Issues: Group III Written Notice (violation of Drug/Alcohol Policy) and Termination; Hearing Date: 04/30/09; Decision Issued: 05/04/09; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9070; Outcome: Full Relief; **Administrative Review: DHRM Ruling Request received 05/19/09; DHRM Ruling issued 06/22/09; Outcome: AHO's decision affirmed. Addendum Decision addressing attorney's fees issued 07/13/09.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9070

Hearing Date: April 30, 2009
Decision Issued: May 4, 2009

PROCEDURAL HISTORY

On January 23, 2009, Grievant was issued a Group III Written Notice of disciplinary action, with termination of employment. The offense was admission to use of illegal/controlled substance, marijuana, since 2007 and as recently as New Year's Eve 2008, in violation of Department of Human Resource Management ("DHRM") Policy No. 1.05.

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 April 13, 2009, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on April 16, 2009. The hearing was scheduled at the first date available between the parties and the hearing officer, April 30, 2009. The grievance hearing was held on April 30, 2009, at the Agency's headquarters office.

The Agency submitted documents for exhibits that were, with the exception to the Agency's internal investigation report, admitted into the grievance record and will be referred to as Agency's Exhibits. The Grievant objected to the Agency's internal investigation report because the investigator was not present to verify the report or to be subjected to cross-examination. Because the Agency relied solely on the Grievant's admission and written statement, and because the internal investigation report was not verified by any witness, the Grievant's objection is sustained.

Likewise, the Grievant submitted documents for exhibits that were, without objection from the Agency, admitted into the grievance record and will be referred to as Grievant's Exhibits. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant
Counsel for Grievant
Two Witnesses for Grievant including Grievant
Representative for Agency
Advocate for Agency
Three Witnesses for Agency including Representative

ISSUES

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?

The Grievant requests rescission of the Group III Written Notice and reinstatement to her position, restoration of benefits, back pay, and attorney's fees.

BURDEN OF PROOF

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, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

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:

> 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.

The Agency's Operating Procedure No. 135.1, Standards of Conduct, defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence normally warrants removal. A specific policy example of such an offense is violation of DHRM Policy 1.05, depending upon the nature of the violation, such as use or possession of a controlled drug while on the job. *However, the same procedure provides that violations of Policy 1.05 may also be considered Group I or Group II offenses.* The procedure defines Group I offenses to include types of behavior less severe in nature, but require correction in the interest of maintaining a productive and well-managed work force, including violation of DHRM Policy 1.05, depending on the nature of the violation. Group II offenses are more severe in nature and specifically includes violation of DHRM Policy 1.05, depending upon the nature of the violation, such as reporting to work when impaired by or under the influence of alcohol, or the unlawful use of a controlled drug. Agency's Exh. 6.

The Agency's Operating Procedure No. 5-55 establishes the procedures for urinalysis testing for illegal drug use and for alcohol testing. Paragraph 5-55.5 of the procedure states that

> employees and volunteers of the Department must be free of illegal drugs at all times and cannot be under the influence of alcohol while at work or in a facility. The use of illegal drugs by employees undermines the Department's ability to perform its mission of inmate, probationer, and parolee supervision and control, as well as the public's perception of the Department's ability to fulfill its mission. Employees involved in illegal drug use or who are under the influence of alcohol may have their judgment and performance impaired and are therefore more susceptible to corruption and pose an unacceptable risk to the Department based on issues of security and civil liability.

Agency Exh. 5. Procedure 135.1, Standards of Conduct, ¶ XII D, states an illegal drug violation of Procedure 5-55 will result in a Group III offense and termination. Agency Exh. 6.

The Grievant signed her receipt of notification of Procedure 5-55. The notification states "If you test positive for illegal drug use, your employment will be terminated immediately." Agency Exh. 7.

The Agency's Operating Procedure 135.1, Standards of Conduct, Section VIII, A, requires that a Written Notice include "notice of the offense" in addition to an explanation of the agency's evidence in support of the charge. Agency's Exh. 6.

The Offense

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

The Agency employed Grievant as a supervisor to assist in the overall inventory, materials management, shipping/receiving and quality control of the Agency's industrial operations at a regional facility. The Grievant has been so employed, with a good work record, for 22 years. No other disciplinary actions or active written notices were identified as part of the Grievant's employment record. As an ancillary aspect of her position, she was in regular proximity with the Agency's drug seeking dogs during certain training exercises. The Grievant's immediate supervisor testified that the Grievant was a very valuable employee to the Agency, and that her honesty and integrity was beyond reproach.

The Agency's witnesses testified that when the Grievant was being subjected to a drug test on January 7, 2009, the Grievant admitted to use of marijuana on New Year's Eve 2008 and at another, earlier, time in history related to an emotional personal experience. The Grievant denied her use of marijuana was while at work, and there is no evidence to the contrary. The Grievant was concerned that the drug screen on January 7, 2009, would indicate some detectable level from her New Year's Eve use. The drug test, however, was negative. Grievant's Exh. 2. The Grievant testified that her conduct in limited use of marijuana was a big, regrettable mistake, but, absent a positive drug test, she did not consider such mistake outside the workplace a violation of policy or cause for termination. She stated that her marijuana use was limited to a couple of isolated events and she denied having a drug problem.

The Agency's witnesses indicated there was an internal investigation of the claimant's drug use, but the investigator or witnesses interviewed (other than the Grievant) were not present for the grievance hearing. Based on the lack of opportunity to cross-examine any aspect of the investigation report, the Grievant's objection to the internal investigation report was sustained. The Agency's witnesses, however, testified that the Written Notice and discipline was related solely to the Grievant's admission to the marijuana use.

The Agency witnesses also testified that the admitted offense of using marijuana away from the workplace was considered a Group III offense under DHRM Policy 1.05, and that no other, lesser disciplinary sanction was considered. The Agency did not consider the Grievant's long work tenure, good employment record, and other mitigating factors.

Grievant contends that the Group III Written Notice should be reversed because she did not receive adequate notice of the Agency's contention that she was guilty of violation of policies not identified in the Written Notice. Grievant points to the Group III Written Notice which describes the offense specifically as a violation of DHRM Policy 1.05. The Grievant contends that the Written Notice is baseless because she was not guilty of any violation of DHRM Policy 1.05. Accordingly, Grievant asserts that the Group III Written Notice is defective and should be removed.

The Agency contends Grievant, by her admitted use of marijuana off the job, violated Procedure No. 5-55. This policy is characterized by the Agency at the grievance hearing as a "zero tolerance" policy that provides for a single sanction—termination.

Procedural Due Process is inextricably intertwined with the grievance procedure. The *Rules for Conducting Grievance Hearings* state:

> In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.

In support of this principal, the *Rules* cite *O'Keefe v. USPS*, 318 F.3d 1310 (Fed. Cir. 2002). In *O'Keefe*, the agency removed an employee with the general charge of "improper conduct/fraudulent use of personal identifiers." The Court reversed the agency's action because the facts and reasons for the removal were not written in the Notice of Proposed Removal given to the employee.

Agencies are expected to issue Written Notices that properly place employees on notice of the supporting facts and reasons for the agency's disciplinary actions. To satisfy the requirements of procedural due process, an agency is required, at a minimum, to give the employee (1) notice of the charges against him or her, and (2) a meaningful opportunity to respond. It is incumbent on the agency to specify the employee's conduct or actions that are being disciplined. Whether an agency has met this standard is often a matter of degree.

Under the *Rules for Conducting Grievance Hearings,* the first issue in every disciplinary grievance is:

> Whether Grievant engaged in the behavior described in the Written Notice?

Here, the Written Notice is for a violation of DHRM Policy 1.05. Violation of DHRM Policy 1.05, Alcohol and Other Drugs, can be a Group I, Group II, or Group III offense depending on the nature of the violation. DHRM Policy 1.05 states in relevant part:

> Each of the following constitutes a violation of this policy:
>
> A. The unlawful or unauthorized manufacture, distribution, dispensation, possession, or use of alcohol or other drugs in the workplace;
> B. Impairment in the workplace from the use of alcohol or other drugs, except from the use of drugs for legitimate medical purposes;
> C. A criminal conviction for a:
>
> > 1. violation of any criminal drug law, based upon conduct occurring either on or off the workplace; or
> > 2. violation of any alcohol beverage control law or law that governs driving while intoxicated, based upon conduct occurring in the workplace; and

D. An employee's failure to report to his or her supervisor the employee's conviction of any offense, as required in Report Convictions.

The Agency's witnesses testified that the Grievant's conduct of using marijuana away from work violated section A, above. That conclusion is simply disingenuous and disregards the modifying phrase "in the workplace" when referring to possession of alcohol or other drugs.

The Written Notice makes no mention of any other policy violation. DHRM Policy 1.05 states that agencies may promulgate policies that more strictly regulate alcohol and other drugs in the *workplace* provided such policies are consistent with this policy. "Workplace" is defined by DHRM Policy 1.05 as "any state-owned or leased property, or any site where state employees are performing official duties."

The stipulated evidence cannot support the conclusion that the Grievant's conduct established a violation of DHRM Policy 1.05. Hence, the description in the Written Notice of the violation of DHRM Policy 1.05 is insufficient to describe basis of the discipline and termination from employment. *See Agency Exh. 6*, Operating Procedure 135.1, Standards of Conduct, Section VIII, A.

If the standard set forth in *O'Keefe* is to be applied meaningfully, careful review of the Written Notice is necessary when compared to the facts shown. The agency's Written Notice is omits any reference to the policy ground ultimately asserted by the Agency at the grievance hearing. Based on the Written Notice and the evidence presented in light of DHRM Policy 1.05, I find that the Written Notice did not sufficiently detail the nature of the offense, and the agency, necessarily, did not present evidence to show the Grievant violated DHRM Policy 1.05. Accordingly, the Agency fails in its burden of proving that Grievant violated DHRM Policy 1.05 and should be terminated for such violation.

It is possible for the agency to add other offenses to a Written Notice so long as there is sufficient notice to the Grievant. The agency apparently wished to proceed on an offense of Agency Procedure 5-55, which provides more direct authority against use of illegal drugs outside the workplace. The Agency considers its Procedure 5-55 to be a permissible extension of DHRM Policy 1.05. However, the specific action taken for the Written Notice did not rely on Procedure 5-55. Additional charges outside the Written Notice cannot be considered as a valid reason for the discipline levied. While it is not unheard of to add additional offenses after the initial Written Notice, this creates confusion and issues of notice. This Hearing Officer would recommend when additional charges are brought, an Amended Written Notice should be issued to the Grievant.

In making this finding, I recognize that the third step response to the grievance relied on Procedure 5-55. However, that issue was not raised as an amendment to the Written Notice. Nor was it raised sufficiently as to cure the lack of specific, prior notice in the Written Notice when the Written Notice itself was clearly directed to other policy.

Based on the aforementioned, the Hearing Officer finds that the agency inadequately informed Grievant of the policy ground for her discipline and termination. In making this

finding, I do not condone the Grievant's conduct of marijuana use at any level, and I recognize that the Agency has a legitimate interest in enforcing its Procedures, however, because of the due process violation, I find the Agency's Written Notice flawed to the extent that it must be rescinded. While the Agency has full authority to enforce its policies, and protect and guard its reputation, it may not do so without honoring and following applicable policy and procedures in disciplinary matters.

Mitigation

Because of the reversal decision finding that the Grievant was not guilty of any violation of DHRM Policy 1.05, the hearing officer need not reach the issue of mitigation. However, the Agency's witnesses stated that mitigation was essentially not considered because of a zero-tolerance type of policy enforcement when applying its Procedure 5-55.

EDR's Hearing Rules provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or … an employee's long service, or otherwise satisfactory work performance." 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.

Hearing Rules § VI.B.1 (alteration in original). Therefore, the system presumes that the Agency will consider mitigating factors in its disciplinary actions. The Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness. Here, the Agency contended it had no discretion to consider mitigating circumstances. I find the Agency is not restrained from considering mitigating circumstances and that failing to consider mitigating circumstances risks exceeding the bounds of reasonableness.

Assuming the Agency had sufficiently charged the Grievant with a violation of Procedure 5-55, at least the issue of notice to the Grievant of a zero-tolerance enforcement should be considered as a potential mitigating circumstance.[1] Additionally, the Grievant's immediate supervisor's glowing comments about the Grievant's job performance and value to the Agency could be considered along with her long work tenure.

[1] Grievant asserted that Procedure 5-55 exceeds the permissible scope of further Agency procedures in accord with DHRM Policy 1.05. This decision does not address the question of whether Procedure 5-55, in extending its reach to non-workplace usage, exceeds the permissible extension of DHRM Policy 1.05.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action and termination is **reversed**. The Agency is ordered to reinstate Grievant to her former position, or if occupied, to an objectively similar position.[2] She is awarded full back pay from which any interim earnings must be deducted (which include unemployment compensation and other income earned or received to replace the loss of state employment). The Grievant is restored to full benefits and seniority. Grievant is further entitled to seek a reasonable attorney's fee, which cost shall be borne by the agency.[3]

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:

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 is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state 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 the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.

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 the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

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 days; the day

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[2] *See Virginia Department of Taxation v. Daugherty*, 250 Va. 542, 463 S.E.2d 847 (1995).
[3] Va. Code § 2.2-3005.1.A & B.

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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

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Cecil H. Creasey, Jr.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
Department of Corrections

June 22, 2009

The Department, through its representative, has requested an administrative review of the hearing officer's decision in Case No. 9070. The grievant was issued a Group III Written Notice and separated from her employment with the Department of Corrections. She filed a grievance to have the disciplinary action reversed. When she did not get the relief she was seeking, she requested a hearing before an administrative hearing officer. In his decision, the hearing officer rescinded the Group III Written Notice and the termination. For reasons stated below, this Agency will not disturb the hearing officer's decision. The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to this request for an administrative review.

FACTS

The Department of Corrections employed the grievant as a Materials Coordinator at one of its facilities. According to the hearing officer's statement of facts, "the Grievant has been so employed, with a good work record, for 22 years. No other disciplinary actions or active written notices were identified as part of the Grievant's employment record…. The Agency's witnesses testified that when the Grievant was being subjected to a drug test on January 7, 2009, the Grievant admitted to use of marijuana on New Year's Eve 2008 and at another, earlier, time in history related to an emotional experience. The Grievant denied her use of marijuana was while at work and there is no evidence to the contrary. The Grievant was concerned that the drug screen on January 7, 2009, would indicate some detectable level from her New Year's Eve use. The drug test, however, was negative…The Agency's witnesses indicated there was an internal investigation of the claimant's drug use, but the investigator or witnesses interviewed (other than the Grievant) were not present for the grievance hearing. Based on the lack of opportunity to cross-examine any aspect of the investigation report, the Grievant's objection to the internal investigation report was sustained. The Agency's witnesses, however, testified that the Written Notice and discipline were related solely to the Grievant's admission to the marijuana use." "The Agency's witnesses also testified that the admitted offense of using marijuana away from the workplace was considered a Group III offense under DHRM Policy 1.05, and that no other, lesser disciplinary sanction was considered. The Agency did not consider the Grievant's long work tenure, good employment record, and other mitigating factors.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute

misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is beyond the limit of reasonableness, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states, "It is the policy of the Commonwealth to promote the well-being of its employees in the workplace by maintaining high standards of work performance and professional conduct." The policy states as its purpose, "The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness." Attachment A, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive.

In addition, DHRM Policy No. 1.05, Alcohol and Other Drugs, and DOC Procedure 5-55 are applicable. DHRM Policy is silent in regards to what, if any, corrective action is to be taken in the case where employees are no longer using drugs. The policy, in relevant part, states as its purpose, "It is the Commonwealth's objective to establish and maintain a work environment free from the adverse effects of alcohol and other drugs. The effects of alcohol and other drugs in the workplace could undermine the productivity of the Commonwealth's workforce, one of Virginia's greatest assets. The adverse effects of alcohol and other drugs create a serious threat to the welfare of fellow employees and to Virginia's citizens."

DOC Procedure No. 5-55 states the following as its purpose, "To establish procedures for urinalysis testing for illegal drug use and for alcohol testing of Department of Corrections employees, applicants and volunteers when reasonable suspicion exists, in post accidents, and for random testing."

In the instant case, the DOC charged the grievant with the following:

> On 7 January 2009 during the course of a DOC investigation, conducted by Special Agent XX of DOC, the grievant admitted to the use of an illegal/controlled substance, Marijuana, since 2007 and as recently as New Year's eve 2008. This is in violation of DHRM Policy1.05.

The grievant signed a statement and admitted, "The last time I smoked marijuana was this past New Year's 2008. I know that the marijuana (THC) is probably still in my system right now."

The Agency further contends that DHRM Policy No. 1.60 provides "Agencies may promulgate alcohol and other drug policies as needed to comply with federal or state law, as provided below:

> 1. Agencies may promulgate policies that more strictly regulate alcohol and other drugs in the workplace provided such policies are consistent with this policy.

The DOC further contends that the Agency promulgated a supplemental alcohol and drug policy titled Procedure 5-55, Urinalysis and Alcohol Testing, which includes references to DHRM Policy 1.05.

The Agency also stated that the grievant, by her admitted use of marijuana off the job, violated Procedure No. 5-55. In his decision, the hearing officer stated, "This policy is characterized by the Agency as a "zero tolerance" policy that provides for a single sanction – termination. Procedural Due Process is inextricably intertwined with the grievance procedure. The *Rules for Conducting Grievance Hearings* state: In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."

Summarily, the hearing officer stated that in issuing a Written Notice, in order to satisfy the requirements of due process, an agency is required to give the employee (1) notice of the charges against him or her, and (2) a meaningful opportunity to respond. In this case, the DOC issued a disciplinary action based on one policy, DHRM Policy No. 1.05, and applied an additional policy, DOC Procedure No. 5-55, to support its disciplinary action after the fact without issuing any supplementary disciplinary action, thus the grievant had no opportunity to respond.

In addition, the hearing officer pointed out that DHRM Policy No. 1.05 states, in relevant part, the following as violations:

> A. The unlawful or unauthorized manufacture, distribution, dispensation, possession, or use of alcohol or other drugs in the workplace;
> B. Impairment in the workplace from the use of alcohol or other drugs, except from the use of drugs for legitimate medical purposes;
> C. A criminal conviction for a:
>> 1. violation of any criminal drug law, based upon conduct occurring either on or off the workplace; or
>> 2. violation of any alcohol beverage control law or law that governs driving while intoxicated, based upon conduct occurring in the workplace, and
>
> D. An employee's failure to report to his or her supervisor the employee's conviction of any offense, as required in Report Convictions.

In conclusion, the hearing officer determined that the DOC officials did not prove that the grievant, though she admitted using marijuana off the job, had committed a violation under DHRM Policy 1.05. In addition, he stated that the DOC did not meet the due process

requirements when the contents of the Written Notice did not fully identify all policies that the grievant allegedly violated, thus not giving her a reasonable opportunity to respond to those violations.

It is the opinion of this Agency that the hearing officer properly interpreted DHRM Policy No. 1.05 as related to drug use. However, it is beyond the authority of DHRM to rule on whether the grievant was afforded her due process rights when the DOC officials did not include on the Written Notice the complete list of policies that the grievant allegedly violated. This Agency has no authority to rule on due process issues; rather, due process issues most appropriately should be decided by legal entities. Thus, this Agency will not interfere with the application of the decision.

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Ernest G. Spratley

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM
DECISION OF HEARING OFFICER

In the matter of: Case No. 9070

Addendum Decision Issued: July 13, 2009

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.[4] For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.[5] The Agency appealed the decision to the Department of Human Resource Management (DHRM), and DHRM did not reverse the hearing officer's interpretation of policy. Grievant's counsel submitted a petition with affidavit identifying 23.3 hours of time devoted to representing Grievant in his hearing and Agency appeal to DHRM. The applicable maximum hourly rate for reimbursement of attorney's fees is $131. The Agency did not provide any response to the request for attorney's fees. I find the request appropriate.

AWARD

The grievant is awarded attorneys' fees in the amount of $3,052.30.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the

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[4] Va. Code § 2.2-3005.1.A.

[5] § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004.

Rules and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

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Cecil H. Creasey, Jr.
Hearing Officer