

Issues: Group I Written Notice (speeding ticket while operating a State vehicle) and Group III Written Notice with termination (possession of a controlled substance);  
Hearing Date: 01/31/06; Decision Issued: 02/08/06; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 8242; Outcome: Agency upheld in full.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8242**

Hearing Date: January 31, 2006  
Decision Issued: February 8, 2006

**PROCEDURAL HISTORY**

On July 25, 2005, Grievant was issued a Group I Written Notice of disciplinary action for driving a State vehicle 70 mph in a 55 mph zone. He also received a Group III Written Notice with removal for possession of a controlled substance. On August 30, 2005, Grievant filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On December 29, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 31, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUE**

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 actions against the Grievant were 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 Motor Vehicles employed Grievant as a DMV Driver Licensing Specialist at one of its Facilities until his removal effective July 25, 2005. He had been employed by the Agency for approximately 21 years. His work performance had been satisfactory to the Agency prior to the event giving rise to disciplinary action. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

In the morning of July 6, 2005, Grievant traveled to the VDOT facility where he regularly parked his Agency issued van. He unlocked the van and placed his fanny pack and several other items inside the van.<sup>1</sup> He drove the van out of the VDOT facility and onto the roadway. He was headed towards one of the Agency's locations in order to perform work-related duties.

On July 6, 2005 at approximately 8:20 a.m., the State Trooper was operating radar on a road in Grievant's locality. The speed limit on the road was 55 miles per

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<sup>1</sup> Only Grievant and his supervisor had keys to the vehicle. The Agency's expectation was that employees with assigned vehicles should lock those vehicles when not being used.

hour. Grievant drove his van past the State Trooper at a rate of 70 miles per hour. With police lights flashing, the State Trooper drove his police cruiser with its lights flashing behind Grievant's vehicle. Grievant stopped his van on the side of the road with the police cruiser behind him. Grievant got out of his vehicle and walked back towards the State Trooper. While standing within arm's reach of Grievant, the State Trooper smelled the odor of marijuana coming from Grievant.<sup>2</sup> Grievant presented his driver's license but not his vehicle registration. The State Trooper asked for the vehicle registration. Grievant said it was in the vehicle and they both walked towards the van. The registration information was on the driver's side of the vehicle. The State Trooper asked Grievant if he could open a door on the passenger side of the vehicle for the purpose of ensuring the Trooper's safety. Grievant agreed. The State Trooper smelled the odor of marijuana coming from inside the van.

The State Trooper gave Grievant his "Miranda warnings." Grievant indicated he understood the warnings. The State Trooper asked Grievant if he had marijuana. Grievant responded that he did not have marijuana on his person but there was some in the vehicle. Grievant said the marijuana was in his blue fanny pack located inside the van. The State Trooper asked if he could search the van.<sup>3</sup> The State Trooper obtained the fanny pack and opened it. Inside was a sunglass case. He opened the sunglass case and saw five marijuana "joints" and a "roach clip" used for smoking marijuana.

The State Trooper required Grievant to perform a field sobriety test in order to determine the degree Grievant may have been under the influence of marijuana. Grievant passed the field sobriety test. The State Trooper charged Grievant with speeding and with possession of marijuana.

In order to have the van removed from the side of the road, the State Trooper called an Agency employee. Agency employees were not immediately available to drive the van, so the State Trooper called a towing service. A tow truck moved the van.

After Grievant was processed at the local law enforcement office, he was released. Grievant went to the van and drove it to one of the Agency's customer service centers. Grievant's Supervisor called Grievant and told him to put the keys inside the van and leave it where it was parked. The Supervisor told Grievant he would be on administrative leave.

The Supervisor called a Driver's License Specialist in another location and asked her to come with him to pick up Grievant's van. At approximately 4:30 p.m., the Supervisor and Driver's License Specialist reached the van. As the Driver's License Specialist opened the van, she noticed the smell of marijuana.

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<sup>2</sup> The State Trooper and Grievant had not met prior to July 6, 2005.

<sup>3</sup> The State Trooper believed he had probable cause to search the van regardless of Grievant's consent to search.

On July 6, 2005, the Employee Relations Counselor Senior spoke with a Captain working in the Office of the Sheriff of the locality. He asked the Captain if the Captain would submit an affidavit of his conversation with Grievant. The Captain submitted the following affidavit:

On 07-06-2005 reporting agent was approached by [Grievant]. [Grievant] stated that he had been charged with possession of Marijuana by [the State Trooper]. [Grievant] admitted he had smoked Marijuana but not on that particular day. [Grievant] stated that [one of Grievant's friends] had given him the Marijuana over the 4<sup>th</sup> of July holiday & he had forgotten he had it with him. [Grievant] indicated that he would be willing to make a donation to the Drug Task force if we could get the case dismissed because he was going to lose his job over this. Reporting agent contacted [the Commonwealth's Attorney and the State Trooper] to see what if anything could be worked out. [The State Trooper] advised his Lieutenant had been notified and the case was going to have to go to court.<sup>4</sup>

On July 6, 2005, an Agency manager sent Grievant a letter providing him with notice of the charge against him and asking him to respond to the charge in writing. On July 11, 2005, Grievant presented the Agency with a statement reading, in part:

On July 6<sup>th</sup>, I was stopped for speeding. I admit I was speeding 70 – 55 going down hill. However, I deny being in possession of a controlled drug. I deny to admitting possession of a controlled drug.<sup>5</sup>

On August 9, 2005, the local Court ordered that the Warrant of Arrest against Grievant be dismissed “conditioned upon payment of costs (accord and satisfaction)” pursuant to Va. Code § 19.2-151.<sup>6</sup> The order lists these costs as \$141.<sup>7</sup>

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<sup>4</sup> Agency Exhibit 2. Grievant objects to the introduction of the affidavit at the hearing because it was not made available to Grievant at the time of the disciplinary action. Grievant contends his rights of procedural due process would be violated if the exhibit is considered as evidence. Grievant's argument fails. Procedural due process requires that Grievant be given adequate notice of the charges against him so that he may present his defenses to the charges. Nothing in the Standards of Conduct, Grievance Procedure Manual or legal principles of procedural due process require the Agency to present Grievant with each and every piece of evidence it has to support its case prior to the issuance of the disciplinary action. Grievant was presented with the affidavit at least four workdays prior to the hearing. Grievant had the opportunity to present evidence challenging the Captain's testimony. Hearsay evidence is admissible in grievance hearings and the Captain's affidavit may be considered as evidence of Grievant's actions.

<sup>5</sup> Agency Exhibit 7.

<sup>6</sup> Va. Code § 19.2-151 provides,

When a person is in jail or under a recognizance to answer a charge of assault and battery or other misdemeanor, or has been indicted for an assault and battery or other misdemeanor for which there is a remedy by civil action, unless the offense was committed (i) by or upon any law-enforcement officer, (ii) riotously in violation of §§ [18.2-404](#) to [18.2-407](#), (iii) against a family or household member in violation of § [18.2-57.2](#), or (iv) with intent to commit a felony, if the person injured appears before the court which

On November 10, 2005, Grievant, by his counsel, appeared before the local Circuit Court and moved the Court to expunge the police and court records relating to his arrest. The Court granted Grievant's motion.<sup>8</sup>

## CONCLUSIONS OF POLICY

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." DHRM § 1.60(V)(B).<sup>9</sup> 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." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

### Group I Written Notice

"Conviction of a moving traffic violation while using a state-owned or other public-use vehicle" is a Group I offense.<sup>10</sup> On July 6, 2005, Grievant was operating a State-owned vehicle. He was driving 70 miles in a 55 mile per hour zone. He was convicted of a moving traffic violation in court. Grievant did not appeal his conviction and does not deny speeding. Accordingly, the Group I Written Notice against Grievant must be upheld.

### Group III Written Notice

Group III offenses include, "Violation of Policy 1.05, Alcohol and Other Drugs (considered a Group III offense depending on the nature of the violation, such as the use of alcohol or unlawful use or possession of a controlled drug while on the job)."<sup>11</sup>

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made the commitment or took the recognizance, or before the court in which the indictment is pending, and acknowledges in writing that he has received satisfaction for the injury, the court may, in its discretion, by an order, supersede the commitment, discharge the recognizance, or dismiss the prosecution, upon payment by the defendant of costs accrued to the Commonwealth or any of its officers.

No evidence was presented regarding what "person injured" appeared before the court to acknowledge in writing that he has received satisfaction for the injury.

<sup>7</sup> Grievant Exhibit 3.

<sup>8</sup> Grievant Exhibit 4.

<sup>9</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>10</sup> DHRM Policy 1.60(V)(B)(1)(f).

<sup>11</sup> DHRM Policy 1.60(V)(B)(3)(M).

DHRM Policy 1.05, Alcohol and other Drugs, sets forth the Commonwealth's policy "to establish and maintain a work environment free from the adverse effects of alcohol and other drugs."<sup>12</sup> A controlled drug is defined as:

Any substance defined as such in the Drug Control Act, Chapter 34, Title 54.1 of the Code of Virginia, as amended, and whose manufacture, distribution, dispensation, use, or other possession is controlled by law.

Va. Code § 54.1-3401 states:

"Marijuana" means 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 12 percent of tetrahydrocannabinol by weight, nor shall marijuana include the mature stalks of such plant, fiber produced from such stalk, oil or cake made from the seeds of such plant, unless such stalks, fiber, oil or cake is combined with other parts of plants of the genus Cannabis.

Marijuana has a unique smell and appearance. The Hearing Officer finds that Grievant was in the possession of marijuana on July 6, 2005 for the following reasons. First, the State Trooper smelled marijuana coming from Grievant's person. He smelled marijuana inside Grievant's assigned vehicle. He observed five marijuana "joints" and a "roach clip" inside Grievant's sunglass case. The sunglass case was inside Grievant's fanny pack located inside Grievant's assigned vehicle. Second, the Driver's License Specialist smelled marijuana coming from the vehicle. Third, Grievant admitted to the State Trooper that he had smoked marijuana that morning. Grievant told the State Trooper that marijuana was located in his fanny pack. Grievant told the Captain that he had received marijuana over the 4<sup>th</sup> of July holiday and had forgotten he had it with him. The evidence is overwhelming that Grievant was in possession of marijuana on July 6, 2005 while driving a State issued vehicle and in the performance of his duties.

Grievant denies he knowingly possessed marijuana. Grievant argues that without a certificate of analysis following forensic tests on the substance, there is no basis to conclude that the substance found was marijuana. Grievant cites Va. Code § 19.2-187 in support of his argument. This statute, however, applies only to "any hearing or trial of a criminal offense or in any proceeding brought pursuant to chapter 22.1 (§ 19.2-386.1 et seq.) of this title ...." Grievant was disciplined pursuant to the DHRM Policy 1.60, Standards of Conduct and Va. Code § 2.2-3000 et seq. Grievant was not disciplined pursuant to any provision of criminal law. Accordingly, Grievant has not

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<sup>12</sup> DHRM Policy 1.05.

cited any legal authority that would exclude consideration of any evidence other than a certificate of analysis.

The State Trooper's conclusion that he smelled and observed marijuana is supported by the evidence. During the State Trooper's 16 year career in law enforcement, he had been involved in a number of drug raids where he was able to see and smell marijuana. He had obtained substances that he believed to be marijuana and then received confirmation by forensic tests that his belief was correct. He had testified in several hundred criminal cases involving marijuana.

The Driver's License Specialist's conclusion that she smelled marijuana is supported by the evidence. She admitted to smoking marijuana prior to joining the Agency and was familiar with its smell.

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 Employment Dispute Resolution...."<sup>13</sup> Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." 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 I Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice with removal is **upheld**.

## 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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

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<sup>13</sup> Va. Code § 2.2-3005.



2. 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to 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:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

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 give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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.<sup>14</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>14</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.