

Issues: Group III Written Notice (violation of drug/alcohol policy) with Suspension, Demotion and Pay Reduction; Hearing Date: 10/12/11; Decision Issued: 12/17/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9680; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 10/29/11; Reconsideration Decision issued 11/03/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 10/29/11; EDR Ruling No. 2012-3148 issued 11/28/11; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 11/29/11; DHRM Ruling issued 12/19/11; Outcome: AHO’s decision affirmed; Judicial Review: Appealed to Wise County Circuit Court; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9680

Hearing Date: October 12, 2011
Decision Issued: October 17, 2011

PROCEDURAL HISTORY

On June 22, 2011, Grievant was issued a Group III Written Notice of disciplinary action for violation of DHRM Policy 1.05 and conduct unbecoming a corrections officer. Grievant was demoted to a position of Corrections Officer with a 5% disciplinary pay reduction. He received a 40 hour suspension.

On June 30, 2011, 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 he requested a hearing. On September 7, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of a party. On October 12, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

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?

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 Corrections employed Grievant as a Corrections Sergeant at one of its Facilities. He began working for the Agency on February 1, 2001. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On June 6, 2011, the Agency conducted a drug interdiction at the Facility. One of the Agency's objectives was to limit the introduction of illegal drugs by employees and visitors into the Facility. Individuals and vehicles entering the Facility's parking area were subject to search by Agency employees. At approximately 5:11 p.m., Grievant signed a Consent to Search form authorizing Agency employees to search his vehicle and its contents.

The Canine Officer opened the driver's side door of Grievant's vehicle. He observed marijuana seeds in a pocket in the door. As soon as he saw the seeds, he knew based on his experience to look in the vehicle's floorboard. He found seeds, stems, and residue on the floor board. Based on his training and experience, he recognized the substance as marijuana. He picked up the marijuana, put it on the driver's seat and took pictures of it. He then tested the marijuana with a field drug test kit. The field drug test kit showed that the material tested was marijuana.

The trunk to Grievant's vehicle was opened. Agency employees found a small amount of marijuana leaves and residue. Another employee placed the substance

found into a field drug test. The field drug test kit has showed that the material tested was marijuana.

Grievant was sent for drug testing at a local drug testing facility. His test results were negative. Grievant argued that he had never used illegal drugs. There is no reason for the Hearing Officer to disregard Grievant's denial regarding his use of illegal drugs.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."¹ Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

DHRM Policy 1.05 governs Alcohol and Other Drugs.⁴ This policy prohibits the unlawful or unauthorized possession of alcohol or other drugs in the workplace. "Other Drug" is defined as any, "substance other than alcohol that may be taken into the body and may impair mental faculties and/or physical performance." Marijuana is an "Other Drug" under DHRM Policy 1.05. Marijuana is a Controlled Drug under the Drug Control Act, Chapter 31, Title 51.1 of the Code of Virginia.

Group III offenses include, "Violation of DHRM Policy 1.05, Alcohol and Other Drugs (considered a Group III offense, depending upon the nature of the violation, such as use or possession of a controlled drug while on the job." On June 6, 2011, Grievant was in possession of marijuana when he entered the Agency's property. Grievant was the only occupant of the vehicle at the time. He had dominion and control over the contents of the vehicle. The marijuana found inside the vehicle passenger compartment was within his line of sight and easily accessible by him. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action.

Upon the issuance of a Group III Written Notice, an agency may demote an employee in lieu of removal and suspend an employee. When an employee is demoted, the employee must receive a disciplinary pay reduction. Accordingly,

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

² Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁴ On February 1, 2001, Grievant signed a statement indicating that he had received the Summary of Virginia's Policy on Alcohol and Other Drugs. See, Agency Exhibit 6.

Grievant's demotion to Corrections Officer with a 5% disciplinary pay reduction and 40 hour work suspension is upheld.

Grievant argued that he was not the only person who drove the vehicle. He argued that his wife sometimes drove the vehicle. Grievant presented a statement from his wife in which he states that an incident took place between her and her neighbors over some shrubbery. A neighbor threw shrubbery, leaves, sticks and other debris onto Grievant's vehicle from the front to the back of the car. Grievant argued that the shrubbery may have provided the source of the marijuana. Grievant's arguments fail. It is not necessary for the Agency to show that Grievant was the owner or source of the marijuana. It is only necessary that the Agency show Grievant was in possession of marijuana and the Agency has done so. If the Hearing Officer assumes for the sake of argument that the shrubbery was the source of the marijuana and that it entered Grievant's vehicle when it was thrown at the vehicle, the incident would not explain how marijuana was found inside the trunk of Grievant's vehicle. Grievant did not assert that the trunk of his vehicle was open when the shrubbery was thrown at the vehicle.

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...."⁵ 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. In light of this standard, 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 demotion, disciplinary pay reduction, and 40 hour work suspension 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:

⁵ Va. Code § 2.2-3005.

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 14th St., 12th 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
600 East Main St. STE 301
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.⁶

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9680-R

Reconsideration Decision Issued: November 3, 2011

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material; and
- (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant contends the Agency failed to apply or unfairly applied its policies. This is same argument he raised during the hearing. If the Hearing Officer assumes for the sake of argument that the Agency violated policies as alleged by the Grievant, none of the violations would justify a reversal of the disciplinary action against him.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

APPEAL RIGHTS

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.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Corrections

December 19, 2011

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9680. For the reasons stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In his PROCEDURAL HISTORY, the hearing officer wrote, in relevant part, the following: On June 22, 2011, Grievant was issued a Group III Written Notice of disciplinary action for violation of DHRM Policy 1.05 and conduct unbecoming a corrections officer. Grievant was demoted to a position of Corrections Officer with a 5% disciplinary pay reduction. He received a 40 hour suspension.

In his FINDINGS OF FACT, the hearing officer wrote, in relevant part, the following: The Department of Corrections employed Grievant as a Corrections Sergeant at one of its Facilities. He began working for the Agency on February 1, 2001. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On June 6, 2011, the Agency conducted a drug interdiction at the Facility. One of the Agency's objectives was to limit the introduction of illegal drugs by employees and visitors into the Facility. Individuals and vehicles entering the Facility's parking area were subject to search by Agency employees. At approximately 5:11 p.m., Grievant signed a Consent to Search form authorizing Agency employees to search his vehicle and its contents.

The Canine Officer opened the driver's side door of Grievant's vehicle. He observed marijuana seeds in a pocket in the door. As soon as he saw the seeds, he knew based on his experience to look in the vehicle's floorboard. He found seeds, stems, and residue on the floor board. Based on his training and experience, he recognized the substance as marijuana. He picked up the marijuana, put it on the driver's seat and took pictures of it. He then tested the marijuana with a field drug test kit. The field drug test kit showed that the material tested was marijuana.

The trunk to Grievant's vehicle was opened. Agency employees found a small amount of marijuana leaves and residue. Another employee placed the substance found in a field into a field drug test. The field drug test kit has showed that the material tested was marijuana.

Grievant was sent for drug testing at a local drug testing facility. His test results

were negative. Grievant argued that he had never used illegal drugs. There is no reason for the Hearing Officer to disregard Grievant's denial regarding his use of illegal drugs.

In his CONCLUSIONS OF POLICY, the hearing officer wrote the following:

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force." Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."

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Upon the issuance of a Group III Written Notice, an agency may demote an employee in lieu of removal and suspend an employee. When an employee is demoted, the employee must receive a disciplinary pay reduction. Accordingly, Grievant's demotion to Corrections Officer with a 5% disciplinary pay reduction and 40 hour work suspension is upheld.

Grievant argued that he was not the only person who drove the vehicle. He argued that his wife sometimes drove the vehicle. Grievant presented a statement from his wife in which he states that an incident took place between her and her neighbors over some shrubbery. A neighbor threw shrubbery, leaves, sticks and other debris onto Grievant's vehicle from the front to the back of the car. Grievant argued that the shrubbery may have provided the source of the marijuana. Grievant's arguments fail. It is not necessary for the Agency to show that Grievant was the owner or source of the marijuana. It is only necessary that the Agency show Grievant was in possession of marijuana and the Agency has done so. If the Hearing Officer assumes for the sake of argument that the shrubbery was the source of the marijuana and that it entered Grievant's vehicle when it was thrown at the vehicle, the incident would not explain how marijuana was found inside the trunk of

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In his DECISION, the hearing officer stated the following:

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion, disciplinary action, pay reduction, and 40 hour work suspension is upheld.

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. 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.

In his request to this Department for an administrative review, the grievant appealed on the basis of misapplication or unfair treatment under Operating Procedure Special Investigations Unit 030.4 and Operating Procedure Reporting Serious or Unusual Incidents.

CONCLUSION

Summarily, the hearing officer concluded that the illegal drugs, while may not have been used by the grievant, were in a vehicle the grievant owned. He also concluded that it was highly unlikely that the marijuana got into the trunk of the vehicle in the manner described by the grievant.

This Department's review of the hearing decision does not reveal that the decision is in violation of any human resource management policy. Rather, it appears that the grievant is challenging how the investigation of the allegations made against him was conducted. Likewise, he is contesting the assessment of the evidence by the hearing officer and the conclusions the hearing officer drew. Both issues are beyond the authority of the DHRM to address, therefore we will not interfere with the application of this decision.

Ernest G. Spratley, Assistant Director
Office of Equal Employment Services