14:21-1:18:31, 1:19:40-1:24:16.

³⁹ Hearing Recording at 2:18:33-2:20:05.

⁴⁰ See Agency Ex. at 44.

⁴¹ Because the actions giving rise to this grievance were based on the results of the breathalyzer test, this Hearing Officer makes no determination as to the reasonable suspicion for and administration of a drug test to Grievant.

with sufficient reasonable suspicion to warrant subjecting Grievant to a breathalyzer test. Although the Agency could have conducted further investigation, including asking Grievant to explain the events of the morning, the Agency was not required to do so before subjecting Grievant to breathalyzer testing based on the information available at the time.

Accuracy of the Breathalyzer Test Results

Grievant asserted that she would never knowingly come to work under the influence of alcohol and argued that the breathalyzer results were unreliable because Grievant used mouthwash as part of her morning routine, uses oral gels, had taken over-the-counter medication for her sinus issue that morning, and had been chewing gum and sucking on a cough drop and/or a breath mint prior to taking the breathalyzer.⁴² Grievant also asserted that she experiences hypoglycemia and acid reflux (for which she takes over the counter medication). Grievant asserted that all of these things could affect the results of her breathalyzer. In the information Grievant submitted with her grievance, she included information from unidentified sources generally suggesting that mouthwash and oral hygiene products, medications and over the counter drugs, and some foods and drink may impact breathalyzer test results. The information Grievant provided, however, did not specify how or for what period of time following use, such products may impact an individual breathalyzer test result. Grievant also did not provide evidence to show that the results of the breathalyzer tests she took on May 1, 2024, were due to all or any one of those products or factors such that in the absence of any or all of those products or factors her test results would have been below the Agency's "cut-off level" for demonstrating the presence of alcohol of 0.02 percent blood alcohol content. Grievant also did not provide any evidence to show that any specific medication she may have taken might impact the results of a breathalyzer or to what extent such medication might impact breathalyzer test results. Indeed, the evidence showed that once Grievant arrived at the Contract Lab, she had to wait at least 45 minutes before she was tested and during that time, she may have been chewing gum and drinking water, but was not otherwise consuming any food or beverages⁴³ that may have caused her to have a breathalyzer test result of 0.053.

The preponderance of the evidence showed that Grievant violated the Agency's Administrative Procedure when a breathalyzer test result showed that, while on duty, Grievant had a blood alcohol concentration of 0.053 percent which is above the level allowed by Agency policy.

Whether the Agency's discipline was consistent with law and 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."⁴⁴ 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."

⁴² Agency Ex. at 43-44.

⁴³ Hearing Recording at 2:47:43-2:49:43.

⁴⁴ See DHRM Policy 1.60, Standards of Conduct.

The Agency has demonstrated that Grievant violated the Agency's Administrative Procedure, VOL I-1.2-10, Employee Drug and Alcohol Testing, when her breathalyzer test results showed that, while on duty, she had a blood alcohol level above the 0.02 percent established for determining presence of alcohol. Violation of policy typically is a Group II level offense. The Agency did not provide any additional information or offer any evidence as to why the Agency's determination of the presence of alcohol in Grievant's system at the level determined through the breathalyzer testing warranted the issuance of a Group III Written Notice in this case. Although the Administrative Procedure puts Agency employees on notice that the Agency may take "disciplinary action up to and including termination of employment" following confirmation of a blood alcohol level of .02 percent or above while on duty, the Agency has provided no evidence as to why a Group III Written Notice was warranted in this case. The Administrative Procedure distinguishes between alcohol use and drug use, as it makes clear that with respect to drug use, employees whose test results are positive for the presence of a controlled substance will be terminated for "conduct that endangers the public safety, internal security, or adversely affects the safe and efficient operation of the Department." There is no similar language in the Administrative Procedure with respect to testing positive for the presence of alcohol. Beyond the information provided to demonstrate a reasonable suspicion for testing, the Agency offered no additional information as to Grievant's potential impairment while on duty, its effect on safety or security, or any other information as to why the Agency determined that Grievant's misconduct rose to the level of a Group III offense. This Hearing Officer does not suggest that violating the Agency's Administrative Procedure for blood alcohol content can never rise to the level of a Group III offense or that impairment could not be presumed at a certain blood alcohol concentration, but the Hearing Officer does not find evidence in the record on which to base such finding or presumption in this case.

The discipline must be reduced to a Group II Written Notice. Based on the evidence provided by the Agency, Grievant had an active Group II written notice that had been issued on December 6, 2023.⁴⁵ An Agency may terminate an employee upon the accumulation of two active Group II Written Notices.⁴⁶

Mitigation

Grievant appeared to argue that she was not aware that the Agency's policy would allow her to be tested for alcohol. Grievant testified that the Agency sends out emails to Agency employees to make them aware of policies, but that the Agency had been updating a number of policies and Grievant had not reviewed all the policy changes and had not "signed" all of the policy updates.⁴⁷ Administrative Procedure VOL I-1.2-10 superseded Administrative Directive 05-005, Employee Drug and Alcohol Testing, which had been effective since November 11, 2004. Administrative Procedure VOL I-1.2-10 became effective on April 15, 2024, approximately 15 days before the incident giving rise to this case. There was no testimony as to any specific changes the Agency may have

⁴⁵ Agency Ex. at 74-76.

⁴⁶ DHRM Policy 1.60, Standards of Conduct.

⁴⁷ Hearing Recording at 2:26:54-2:31:07.

made to its alcohol and drug testing policies. Grievant admitted that she knew she could be subjected to random “drug” testing and that she could be subjected to “drug” testing based on reasonable suspicion of impairment due to drugs. Regardless of Grievant’s specific understanding of the Agency policy, the Commonwealth has had a drug and alcohol testing policy, DHRM Policy 1.05, in effect since at least October 2021 that prohibited state employees, including Grievant, from being impaired by alcohol or other drugs while in the workplace. DHRM Policy 1.05 also put employees on notice that they may be subject to alcohol or drug testing based on reasonable suspicion to suggest that the employee was impaired or under the influence of alcohol or drugs while performing their job duties.⁴⁸

Grievant argued that the punishment was overly harsh given her 18 years of service and that if Supervisor and Unit Director were concerned that she was abusing alcohol or other substances, they did not make her aware of any such concerns or offer her help to address those concerns. Grievant appeared to argue that other employees had been provided opportunities to address alcohol or drug problems without being subjected to testing or discipline. Grievant did not, however, provide any specific information as to the circumstances of those other employees and whether those individuals had voluntarily disclosed issues with use of alcohol or drugs pursuant to the voluntary disclosure provisions of Administrative Procedure I-1.2-10, prior to being directed to take an alcohol or drug test.

Grievant argued that the Agency unnecessarily humiliated her by requiring that she submit to drug testing and that she be observed for the testing. The Agency did not provide any information or testimony as to the basis for its determination that the drug testing should be observed. Because the basis for this grievance relates to the Agency’s discipline and termination of Grievant based on the results of the breathalyzer test only, the results of the drug test and reasonableness of the drug test do not appear to be a matter before this Hearing Officer or a matter for which this Hearing Officer can provide relief.

Virginia 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....”⁴⁹ 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 the disciplinary action.

⁴⁸ See DHRM Policy 1.05, Alcohol and Other Drugs.

⁴⁹ Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to Grievant of Group III Written Notice with termination is **reduced** to a Group II Written Notice with termination based on accumulation of discipline.

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 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 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.⁵⁰

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

⁵⁰ 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.