

Issues: Group III Written Notice (felony conviction) and termination; Hearing Date: 04/30/07; Decision Issued: 05/01/07; Agency: James Madison University; AHO: David J. Latham, Esq.; Case No. 8579; Outcome: Agency upheld in full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:  
Case No: 8579

Hearing Date: April 30, 2007  
Decision Issued: May 1, 2007

**APPEARANCES**

Grievant  
Representative for Agency  
Three witnesses for Agency  
Observer for Agency

**ISSUES**

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

## FINDINGS OF FACT

Grievant filed a grievance from a Group III Written Notice for felony convictions.<sup>1</sup> As part of the disciplinary action, grievant was removed from state employment effective January 25, 2007. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup> James Madison University (Hereinafter referred to as “agency”) employed grievant as a backhoe operator for four years.

Grievant worked in the buildings and grounds department operating a backhoe and performing other landscaping work. His work performance was more than satisfactory and grievant’s supervisor considered him an excellent employee. Grievant has no prior disciplinary actions.

Agency policy provides that a criminal conviction for violation of any criminal drug law, based upon conduct occurring either on or off the workplace is a prohibited act which may be subject to disciplinary action including discharge from employment.<sup>3</sup>

On August 3, 2006, grievant was arrested for growing marijuana in his home and possessing firearms as a convicted felon.<sup>4</sup> The police seized marijuana plants, scales, smoking paraphernalia, and firearms. The agency learned of the arrest through the local newspaper and from grievant. The agency took no immediate action and decided to await the outcome of the legal process through the court. On January 22, 2007, pursuant to a plea agreement, grievant pleaded guilty to possessing marijuana with the intent to distribute and possessing a firearm as a convicted felon.<sup>5</sup> Grievant was sentenced to five years in prison on each conviction, but the sentence was suspended in accordance with the plea agreement. Several members of the agency upper management team evaluated grievant’s situation and concluded that, because of grievant’s exposure to the student population, the convictions of criminal activity precluded any form of discipline other than removal from employment.

## 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

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<sup>1</sup> Agency Exhibit 2. Group III Written Notice, issued January 24, 2007.

<sup>2</sup> Agency Exhibit 7. Grievance Form A, filed February 20, 2007.

<sup>3</sup> Agency Exhibit 6. *Classified Employee Handbook, Policy 1110, Drug/Alcohol Policy*, revised July 29, 2005.

<sup>4</sup> Agency Exhibit 7. Newspaper article, January 23, 2007. [NOTE: Grievant had been convicted of felony driving under the influence approximately 20 years ago.]

<sup>5</sup> Agency Exhibit 3. Virginia Courts Case Information, January 22, 2007.

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:

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.<sup>6</sup>

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 effective September 16, 1993. The *Standards* 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.<sup>7</sup> Criminal convictions for illegal conduct occurring on or off the job that are clearly related to job performance or are of such a nature that to continue an employee in his position could constitute negligence in regard to the agency's duties to the public or to other state employees is an example of a Group III offense.

The agency has shown, by a preponderance of evidence, that grievant was convicted of (and plead guilty to) two very serious illegal charges. The agency has also shown that to allow a person with such convictions to continue his employment could constitute negligence in regard to the agency's duty to protect the students at the university.

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<sup>6</sup> § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

<sup>7</sup> Agency Exhibit 4. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

Grievant's immediate supervisor had told grievant in August 2006 that, if grievant did not serve any jail time, the supervisor thought that grievant's job would probably be "OK." While the supervisor initially thought this would be the case, he later recognized the gravity of the convictions and had to concur with other agency management that termination of employment was the only possible course of action in this case.

Grievant argued that his possession of marijuana was not with the intent to distribute; he asserted that he had the plants only as decoration. However, because the police had also seized scales and smoking paraphernalia at the time of grievant's arrest, grievant eventually pleaded guilty to the charge of possession with intent to distribute.

Grievant also argued that he was not aware that he was still considered a convicted felon. When he was convicted approximately 20 years ago, grievant's driver's license was revoked. Several years later grievant reapplied for and received his driver's license. Grievant asserts that the judge who granted his license told him his record was then clean. Grievant assumed that the judge meant that the felony conviction was removed from his record. He didn't realize that the judge was referring to his driving record. Accordingly, grievant did not realize that he should not have firearms in his possession. While grievant's confusion may be understandable, it does not change the fact that he was a convicted felon when he came into possession of the firearms, and was therefore, in violation of the law.

### 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 not have long service but does have satisfactory job performance. The agency weighed the decision to remove grievant very carefully. Because of grievant's good reputation and very good work performance, the agency was reluctant to remove him from employment. However, the agency considered that grievant's guilty plea to the charges left it no alternative. Given its responsibilities, the agency concluded that it could not allow a convicted felon who was guilty of possession of marijuana with intent to distribute to work in close proximity to thousands of college students. Given this circumstance, the discipline in this case is within the limits of reasonableness.<sup>8</sup>

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<sup>8</sup> 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.'"

## DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and grievant's removal from employment effective January 25, 2007 are hereby UPHELD.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this 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. Address your request to:

Director  
Department of Human Resource Management  
101 N 14<sup>th</sup> St, 12<sup>th</sup> 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.<sup>9</sup> 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>10</sup> 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*

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David J. Latham, Esq.  
Hearing Officer

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<sup>9</sup> 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).

<sup>10</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.