Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: July 27, 2001; Decision Date: August 13, 2001; Agency: Department of State Police; AHO: Carl Wilson Schmidt, Esquire; Case No.: 5235

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of Department of State Police Case Number 5235

Hearing Date: July 27, 2001

Decision Issued: August 13, 2001

PROCEDURAL HISTORY

On April 23, 2001, Grievant was issued a Group I Written Notice of disciplinary action for:

> *On January 4, 2001, you received evidence/contraband which you failed to handle according to the requirements of General Order 43. You disposed of potential marijuana evidence by placing it in a trash can. This action is a violation of General Order 19, paragraph 12.b.(4), i.e. Unsatisfactory Job Performance.*

On May 14, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 22, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 27, 2001, a hearing was held at the Agency's regional office. Upon motion of a party, the Hearing Officer found just cause to grant an extension of the 30 day time frame for issuing the decision because of the conflicting schedules of the parties.

APPEARANCES

Grievant

Grievant's Counsel

Agency Party Designee

Agency Representative

Safety Service Patrol Supervisor

First Sergeant

Sergeant

Trooper

Special Agent

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action.

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 Department of State Police employs Grievant as a State Trooper. He has been employed by the Department for approximately 20 years. Grievant has had a very successful career and has received over 80 commendations since he began working for the Agency. For five of the past six years, Grievant's performance exceeded the Agency's expectations.

On January 4, 2001, Grievant was dispatched to a local Virginia Department of Transportation facility to meet with a VDOT employee who reported finding marijuana. The

employee gave Grievant a very small, one inch by one inch, blue baggy. Inside the baggy was a three-quarter inch plant stem and one smashed or broken seed approximately two millimeters in diameter. Both the VDOT employee and Grievant could detect the odor of marijuana from inside the bag which once was likely full of marijuana. The baggy had dimple marks suggesting it had been driven over on the gravel where the bag was found. Grievant spoke with the VDOT employee briefly and then thanked him. Based on his experience, Grievant knew that because there was no suspect and the amount of marijuana was so small, the baggy and its contents were of little value to obtain a conviction against the unknown owner. Grievant threw the bag away.

Evidence suspected of being marijuana is tested by the Division of Forensic Science within the Department of Criminal Justice Services. Division guidelines provide that, "Due to the tremendous case load, cases in which there is no suspect will not be analyzed. Please submit these cases at a later date when a suspect develops." (Grievant's Exhibit 16). Thus, if Grievant had submitted the baggy contents for testing, the Division would not have tested the contents since no suspect had been identified. If the contents had been tested, the test would have used up the suspected marijuana thereby leaving nothing remaining (other than the test results) as evidence in a subsequent prosecution.

CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." General Order 19(12)(a). Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." General Order 19(13)(a). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." General Order 19(14)(a).

Section 18.2-247 of the Code of Virginia defines marijuana as:

> 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 its resin. Marijuana shall not include any oily extract containing one or more cannabinoids unless such extract contains less than twelve percent of tetrahydrocannabinol by weight, or the mature stalks of such plant, fiber produced from such stalk, oil or cake made from the seed of such plant, unless such stalks, fiber, oil or cake is combined with other parts of plants of the genus Cannabis. (Emphasis added.)

The small bag given to Grievant contained a smashed seed and, thus, contained marijuana.

General Order 43 provides security measures to maintain the integrity of evidence and provide for its orderly disposition. All narcotics and dangerous drugs must be secured in the Agency's property storage lockers. Marijuana "which will not be used as evidence in a trial, will be destroyed as provided for in § 18.2-253, Code of Virginia. (General Order 43(11)(d).) Section

18.2-253 provides that marijuana shall be disposed of pursuant to a court order.

When Grievant threw away the small bag containing a marijuana seed, he failed to follow General Order 43. Failure to follow established written policy is a Group II offense. (General Order 19(13)(b)(1).) Disciplinary action may be reduced if mitigating circumstances exist. Mitigating circumstances include (1) conditions which support a reduction of corrective action in the interest of fairness and objectivity and (2) an employee's long service and/or otherwise satisfactory work performance. (General Order 19(9)(b).)

This case is difficult to resolve. The Agency has met its burden of proof and has properly exercised good judgment in mitigating the offense based on Grievant's long tenure and good work performance. All aspects of this case have been handled properly by the Agency. Much credit should be given to the Agency. With this said, the Hearing Officer must address whether the corrective action should be mitigated further.

The Hearing Officer believes the Group I Written Notice should be reduced to a counseling memorandum based on two mitigating circumstances. First, Grievant had been faced with a similar evidentiary dilemma in the past. He consulted his Former Supervisor to seek instruction regarding what procedure to follow. The Former Supervisor incorrectly instructed him to throw away the evidence. Grievant's actions on January 4, 2001 were consistent with the instructions of his Former Supervisor. When Grievant threw away the evidence on January 25th, he believed he was acting in accordance with Agency policy as interpreted by his Former Supervisor. Grievant's reliance on the instructions from his Former Supervisor was reasonable.

Second, Grievant has an overwhelming list of commendations. During Grievant's career, he has received approximately 80 commendations from private citizens, law enforcement officers, and his supervisors. He even received a commendation from a former Governor.

Grievant has had a successful career in removing drunk drivers from the highways. In 1998, 1999, and 2000, he received awards from the Mothers Against Drunk Driving organization for excellent performance. He has a long history of pursuing drunk drivers. For example, in 1986 he made 114 and in 1987 he made 110 DUI arrests. In 1988, Grievant received the Superintendent's Award of Merit for "extraordinary achievements in the field of DUI enforcement." At that time, only six Superintendent's Award of Merit had been given since the program began in 1979.

Grievant has shown numerous acts of kindness during his career. Rather than calling a tow truck, Grievant often helped distressed motorists by changing their flat tires. In 1993, Grievant was off-duty and driving home when he observed a car to the side of the road. After learning from the driver that the vehicle was out of gas, Grievant drove to the nearest gas station and returned with gasoline. He had no obligation to assist and could have let someone else do the job – instead he chose to help.

Grievant has demonstrated his understanding of the importance of preserving evidence for trials. One Commonwealth's Attorney wrote in 1998, "[Grievant] handled this matter in a thoroughly professional manner from beginning to end. In the initial stages of the investigation

he was able to preserve the integrity of blood test results and secure a statement from the defendant under very difficult circumstances. His presence of mind at the scene of the accident literally saved the day with regard to important evidence."

Grievant has enhanced the Agency's reputation through his honesty and integrity. One defense attorney whose client was convicted of DUI wrote Grievant's supervisor in 1995:

> It is well-known within the defense counsel community that some police officers tend to "embellish" their testimony while on the stand. *** During my examination, the Trooper testified as to the difficulty of performing dexterity tests at night, in the face of heavy on-coming traffic, and with a cruiser running its emergency equipment. *** [Grievant] did not "stroke" or "embellish" his story. *** He called it exactly like he saw it, and by doing so, before a courtroom of members of the public, he has done an honor to your profession and raised the esteem of the Virginia State Police as viewed by the eyes of the public.

In short, Grievant's history of exceptional service justifies mitigating Grievant's mistake.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**. The Hearing Officer recommends that the Agency, in its sole discretion, provide Grievant with a counseling memorandum outlining its performance expectations regarding evidence handling.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision.** (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

Section 7/2(d) of the Grievance Procedure Manual provides that a hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 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 EDR or HRM, the hearing officer has issued a revised decision.

<u>Judicial Review of Final Hearing Decision</u>

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.

Carl Wilson Schmidt, Esq., Hearing Officer