



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11839**

Hearing Date: October 5, 2022  
Decision Issued: October 12, 2022

**PROCEDURAL HISTORY**

On May 5, 2022 Grievant was issued a Group III Written Notice of disciplinary action with removal for testing positive for marijuana.

On May 16, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On June 13, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 5, 2022, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Agency Representative  
Agency Party

**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 Corrections employed Grievant as a Corrections Officer at one of its facilities. He began working for the Agency on November 10, 2019. He was issued a firearm by the Agency. No evidence of prior active disciplinary action was introduced during the hearing.

On March 11, 2022, Grievant signed an acknowledgment that he held a safety-sensitive position and was subject to Operations Procedure 135.4 which subjected him to the possibility of random drug testing. The document stated:

In accordance with federal law, employees in positions that are issued firearms in the performance of their duties are prohibited from using or possessing marijuana and marijuana products, cannabis oil and cannabis products.<sup>1</sup>

Grievant suffered injuries causing him pain. One of Grievant's friends suggested he treat the pain by taking a product purchased over-the-counter. The product came in a bag which described it as, "hemp derived THC, elevated Delta 8." Hemp is a subspecies of cannabis. Grievant's objective was not to "get high" or intoxicated but to reduce the pain he felt. He believed he could take the product because it was sold legally in Virginia.

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<sup>1</sup> Agency Exhibit p. 19.

Grievant was randomly selected to be drug tested. Grievant provided an oral fluid sample on March 16, 2022. He completed the necessary chain of custody forms. The sample was tested and found by a Medical Review Officer to be positive for marijuana. The Agency removed Grievant based on the positive drug test.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.” Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>2</sup>

Group III offenses include:

Violation of DHRM Policy 1.05 Alcohol and Other Drugs or Operating Procedure 135.4, Alcohol and Other Drug Testing. Use of alcohol while on the job; any/all use, possession, distribution, sale, etc. of illegal drugs; or unlawful use of controlled substances will result in termination.<sup>3</sup>

Operating Procedure 135.4 governs Alcohol and Drug Testing. This policy defines marijuana as:

For the purposes of this procedure, any part of a plant of the genus Cannabis, whether growing or not, its seeds, or resin; and every compound, manufacture, salt, derivative mixture, or preparation of such plant, its seeds, or any extract containing one or more cannabinoids.

Section I(M)(3) provides:

In accordance with the Federal Gun Control Act, employees in positions that carry and/or possess firearms are prohibited from using marijuana, marijuana products, cannabis oil, and cannabis products. There are no exceptions in federal law for marijuana use or possession, even if use is sanctioned by state law.

Section III(D)(2) provides:

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<sup>2</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>3</sup> See, Operating Procedure 135.1.

Employees who are confirmed positive for unlawful, illegal, or prohibited usage will be terminated for conduct which endangers public safety, internal security, or affects the safe and efficient operation of the DOC.

On March 16, 2022, Grievant was randomly selected for an oral fluid test. He tested positive for Marijuana. His usage was prohibited under the Agency's policy which authorized termination for such usage. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that he misunderstood the Agency's policy because he assumed the legality of the product in Virginia meant it would be allowed under Agency policy. He asserted he consumed a product intended to relieve pain and not cause him to become intoxicated.

The outcome of this case is unfortunate. The evidence showed that Grievant was a valuable employee who enjoyed his work. Grievant has not presented sufficient evidence, however, to show that the product he consumed was not prohibited by the Agency's policy. Grievant received adequate notice that he held a safety-sensitive position subjecting him to random drug testing. He was adequately informed of the Agency's policy and its prohibition against using or possessing marijuana and marijuana products, cannabis oil and cannabis products. Grievant has not established how the product he consumed would be an exception to the Agency's policy.

*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>4</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-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

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<sup>4</sup> Va. Code § 2.2-3005.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal 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>

[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

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