COMMONWEALTH OF VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 12066

Hearing Officer Appointment: March 7, 2024
Hearing Date: March 11, 2024
Decision Issued: March 21, 2024

ISSUES:

The Grievant requested an administrative due process hearing to challenge the issuance on December 18, 2024, of a Group III Written Notice (violations of Written Notice Offense Code 31 – Violation of DHRM Policy 1.05, Alcohol and Other Drugs) by a facility (the "Facility") of the Virginia Department of Corrections (the "DOC" or the "Department" or the "Agency").

The Grievant has raised the issues specified in his Grievance Form A and is seeking the relief requested in his Form A, including reversal of the discipline.

PROCEDURAL HISTORY & BACKGROUND:

The parties and the initial hearing officer participated in a prehearing conference call on January 25, 2024. The hearing was scheduled for and held March 11, 2024, as reflected in the Scheduling Order of January 25, 2024, incorporated herein by this reference.

The parties all agreed that email is acceptable as a sole means of written communication.

At the hearing, the hearing officer received various documentary exhibits into evidence, namely all exhibits in the Agency's white exhibit binder.[1]

The hearing officer recorded the hearing.

At the hearing, the Grievant represented himself and the Agency was represented by its legal advocate. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party.

APPEARANCES

Representative for Agency
Grievant
Advocate for Agency
No Advocate for Grievant
Witnesses

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency in a secure Facility as a Corrections Sergeant, supervising other Correctional Officers ("C/O"s), safeguarding inmates and other Facility personnel in, amongst other places, restorative housing units.
2. The Grievant tested positive for marijuana use on a random drug screening administered by the Facility on December 4, 2023. The testing was performed by an independent laboratory.

[1] References to the agency's exhibits will be designated AE followed by the exhibit tab and/or page number. The Grievant did not offer any exhibits.

3. The Grievant admits that he used marijuana on December 3, 2023.

4. The Grievant performed a vital function for the Facility as a Corrections Sergeant with significant supervisory duties and experience with DOC.

5. The Grievant was in a designated safety-sensitive position.

6. DOC invested substantial time and resources training the Grievant in his supervisory role and in all aspects of his employment.

7. The Facility reasonably and of necessity relied on the Grievant to fulfill all his supervisory and other duties.

8. Accordingly, Grievant's example as a role model to subordinates and his ability to strictly adhere to Agency policies and procedures, are critical for the orderly and efficient functioning of the Agency.

9. Despite this critical need, Grievant committed serious violations of the Agency's drug policies and protocols when Grievant admittedly used marijuana.

10. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.

11. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

12. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

13. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

APPLICABLE POLICY, LAW, ANALYSIS AND DECISION

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).

Va. Code § 2.2-3000(A) 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. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department

of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The operative Agency Standards of Conduct (the "SOC") are contained in Agency Operating Procedure 135.1 ("Policy No. 135.1"). AE 14. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC 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.

Additionally, Agency Operating Procedure 135.4 ("Policy No. 135.4") provides in part:

“PURPOSE

This operating procedure specifies the actions that will be taken against employees for violations of this policy and provides protocols for alcohol and drug testing of Department of Corrections (DOC) applicants, employees, interns, and volunteers. For purposes of this operating procedure, the term marijuana will be inclusive of marijuana products, and the term cannabis will be inclusive of cannabis oil and cannabis products.

PROCEDURE

I. Responsibilities

A. The DOC establishes and maintains a work environment free from the adverse effects of alcohol or drugs, to include marijuana and marijuana products, cannabis oil and cannabis products, and to ensure the fair and equitable application of policy requirements. The effects of alcohol or drugs in the workplace could undermine the productivity of the DOC's workforce and create a serious threat to the welfare and safety of employees, inmates and probationers/parolees, visitors, and the general public…

D. Unlawful, illegal, or prohibited substance use by employees, volunteers, interns, and contractors undermines the DOC's ability to perform its mission, as well as the public's perception of the DOC's ability to fulfill its mission, **and will not be tolerated.**

E. Employees, volunteers, interns, and contractors involved in illegal or unlawful drug use or who are under the influence of alcohol, marijuana, marijuana products, cannabis oil, and cannabis products may have their judgment and performances impaired, are more susceptible to corruption, and pose an unacceptable risk to the DOC based on issues of security and civil liability.

F. Employees, volunteers, interns, and contractors must be free of illegal or unlawful drugs at all times and cannot be under the influence of alcohol, marijuana, marijuana products, cannabis oil, and cannabis products while at work or in a facility or other Organizational Unit…

H. As a condition of employment, employees, volunteers, interns, and contractors agree to abide by DOC requirements for an alcohol and drug-free workplace.

I. Applicants, employees, volunteers, interns, and contractors may be asked to submit to substance abuse screening which may include: oral or urine drug testing, oral or Evidential Breath Test (EBT) alcohol testing, or other pre-approved appropriate testing methods as outlined in this operating procedure…

M. Federal, state, and DOC mandates dictate the nature of compliance and regulation governing substance abuse and the provisions of this operating procedure…

3. In accordance with the Federal Gun Control Act, employees in positions that carry and/or possess firearms are prohibited from using marijuana, marijuana products, cannabis oil, and cannabis products. There are no exceptions in federal law for marijuana use or possession, even if such use is sanctioned by state law…

II General Provisions

A. Employees occupying designated safety-sensitive positions will be subject to pre-employment, random, post-accident, and reasonable suspicion drug and alcohol testing. Employees classified as non-safety sensitive positions will be subject only to reasonable suspicion and post-accident drug and alcohol testing.

B. Oral fluid testing is the preferred method of drug testing, and the employee will be required to provide two oral fluid samples collected consecutively under the direct supervision of a trained employee or by a trained third party collector…

III Prohibited Conduct and Consequences

A. Engaging in any of the following prohibited conduct will result in disciplinary action under Operating Procedure 135.1, *Standards of Conduct.* (5-ACI-lC-16; 4-ACRS-7C-02; 4-APPFS-3C-01; 2-CI-6C-2; 2- CO-lC-20; 1-CTA-lC-07)

1. Manufacturing, distributing, possessing, or using unlawful drugs, illegal drugs, or controlled substances without a valid prescription is prohibited

by state law. Staff that carry and/or possess firearms in the performance of their duties are prohibited from using or possessing marijuana, marijuana products, cannabis oil and cannabis products. **Violations will result in termination of employment**…

D. Employees Who Test Positive for Unlawful/Illegal Drug Use

2. Employees who are confirmed positive for unlawful, illegal, or prohibited usage **will be terminated** for conduct which endangers the public safety, internal security, or affects the safe and efficient operation of the DOC.

   a. Note: Marijuana and related products may remain in one's system for an extended period of time.

   b. Legal impairment levels are not yet established for standard drug testing procedures or by statute."

   (Emphasis supplied). AE 15.

The Grievant did not follow the applicable state and agency policies.

Specifically, the Grievant committed the following disciplinary infractions which were reasonably classified by management, as a Group III offense. While not required, each offense is expressly listed in the SOC as a Group III offense and a first Group III normally results in discharge. AE 14 at 39.

Violation of Operating Procedure 135.1, Section XIV (B) (10), for:

Violation of DHRM Policy 1.05 *Alcohol and Other Drugs* or Operating Procedure 135.4, *Alcohol and Drug Testing.* Use of alcohol while on the

> job; any/all use, possession, distribution, sale, etc. of illegal drugs; or unlawful use of controlled substances **will result in termination."**

(Emphasis supplied). AE 14 at 40.

The Grievant argues that the Agency has not carried its burden of proof, has misapplied policy and acted unjustly in issuing the discipline. However, the hearing officer agrees with the Agency's advocate that the offense is appropriately classified at the Group III level, as designated, with the Agency appropriately exercising the discipline and ending the Grievant's employment due to a Group III Written Notice.

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated numerous policies, including Policy No. 1.60 and that the violations each rose to the level of a Group III.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The Grievant asserts that the discipline is too harsh. The Agency did consider mitigating factors, including the Grievant's past good service to the Agency. *See,* AE 9.

DHRM's *Rules for Conducting Grievance Hearings* provide in part:

> DHRM's *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." *Rules* § VI(B).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant. AE 1.

The Grievant has asserted that the discipline was unwarranted. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced in AE 1, the Written Notice, the Form A, the hearing, those referenced herein and all of those listed below in this analysis:

1. the demands of the Grievant's work environment;
2. the Grievant's tenure at the Agency;
3. the effect of the COVID-19 pandemic;
4. the Grievant's past performance evaluation history; and
5. the Grievant's admissions.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.* Compounding matters for the Grievant, he has an active Group I Written Notice (AE 11) and was a supervisor.

Grievant supervised Facility employees. EDR has consistently held supervisors, such as Grievant in this case, to a higher standard. As EDR stated in case No. 9872, in evaluating misconduct by a supervisor that to a non-supervisory employee would have been a Group I, the discipline was increased to a Group II, stating, "This is especially so because of the supervisor's role and the agency's expectations of the supervisor to serve as a role model to clients and to employees under his supervision." *See, also*, DHRM Ruling 2015-3953:

> The issue of whether an agency can hold a supervisor to a higher standard is a policy issue as well as a procedural issue. As discussed above, the Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy. DHRM has previously determined that "agencies may hold supervisors and managers to a higher degree of responsibility and leadership than non-management employees." The Rules for Conducting Grievance Hearings require that a hearing officer must show deference to how the agency weighs the supervisory status of an employee in determining the appropriate level of discipline. Here, the agency appears to have determined that the grievant's misconduct was more severe based, in part, on his position as a supervisor. Because policy permits an agency to hold supervisory employees to a higher standard than non-supervisory employees, the hearing officer did not err in deferring to the agency's weighing of that factor. We decline to disturb the decision on this basis. [Footnotes omitted].

Similarly, Agency Operating Procedure 135.3 stresses:

> "Employees in DOC supervisory and managerial positions must be especially mindful of how their words and deeds might be perceived or might affect or influence others. Therefore, they may be held to a higher standard for misconduct and violations of this operating procedure based on their scope of authority and influence, status as a role model, and ability to significantly impact the employment status and direct the work of others."

AE 20.

After testing positive for marijuana use, the Grievant submitted to the Facility a note from his Licensed Clinical Social Worker, outpatient psychotherapy provider, dated December 15, 2023, stating that Grievant "has committed to treatment to work on his issues as he wants to improve his functioning through better management of anxiety by strengthening of his coping skills and decision making skills." AE 10.

Grievant did not provide any evidence that he requested any reasonable accommodations from DOC or even told DOC concerning any psychological or other health issues before the subject drug test.

Accordingly, Grievant has no argument that DOC's discipline represents disability discrimination or a mere pretext. Specifically, the Grievant is precluded from alleging that DOC discriminated against him in violation of its own policies and other applicable law, such as the Americans with Disabilities Act (as amended, the ADA), by (1) terminating Grievant's employment in violation of such policies and laws, and (2) by failing to accommodate Grievant's disability in violation of such policies and laws.

In this regard, the reasoning in *DeWitt v. Sw. Bell Tel. Co.,* 845 F. 3d 1299 (10th Cir.2017) is persuasive. AE 16. The ADA prohibits employers from unlawfully discriminating against an employee by failing to make reasonable accommodations to the **known physical or mental limitations** of an otherwise qualified individual with a disability who is an employee. To facilitate the reasonable accommodation, the federal regulations implementing the ADA envision "an interactive process that requires participation by both parties." However, before the interactive process is triggered, the employee must make an adequate request, putting the employer on notice. Grievant's accommodation claim fails because he did not even inform DOC of his mental health issues, let alone did he request a reasonable accommodation. DOC was not aware of Grievant's mental health issues.

The ADA does not require employers to reasonably accommodate an employee's disability by overlooking past misconduct-irrespective of whether the misconduct resulted from the employee's disability. The Equal Employment Opportunity Commission's ("EEOC") Enforcement Guidance makes clear that the requirement to provide reasonable accommodations

under the ADA is "always prospective," and that "an employer is not required to excuse past misconduct even if it is the result of the individual's disability." U.S. EQUAL OPPORTUNITY EMPLOYMENT COMM'N, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT AT NO. 36.

"Excusing workplace misconduct to provide a fresh start/second chance to an employee whose disability could be offered as an *after-the-fact excuse* is not a required accommodation under the ADA." *Davila v. Quest Corp., Inc.,* 113 Fed.Appx. 849, 854 (10th Cir. 2004) (emphasis added).

Well into the hearing, the Grievant asked to be allowed to retrieve his cell phone to submit certain documents. The Agency objected to this request because the Scheduling Order mandated:

> "Both sides are to exchange with each other their witness lists, providing full names, addresses and phone numbers, and copies of all proposed exhibits **on or before 5:00 p.m., Monday, March 4, 2024.** The parties may use electronic exchange. You must also send the same documentation (witness lists and exhibits) to me by that same date (electronic submission to the hearing officer is permissible, but a paper set also must be submitted for inclusion in the grievance record). Exhibits received after that date may not be accepted into evidence at the hearing. Alternatively, I encourage you to confer on using a joint exhibit book. If separate submissions are made, any objections to proposed exhibits must be made to me in writing prior to 5:00 p.m. on **Wednesday, March 6, 2024.** Should the parties request another pre-hearing conference, we can schedule one."
>
> (Emphasis in original).

The hearing officer sustained the objection and denied the Grievant's request.

The Supreme Court of Virginia looks with favor upon the use of scheduling orders, stipulations and other pre-trial (or in this proceeding, pre-hearing) techniques which are designed to narrow the issues, promote fairness or foster settlement of litigation. *McLaughlin v. Gholson,*

210 Va. 498, 500, 171 S.E.2d 816, 817 (1970). The Scheduling Order in this proceeding and, specifically, the parties' stipulated deadline concerning exchange of witness lists and exhibits, was a set of rules which the parties agreed to live by and constituted precisely such a pre-hearing technique. To have allowed the Grievant to surprise DOC at the hearing with documents it had not seen would have thwarted the rules the parties themselves agreed to abide by and violated fundamental principles of fairness, notice and due process.

In *City of Hopewell v. County of Prince George, et als.*, 240 Va. 306, 314, 397 S.E.2d 793, 797 (1990), the Supreme Court of Virginia specifically left open the question whether the trial judge in that case even had the discretion had to allow a rebuttal witness to testify where Petersburg had not previously named such witness in accordance with the court's pretrial order entered January 30, 1989. In any event, the Court decided that the trial judge clearly had not abused his discretion in refusing to allow such witness to testify even under circumstances where Petersburg was arguing that there were good reasons why the witness was not named on the witness list filed by the deadline in the pretrial order.

Here the policies are important to the proper functioning, appearance and reputation of the Agency, and the Grievant held an important position where management of necessity relied on him to attend work and to perform his duties in strict conformity with Agency policies, as he had undertaken to do. The hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

The hearing officer decides for the offenses specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's

action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.[1]

ENTER 3/22/2024

John Robinson

_____

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by e-mail transmission as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.