

Issues: Group III Written Notice (violation of Drug/Alcohol policy) and Termination;  
Hearing Date: 04/18/07; Decision Issued: 04/23/07; Agency: Department of  
Rehabilitative Services; AHO: Carl Wilson Schmidt, Esq.; Case No. 8576;  
Outcome: Agency upheld in Full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8576**

Hearing Date: April 18, 2007  
Decision Issued: April 23, 2007

**PROCEDURAL HISTORY**

On February 16, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for possession of marijuana at work. On February 28, 2007, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On March 28, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 18, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUE**

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. 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 Rehabilitative Services employed Grievant as a Human Service Care Worker at one of its Facilities. The purpose of her position was to:

provide direct personal care to individuals with disabilities, advocating for the highest quality nursing services that will support the client's fullest participation in individualized program goals.<sup>1</sup>

Grievant was employed by the Agency for approximately 18 years until her removal effective February 16, 2007.

Ms. S testified that in November 2006 she was at work and observed another employee, Mr. A, light a small pipe filled with marijuana, smoke the marijuana, and pass the pipe to Grievant. Ms. S notified Agency managers and the Agency's police. Ms. S was asked and agreed to be an informant for the police department. She was outfitted with clothing containing a hidden camera and audio recording equipment.

On February 6, 2007, Ms. S asked Grievant if she and Mr. A were going outside to smoke marijuana. Later on, Mr. A approached Grievant and asked her if she wanted

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<sup>1</sup> Agency Exhibit A.

to go outside. As he asked Grievant to go outside, Mr. A brought his hand to his mouth as if smoking a marijuana cigarette. Grievant agreed and then said that Ms. S also wanted to go outside with them.<sup>2</sup> Mr. A left and walked to his vehicle. At approximately 6:15 p.m., Mr. A drove his vehicle to another part of the Agency's parking lot. Grievant and Ms. S walked to Mr. A's vehicle. Grievant entered the vehicle and sat in the middle of the back seat. Ms. S sat in the front passenger seat. Mr. A held up a bag of marijuana and said, "got the pipe, got the bowl, got the pot." He then said, "the bowl is loaded." Mr. A began trying to explain to Ms. S how to smoke the marijuana. He said, "See that little hole right here. You put your lighter over there, and suck it." He says, "Gotta watch for [another employee] coming out here" as he placed his lighter to the pipe and began smoking the marijuana. Mr. A then passed the pipe to Ms. S who said, "Give it to [Grievant] and then I'll try." Mr. A reached back and passed the pipe to Grievant who accepted it. Grievant held the pipe for approximately 26 seconds until Mr. A reached back to retrieve the pipe. Ms. S testified she did not see Grievant smoke the marijuana but she heard Grievant strike her lighter. Mr. A passed the pipe to Ms. S who had difficulty lighting the pipe. Grievant observed Ms. S and said, "Lying bitch, I told you she wasn't going to smoke it." Facility Police were monitoring the conversation, and they approached the vehicle at that time and instructed everyone to exit the vehicle.

## 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>3</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).

DHRM Policy 1.05(IV)(A) prohibits the unlawful or unauthorized possession of drugs in the workplace. Possession of marijuana is unlawful in Virginia.<sup>4</sup> On February 6, 2007, Grievant was in possession of marijuana while sitting in Mr. A's vehicle in the Facility parking lot. As Grievant was walking towards Mr. A's vehicle, she knew the purpose of entering the vehicle was to smoke marijuana. When Mr. A give her the pipe, Grievant knew that she was holding was marijuana because Mr. A had smoked the marijuana from the pipe immediately before he passed the pipe to Grievant. Grievant

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<sup>2</sup> At approximately 6 p.m., Ms. S contacted the Facility police and indicated that she believed something illegal might take place soon.

<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>4</sup> *Va. Code* § 18.2-250.1.

did not refuse to accept the pipe. She held on to it long enough to show her possession was not inadvertent. Grievant acted contrary to DHRM Policy 1.05.

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).

The Agency contends Grievant's possession of marijuana rises to the level of a Group III offense. The Agency's judgment is supported by the fact that Grievant's was responsible for direct patient care. Regardless of whether Grievant smoked marijuana on February 6, 2007, she was a willing participant in an event during which another employee smoked marijuana. Her participation served as an expression of tolerance towards unlawful behavior among staff responsible for the care of the Agency's clients.

*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>5</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.

Grievant contends the disciplinary action should be mitigated because she did not smoke the marijuana and when she asked Agency managers if she could be tested for drugs, Agency managers did not authorize the drug testing. She contends the test would have shown she did not consume marijuana.<sup>6</sup>

Grievant's argument is misplaced. The Agency did not discipline her for smoking marijuana at the workplace. The Agency disciplined her for possessing marijuana at the workplace. Assuming for the sake of argument that Grievant did not consume

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<sup>5</sup> *Va. Code § 2.2-3005.*

<sup>6</sup> Grievant also argued that the Agency should not have reinstated Ms. S because Ms. S was also in possession of marijuana. Ms. S was not an employee similarly situated to Grievant because Ms. S was a police informant at the time. The Facility Police Chief referred to Ms. S as a "real hero and deserves a lot of credit for stepping up to the plate and helping our Officers keep the campus safe and drug free." See Agency Exhibit J. The Agency's failure to discipline Ms. S was not a mitigating circumstance for Grievant.

marijuana and a drug test would have revealed that fact, the outcome of this case remains unchanged. The Agency has established that Grievant was in possession for approximately 26 seconds. Grievant knew she was holding a pipe containing marijuana. In light of the standard set forth in the *Rules*, 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 III Written Notice of disciplinary action 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.
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 all of your appeals to the other party and to the

EDR Director. 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>7</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>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.