

Issues: Group III Written Notice with Termination (violation of Policy 1.05 – Drugs and Alcohol); Hearing Date: 07/12/07; Decision Issued: 07/23/07; Agency: DRS; AHO: Lorin A. Costanzo, Esq.; Case No. 8648; Outcome: No Relief – Agency Upheld in Full.

# Commonwealth of Virginia

## DEPARTMENT OF REHABILITATIVE SERVICES

### DECISION OF HEARING OFFICER

In re: Grievance Case No. 8648

Hearing Date: July 12, 2007

Decision Date: July 23, 2007

### PROCEDURAL HISTORY

On February 26, 2007, Grievant was issued a Group III Written Notice of disciplinary action with termination for violation of DHRM Policy 1.05, Alcohol and Other Drugs (use of marijuana at Facility).<sup>1</sup> On March 26, 2007, Grievant timely filed a grievance to challenge the Agency's disciplinary action. On May 18, 2007 Agency Head qualified the grievance for hearing solely on the issue relating to Grievant's termination.<sup>2</sup> EDR Ruling of June 6, 2006 partially qualified the Grievant's March 26, 2007 grievance and Grievant's access to the grievance procedure was limited to challenges to actions directly resulting in her termination or involuntary separation.<sup>3</sup> On June 21, 2007, the Department of Employment Dispute Resolution assigned this grievance to the Hearing Officer. A hearing was held at Facility on July 12, 2007.

### APPEARANCES

Agency Representative  
Agency Party Designee  
Chief of Police  
Evening Supervisor  
Director of Nursing  
Worker  
Office Service Specialist  
Medical Technologist  
Grievant's Presenter  
Grievant (who also was a witness)  
Former Employee

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<sup>1</sup> Agency Exhibit K. Written Notice issued February 26, 2007.

<sup>2</sup> Agency Exhibit L. Grievance Form A.

<sup>3</sup> Department of Employment Dispute Resolution, Access Ruling of the Director, Ruling No. 2007-1692, June 6, 2007

## **ISSUES**

Were the Grievant's actions such as to warrant disciplinary actions under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

## **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances.<sup>4</sup> A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.<sup>5</sup>

## **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Grievant was a 7 year employee of the Department of Rehabilitation Services ("Agency") who worked at Facility as a Direct Services Associate II, (Human Service Care Worker) until February 26, 2007 when she was removed. This 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>6</sup>

In November of 2006 information was received by Agency concerning drugs being used at Facility. This information led to an investigation of matters and arrests in February of 2007. Grievant was not arrested but her name was raised during the investigation.

On February 12, 2007, Grievant was interviewed by the Facility Chief of Police. During such interview Grievant wrote out and signed a written statement that she had used marijuana on Facility property, once in a bathroom and once in a parking lot.<sup>7</sup> Grievant later recanted the written statement and stated that the written statement was coerced and not true.

On February 12, 2007, after writing and signing the statement, Grievant requested Evening Supervisor come to the Police Security Office. Evening Supervisor testified that, while they were alone, Grievant told her that she had used pot while on duty twice, once in bathroom 102 and once when driving off of the parking lot. Grievant stated she smoked pot but this was not a drug.<sup>8</sup>

Director of Nursing testified that on February 13, 2007, Grievant called her and stated that she smoked pot in the bathroom in 102 and at Facility parking lot.

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<sup>4</sup> §5.8, Department of Employment Dispute Resolution, Grievance Procedure Manual, effective August 30, 2004.

<sup>5</sup> §9, Department of Employment Dispute Resolution, Grievance Procedure Manual, effective August 30, 2004.

<sup>6</sup> Agency Exhibit D. Employee Work Profile.

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

<sup>8</sup> Agency Exhibit C.

Office Service Specialist testified that on February 12, 2007, Grievant stated in her presence a.) that Chief knows we were smoking it in the bathroom, b.) when asked, "You never did that did you?" Grievant said, "yes", and c.) Grievant said she didn't do drugs, just smoked a little marijuana.

## CONCLUSIONS OF LAW AND POLICY

The Virginia Personnel Act, Va. Code §2.2-2900 et seq., establishes procedures and policies applicable to employment within the Commonwealth of Virginia and includes procedures 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/her rights and pursue legitimate grievances.

Code of Virginia, §2.2-3000(A) sets forth the Virginia grievance procedure and provides, in 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 employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001."

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to §2.2-1201 of the Code of Virginia, the Department of Human Resource Management ("DHRM") promulgated the *Standards of Conduct, Policy No. 1.60, effective 9/16/93*. 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 of Conduct* 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.

Unacceptable behavior is divided into three groups according to the severity of the behavior. Group III offenses include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal. The offenses set forth in Policy 1.60 are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense that, in the judgment of agency heads, undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions therein.<sup>9</sup>

Grievant was given a Group III Written Notice with termination (effective 2/26/07) for use of marijuana at Facility violating DHRM Policy 1.05. The Written Notice stated that on February 12, 2007, Facility police questioned Grievant regarding use of marijuana during the work hours and that Grievant wrote a letter of her own free will stating that she did use marijuana on Facility premises during her workshift.<sup>10</sup> DHRM Policies and Procedures Manual,

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<sup>9</sup> Agency Exhibit H. DHRM Policies and Procedures Manual, Standards of Conduct, Policy No. 1.60.

<sup>10</sup> Agency Exhibit K. Written Notice of 2/26/07.

Policy No. 1.05, prohibits the unlawful or unauthorized possession or use of drugs in the workplace. Possession of Marijuana is unlawful in the Commonwealth of Virginia.<sup>11</sup>

In November of 2006 Facility Chief of Police (“Chief”) was informed by Deputy Director of concerns raised about drug use at Facility. Chief began an investigation and obtained assistance from the local drug task force in the investigation. Grievant’s name arose in connection with the investigation. Individuals were arrested in connection with the investigation. Grievant was not arrested and was not physically found with drugs in her possession.

Agency requested Chief to interview Grievant and he did so on February 12, 2007. During the interview Chief testified he indicated to Grievant he had received information that she was using drugs in room 103 and Grievant corrected him saying it was in room 102 and it was not drugs but marijuana. On February 12, 2007, Grievant wrote and signed a statement that she used marijuana at Facility on two prior occasions. She does not contest she made this statement admitting she used marijuana on two occasions at Facility. However, she contends that the statement was coerced, not true, and this statement is the only evidence of any use of marijuana. She contends Chief told her what to write down and she was coerced because Chief indicated she could be charged with a Class 6 Felony and could be put in jail if she did not write down a statement. Grievant indicated she does not remember anything except writing down exactly what Chief said to write.

Officer provided in a written report that he observed Chief advising Grievant she was not under arrest and was free to leave. He reported Chief asked Grievant if she would write her statement on paper and said she should only do this of her own free will. Officer indicated he knew Grievant, Grievant said she couldn’t do this with Officer in the room, Chief asked if she wanted someone else in room, and Grievant said she didn’t. Officer also reported that when Grievant began writing the statement Chief left the room briefly.<sup>12</sup>

Chief testified during the 2/12/07 interview, Grievant asked him if she could go to the bathroom and he said she could. When he asked if she had anything on her Grievant replied she did not, emptied her pockets and said “here” to which he testified he said he was not going to search her. Grievant then went to the bathroom, came back, and sat down. Chief testified he told Grievant she was not under arrest, this was an administrative inquiry, and she could leave. Chief indicated he did not threaten Grievant with jail time or a felony if she did not sign a statement and did not dictate the statement to Grievant that she wrote and signed.

On 2/12/07, after the written statement was signed, Grievant requested Evening Supervisor to come to the security office to speak with her. Grievant and Evening Supervisor spoke alone in the security office. Evening Supervisor observed Grievant was nervous, anxious, and wanted to return to her job. During this conversation Evening Supervisor testified that Grievant told her that she had used marijuana in bathroom in 102 and in the parking lot of Facility. Evening Supervisor also indicated also that Grievant repeated that she smoked pot, but this was not a drug and she did not take any drugs. Grievant contends Evening Supervisor was confused and what she had really said was that she was forced to make a statement that she had used marijuana and not that she had actually used marijuana. Evening Supervisor testified there

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<sup>11</sup> Va. Code §18.2-250.1.

<sup>12</sup> Agency Exhibit B. Incident Report.

was no confusion as to what Grievant said to her.<sup>13</sup>

On 2/13/07 Grievant called Director of Nursing. During this conversation Grievant said she did not use drugs and never used drugs but she did admit that she smoked pot in the parking lot and in the bathroom in 102 at the Facility.<sup>14</sup> Grievant also contends the Director of Nursing was confused and she (i.e. Grievant) did not say this. Director of Nursing testified that there was no confusion as to what Grievant said.

Worker at Facility testified she raised concerns to a supervisor over drug/marijuana use by staff at Facility and the effect this could have on clients. Worker was involved in the investigative process and Worker testified to concerns about Grievant's frequent use and related two specific incidents. Worker did not see Grievant actually smoking marijuana in these two incidents but saw her in situations at Facility. Worker entered a Facility bathroom during work hours and smelled marijuana. Grievant and an individual came out of the bathroom. The individual had a spray can of Lysol spray and a lighter and the individual told Worker that she was trying to cover up the smell because she had walked in and Grievant and another person were smoking marijuana in the 102 bathroom. Worker indicated another incident in the parking lot that she believed involved marijuana. There was an incident at the Facility parking lot in which she observed Grievant and another employee go into a vehicle. After reporting this Worker saw a client's mother getting ready to go around the turn in the parking lot and going toward the vehicle. Worker got the mother to come back so she would not see them in the vehicle. When Worker did this Grievant got out of the vehicle and came over to Worker, hugged Worker, and said thank you, thank you, thank you. Worker expressed that the other person in the vehicle with Grievant had a pipe and was using marijuana. Worker did not see Grievant smoking marijuana in the vehicle.

Office Service Specialist had not observed Grievant using marijuana at work however she testified Grievant admitted in her presence using marijuana at work in the bathroom and in the parking lot. She stated that on 2/7/07 Grievant stated to her that she was scared because she had been in the parking lot smoking, she could be in trouble, and Grievant said she promised never to do it again at work. Office Service Specialist testified that on 2/12/07 Grievant came into the office occupied by Office Service Specialist and another person. Grievant was crying, said she was sorry, and said that Chief was asking her a bunch of questions about smoking pot at work and that he knows we were smoking it in the bathroom. Office Service Worker testified that the other person in the office asked Grievant "You never did that did you?" and Grievant said "yes". Grievant further discussed who might have caught her, who knew about the incident in the bathroom. Office Service Specialist also testified also that Grievant told her she didn't do drugs but just smoked a little marijuana.<sup>15</sup>

Testimony indicated Grievant made separate oral statements to a number of different individuals concerning using marijuana including oral statements to Evening Supervisor, Director of Nursing, Office Service Specialist, and Chief. These statements were consistent with her written statement and witnesses to these statements appear clear as to what was said separately to each of them. The totality of the evidence indicates that these statements of

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<sup>13</sup> Agency Exhibit C.

<sup>14</sup> Agency Exhibit G and testimony.

<sup>15</sup> Agency Exhibit M, Document entitled "Statements Made by Grievant ... , and testimony.

Grievant are inconsistent with contentions of coercion. Coercion is not supported by the evidence.

The nature of Grievant's work involved providing direct assistance and services to disabled clients. Grievant had a good work record and was acknowledged by Agency for her work. This was considered but Agency also gave strong consideration to the effect and/or potential effect of staff drug use upon the disabled clients Agency is charged with serving. DHRM Policy No. 1.60(VII)(C)(I), Standards of Conduct, provides that while disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as: a.) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or b.) an employee's long service or otherwise satisfactory work performance. §2.2-3005.1 of the Code of Virginia, authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action". But mitigation must be in accordance with the rules established by the Department of Employment Dispute Resolution.<sup>16</sup> The Hearing Officer is required under the EDR Director's *Rules for Conducting Grievance Hearings* to consider management's right to exercise its good faith business judgment 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. If an agency presents facts sufficient to support the level of disciplinary action it has chosen, the Hearing Officer must give deference to that selection.

Upon reviewing the facts de novo (afresh and independently, as if no determinations had yet been made) it is determined that (i) Grievant engaged in the behavior described in the Written Notice; (ii) The behavior constituted misconduct; (iii) the Agency's discipline was consistent with law and policy. Furthermore the Agency's discipline did not exceed the limits of reasonableness. The Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group III Written Notice and termination was warranted and appropriate under the circumstances.

## DECISION

For the reasons stated herein, the Agency's issuance to Grievant of a Group III Written Notice with termination is hereby UPHELD.

## APPEAL RIGHTS

As the Grievance Procedure Manual sets 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 three types of administrative review, depending upon the nature of the alleged defect of the decision:

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<sup>16</sup> Va. Code § 2.2-3005(C)(6).

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 are the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state policy 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. Requests should be sent to:

Director, Department of Human Resources Management  
101 N. 14th Street, 12th Floor  
Richmond, Virginia 23219

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. Requests should be sent to:

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

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 **15 calendar days** of the date of the original hearing decision. (Note: the 15-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 15 day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 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 DHRM, the hearing officer has issued a revised decision.

**Judicial Review of Final Hearing Decision:** 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. You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Lorin A. Costanzo, Hearing Officer