Issues: Group III Written Notice with termination (violation of the Drug/Alcohol Policy); Hearing Date: 04/09/07; Decision Issued: 04/11/07; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8547; Outcome: Agency upheld in full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8547

Hearing Date: April 9, 2007
Decision Issued: April 11, 2007

APPEARANCES

Grievant
Two Representatives for Grievant
Two witnesses for Grievant
Warden
Advocate for Agency
One witness for Agency

ISSUES

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group III Written Notice for illegal conduct which endangers the public safety, internal security, or affects the safe

and efficient operation of the department.[1] As part of the disciplinary action, grievant was removed from state employment effective December 11, 2006. The grievance proceeded through the resolution steps; when the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.[2] The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for 11 years as a corrections officer.[3] Grievant has accumulated two prior active disciplinary actions – both Group I Written Notices for inadequate or unsatisfactory job performance.[4]

Agency policy requires that employees must be free of illegal drugs at all times.[5] Grievant's position as a correctional officer makes him subject to random testing for illegal drugs. Grievant signed a notification when first employed advising him that he would be subject to random drug testing and, that if he tested positive for illegal drug use, his employment would be terminated immediately.[6] Employees who are confirmed to be positive for illegal drugs will be dismissed from the Department of Corrections for, "Illegal conduct which endangers the public safety, internal security, or affects the safe and efficient operation of the Department."[7]

On Saturday, November 25, 2006, grievant attended a party at his nephew's home at which there were about 20-30 family and friends. Grievant had attended several similar parties at his nephew's home in the past and knew that some of his family smoked marijuana at these gatherings. Grievant participated in the party beginning at about 6:00 p.m. He observed a number of people smoking marijuana and attempted to keep his distance from them. During the evening, grievant ate cookies, brownies, and rum cake that had been provided by one of the guests. At about 1:00 a.m. grievant developed a headache and went to bed. The following morning, grievant ate more of the same desserts for breakfast and then went fishing with his nephew and others. The group took with them more of the cookies, brownies, and rum cake which they ate while fishing.

Grievant was due to report back to work on Monday, November 27th but did not report because of a headache and diarrhea. On Tuesday, November 28th, grievant reported for work. It happened that on that day, grievant was randomly selected for a drug screening test. He provided two urine specimens which were appropriately documented and sent by courier to a laboratory for testing. A chain of custody form documents that the specimen tested was

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[1] Agency Exhibit 1. Group III Written Notice, issued December 11 2006.
[2] Agency Exhibit 2. Grievance Form A, filed December 18, 2006.
[3] Agency Exhibit 4. Grievant's Employee Work Profile Work Description, November 1, 2006.
[4] Agency Exhibit 6. Group I Written Notices, issued October 5, 2005 and January 27, 2006.
[5] Agency Exhibit 5. Section 5-55.5, Procedure 5-55, *Urinalysis and Alcohol Testing,* September 26, 1997.
[6] Agency Exhibit 7. *Notification of Receipt of DOC Procedure 5-55, Urinalysis and Alcohol Testing,* signed November 13, 1997.
[7] Agency Exhibit 5. Section 5-55.9.G, Procedure 5-55, *Urinalysis and Alcohol Testing,* September 26, 1997.

grievant's specimen.[8] The screening test revealed a positive result for cannabinoids (marijuana). Accordingly, the specimen was subjected to a confirmatory test by gas chromatography/mass spectrometry (GC/MS) revealing a positive result for marijuana at 424 ng/ml; the screening level for this test is 50 ng/ml.[9] The agency's medical review officer (a physician) reviewed the test results and called grievant on December 1, 2006 to advise him of the positive test result. Grievant denied ingesting or inhaling marijuana. The physician also asked grievant whether he was taking Marinol®, a prescription medication containing THC (tetrahydrocannibinol – the active ingredient in marijuana);[10] grievant confirmed that he does not take this medication. The physician asked grievant if he wanted his specimen tested at a different laboratory; grievant declined this opportunity.

On the day following the Saturday evening party, grievant's nephew learned for the first time that the guest who had brought the cookies, brownies, and rum cake to the party had made them with marijuana.[11] Several days later, grievant called his nephew to advise him of the positive test result; the nephew then told grievant for the first time about the marijuana-laced desserts. Pursuant to policy, the agency disciplined grievant and removed him from state employment effective December 11, 2006.

On March 21, 2007, grievant went to an independent testing laboratory and on this date he tested negative for marijuana and other illegal drugs.[12]

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

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[8] Agency Exhibit 3. Chain of Custody Form, November 28, 2006.
[9] Agency Exhibit 3. Medical Review Officer Drug Test Results, December 4, 2006.
[10] The only prescription medication that contains THC is Marinol®, which is prescribed for the treatment of cancer or glaucoma.
[11] Grievant Exhibit 2. Written statement of grievant's nephew, undated. [NOTE: The nephew testified at the hearing consistent with his written statement.]
[12] Grievant Exhibit 1. Result of Controlled Substance Test, dated March 22, 2007 but not signed by a physician.

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[13]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B of Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.[14] The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section XII of the DOC *Standards of Conduct* addresses Group III offenses, which are defined identically to the DHRM *Standards of Conduct*.[15] An illegal drug violation of Department Procedure 5-55 Urinalysis and Alcohol Testing will result in a Group III offense and termination of employment.[16]

It is undisputed that grievant tested positive for marijuana. The agency administered a random drug test to grievant, collected the specimen in accordance with procedure, and had the specimen tested twice – an initial screening test, and a confirmatory test by GC/MS. The results show a very high level of THC in grievant's system – more than 28 times the screening level for cannabinoids. Because grievant subsequently learned from his nephew that a guest had laced food with marijuana without telling anyone, grievant does not dispute the test results. Accordingly, the agency has demonstrated that grievant violated policy by testing positive for illegal drug use.

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[13] § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

[14] Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

[15] Agency Exhibit 8. Operating Procedure 135.1*, Standards of Conduct,* September 1, 2005.

[16] Agency Exhibit 8. Section XII.D, *Id*.

Grievant argues that he did not knowingly ingest marijuana; grievant's nephew corroborated his argument. The agency does not dispute grievant's argument but notes that the policy does not require that there be knowledge of ingestion; the policy strictly prohibits the use of illegal drugs irrespective of whether the ingestion was active, passive, or without knowledge. Thus, the policy is, in effect a no-fault, zero tolerance policy; if illegal drugs are in an employee's system, termination of employment is automatic.

It is understandable that the agency would have such a policy. It is far too easy for an employee to claim that ingestion of an illegal substance was either passive or unintentional when, in fact, it may have been active and intentional. In most cases, the employer has no witnesses who could dispute the employee's assertion of innocence. Accordingly, the agency places the responsibility on the employee to assure that he or she does not have drugs in their system. This is made known to the employee at the time of hire and by the occasional reminders of random drug tests.

This decision does not conclude that grievant knowingly ingested marijuana. In fact, all of the available evidence leads to a conclusion that he did not know about the marijuana-laced desserts until after he had already ingested them. However, the fact is that grievant had been to a number of previous parties at his nephew's house and he knew that some of his family and guests smoked marijuana at these parties. Thus, at the very least, grievant knowingly exposed himself to a situation where he was passively inhaling marijuana smoke. Moreover, it is common knowledge that marijuana users sometimes bake the drug into brownies. In a party where marijuana was regularly and frequently used, grievant should have been suspicious or at least curious enough to ask whether the brownies offered to guests were marijuana-laced. Obviously, the most obvious way to avoid accidental or passive ingestion in this case was for grievant not to associate with people whom he knew to be using the illegal drug. By exposing himself to this situation, grievant knowingly acted at his own peril and did, in fact, ingest marijuana.

Grievant had himself tested for illegal drugs three weeks prior to the hearing. However, this test was conducted nearly four months after the November specimen was collected and, therefore, is not probative as to whether grievant had drugs in his system on November 28, 2006. Generally, cannabinoids remain detectable in the body for up to 10 days for infrequent users; the detection period for chronic users is 30 days or longer.[17] Since grievant avers that he does not use marijuana at all, a specimen obtained nearly four months after accidental ingestion is of little or no value. Grievant also asserts that the March test demonstrates that he does not use marijuana since his system is free from the drug at this time. The agency does not dispute grievant's assertion that he is not a regular drug user but finds this irrelevant

[17] *Drug Detection Periods*, Pembrooke Occupational Health, Inc.

because the irrefutable evidence shows that grievant did have marijuana in his system when the agency tested him.

Mitigation

The normal disciplinary action for a Group III offense is a Written Notice and removal from state employment. The policy provides for reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant does have long state service. However, grievant has received two disciplinary actions for unsatisfactory work performance in the fourteen months preceding his removal from employment. Moreover, the agency's strictly enforced zero-tolerance policy regarding illegal drug use requires termination of employment in cases such as this. Based on the totality of the evidence, the hearing officer concludes that the agency's disciplinary action was within the tolerable limits of reasonableness.[18]

DECISION

The decision of the agency is affirmed.

The Group III Written Notice and removal from state employment effective December 11, 2006 is hereby 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.

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

[18] *Cf.* Davis v. Dept. of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

why you believe the decision is inconsistent with that policy. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.[19] 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.[20] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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/David J. Latham

David J. Latham, Esq.
Hearing Officer

[19] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[20] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.