



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12140

Hearing Date: August 9, 2024

Decision Issued: August 14, 2024

PROCEDURAL HISTORY

On April 24, 2024, Grievant was issued a Group III Written Notice of disciplinary action with termination for testing positive for marijuana pursuant to a random drug test.

On May 15, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On June 10, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On August 9, 2024, a hearing was held at the Facility.

APPEARANCES

Grievant
Agency Advocate
Agency Party Designee
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Group III Written Notice of disciplinary action?
2. Whether the behavior constituted misconduct?

An Equal Opportunity Employer

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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:

Prior to her termination, Grievant was a Corrections Officer at a Department of Corrections Facility. Grievant worked for the Agency for more than 16 years. No evidence of prior active disciplinary action was introduced during the hearing.

As part of Grievant's job duties, she was required to lawfully possess and carry a firearm, including maintaining certification to carry firearms.¹

As a Corrections Officer, Grievant's position was a safety-sensitive position subjecting Grievant to random drug testing as part of her employment.²

The Agency utilizes a third-party administrator to randomly select employees in safety-sensitive positions for drug testing each month.

Grievant was on short-term disability leave from September 19, 2023, until February 14, 2024.³ On October 27, 2023, while Grievant's health care provider gave her a prescription for a medication to help control nausea and vomiting.⁴ The medication is a cannabinoid and a controlled substance available by prescription only.⁵

¹ Agency Ex. 13 and Hearing Recording at 29:57-30:22, 30:28-32:06, 38:51-39:38, 40:44-43:33, 48:24-48:40, 1:06:05-1:07:46.

² See Department of Corrections Operating Procedure 135.4 and see Agency Ex. 11 and 12.

³ Agency Ex. 2 and Grievant's Ex. 2.

⁴ Grievant's Ex. 4

⁵ Agency Ex. 15.

While Grievant was on leave, the Agency's third-party administrator randomly selected Grievant to be drug tested. Therefore, when Grievant returned from leave, she was required to submit to the random drug test.⁶ Grievant provided an oral fluid sample on February 14, 2024.⁷ The sample was tested by a third-party laboratory and the test results were reported to an independent Medical Review Officer on February 23, 2024.⁸

The laboratory test results indicated that Grievant had tested positive for marijuana. Consistent with Agency policies, the Medical Review Officer contacted Grievant regarding the positive test result and to gather additional information that may explain the positive test result.⁹

On February 29, 2024, the Medical Review Officer sent a drug test report to the Agency that confirmed Grievant's drug test result as positive for marijuana. The report from the Medical Review Officer included the following comments regarding the Medical Review Officer's interview with Grievant:

[Medical Review Officer] MRO Interview Conducted ** Documentation received does not satisfy MRO requirements documentation received did not satisfy mro requirements donor failed to provide additional documentation.¹⁰

After receiving the report of Grievant's positive drug test results from the Medical Review Officer, on March 4, 2024, Former Assistant Warden and Human Resources Analyst met with Grievant to provide her with notice that the Agency was considering disciplinary action based on the positive drug test results.¹¹ During that meeting, Grievant advised the Former Assistant Warden and the Human Resources Analyst that she had not smoked marijuana, but that she had taken prescription medication containing marijuana.¹²

On March 7, 2024, Grievant received a letter from her health care provider stating that Grievant "was prescribed back in October 27th, 2023 [the controlled-substance medication] to help control nausea and vomiting."¹³

On March 27, 2024, Grievant met with the Warden and Human Resources Analyst, by phone, to discuss Grievant's positive drug test results. At that time, Grievant advised the Warden that she had sent a picture of the medication she asserted she had been taking to the Medical Review Officer. Grievant also told the Warden and the Human Resource Analyst that she had thrown the prescription bottle away after sending the picture to the Medical Review Officer and had been unable to provide a clearer picture of

⁶ Hearing Recording at 16:20-19:34.

⁷ Although the Written Notice indicated that the random drug test occurred on February 15, 2024, the drug test report identified the test date as February 14, 2024, and witness testimony indicated the test occurred on February 14, 2024. The date of the test was not questioned or disputed during the hearing.

⁸ Agency Ex. 7.

⁹ Agency Ex. 7 and see Department of Corrections Operating Procedure 135.4, Procedure XII.

¹⁰ Agency Ex. 7.

¹¹ Agency Ex. 3 and 4.

¹² Agency Ex. 4 and Hearing Recording at 26:04-28:00.

¹³ Agency Ex. 8.

the bottle to the Medical Review Officer when the Medical Review Officer requested it of her. The Warden requested that Grievant send the Warden a copy of the photograph that Grievant had sent to the Medical Review Officer.¹⁴

On April 24, 2024, the Agency terminated Grievant's employment based on the positive drug test.

CONCLUSIONS OF POLICY

Operating Procedure 135.4 sets forth the Agency's procedures for alcohol and drug testing. The stated purpose of Operating Procedure 135.4 is to:

[specify] the actions that will be taken against employees for violations of this policy and [provide] 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.¹⁵

"Marijuana" is defined for purposes of Operating Procedure 135.4 as "any part of a plant of the genus Cannabis, whether growing or not, its seeds or resin; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, its resin, or any extract containing one or more cannabinoids."¹⁶

"Safety-Sensitive Position" is defined for purposes of Operating Procedure 135.4 as

[a] position in which: (i) a drug impairment constitutes an immediate and direct threat to public, employee, or inmate/probationer/parolee security, health or safety; and/or (ii) illegal or unlawful drug use could make the employee susceptible to corruption and thus poses an unacceptable risk to the DOC on issues of security and civil liability and also undermines DOC's ability to perform its mission. Positions designated as Safety-Sensitive include those job classifications that are issued firearms in the performance of their duties; all staff assigned to a correctional facility or probation and parole offices; staff in administrative offices/locations whose job duties involve regular contact with, or direct service to, inmates, probationers or parolees; or staff who have a Commercial Driver's License (CDL) used in an official capacity for the DOC. Safety-sensitive positions are subject to all the drug testing programs referenced herein; to include, pre-employment, random, post-accident, and reasonable suspicion. Additional positions may also be designated as "safety-sensitive" on a case by case basis and with the prior written approval by Human Resources.¹⁷

¹⁴ Agency Ex. 4 and 14.

¹⁵ Virginia Department of Corrections Operating Procedure 135.4.

¹⁶ Virginia Department of Corrections Operating Procedure 135.4.

¹⁷ Virginia Department of Corrections Operating Procedure 135.4.

Procedure I of Operating Procedures 135.4 sets forth the following 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.

B. DOC employees have a responsibility to protect public safety, be a positive role model for inmates and probationers/parolees, and create a safe, secure, and healing environment by acting in accordance with this operating procedure.

C. Employees have the right to work in an environment where security is not jeopardized by fellow employees who engage in illegal or unlawful drug usage or related activity, or who are under the influence of alcohol, marijuana, marijuana products, cannabis oil, and cannabis products, or any other drug that could impair an employee's judgment and/or jeopardize the safety of employees, inmates, or probationers/parolees.

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.

G. Employees, volunteers, interns, and contractors must not possess any illegal drug or prohibited substance except in the performance of official duties. (5-ACI-1C-16; 4-ACRS-7C-02; 4-APPFS-3C-01; 2-CI-6C-2; 2-CO-1C-20; 1-CTA-1C-07)

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.

J. Employees should notify their supervisor if they are taking a medication that could adversely affect their job performance; security employees must make this notification to their supervisor and Human Resource Officer.

K. If an off duty employee has consumed alcohol and is called back in to work, the employee must inform the Shift Commander of their condition. The Shift Commander will decide if the person should come back in to work.

L. Employees and volunteers who have a Commercial Driver's License (CDL) paid by the DOC or are required to have a CDL for their DOC duties are subject to 49 CFR Part 350, *Motor Carrier Safety Assistance Program, (MCSAP) and High Priority Program* and 49 CFR Part 390, *Federal Motor Carrier Safety Regulations (FMCSA); General*. For U.S. Department of Transportation (DOT) purposes, such persons are considered to be, performing a Safety sensitive function at all times that they are at a DOC Organizational Unit or on official business away from the Organizational Unit.

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

1. 41 U.S.C. Chapter 81, *Federal Drug-Free Workplace Act*, requires employees to report convictions related to illicit drug use in the workplace and emphasizes the need for a drug-free workplace.

2. 49 CFR Part 350, *Motor Carrier Safety Assistance Program, (MCSAP) and High Priority Program*, governs drug and alcohol testing of employees and volunteers who hold or are required to hold a CDL.

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.

4. Department of Human Resources Management (DHRM) Policy No. 1.05, Alcohol and Other Drugs, is based on the *Federal Drug-Free Workplace Act* and requires state agencies to establish and maintain a work environment free from the adverse effects of alcohol, and other drugs to include marijuana, marijuana products, cannabis oil and cannabis products.

5. Operating Procedure 040.1, *Litigation*, requires all employees to notify their Organizational Unit Head immediately or the next working day if they are charged with a criminal offense including involvement with illegal drugs or a moving traffic violation.

N. All employees who are classified as working in a safety-sensitive position are required to read and sign Attachment 2, *Notice of Safety-Sensitive Designation*.¹⁸

Operating Procedure 135.4 makes clear that “[e]mployees occupying designated safety-sensitive positions will be subject to pre-employment, random, post-accident, and reasonable suspicion drug and alcohol testing.” The drug testing panels “for safety-sensitive employees that carry and/or possess firearms in the performance of their official duties . . . are screened for the following drugs: Marijuana, Cocaine, Opiates, Phencyclidine (PCP), Amphetamines, and Ecstasy.”¹⁹

Operating Procedure 135.4 further provides that

A. 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.

2. Reporting for duty or remaining on duty while impaired by alcohol, marijuana, marijuana products, cannabis oil and cannabis products, or any other drug that could impair an employee’s judgment and/or jeopardize the safety of employees or inmates, or having an illegal or unlawful substance in the system will result in removal from duty and disciplinary action up to and including termination.

. . .

D. 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.²⁰

¹⁸ Virginia Department of Corrections Operating Procedure 135.4, Procedure I.

¹⁹ Virginia Department of Corrections Operating Procedure 135.4, Procedure II, A and B.1.b.

²⁰ Virginia Department of Corrections Operating Procedure 135.4, Procedure III, A and D.

Operating Procedure 135.4 sets forth the Agency's procedures for random drug testing and makes clear that "if random drug test result is verified positive, the employee will be terminated from employment."²¹

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

There was no dispute that Grievant's position was safety-sensitive and that she was subject to random drug testing by the Agency. Consistent with Agency policies, Grievant was randomly selected for an oral fluid test. There was no dispute that the drug test results showed that Grievant tested positive for marijuana.

Grievant argued that her positive test result was solely the result of her use of medication as prescribed by her health care provider. Grievant argued that such usage was not prohibited by the Agency's policy. Grievant did not point to any specific language in the Agency's policy to support her argument. Grievant argued that Agency policy must allow prescription use of marijuana because there would be no other reason for the Medical Review Officer and the Agency to have asked Grievant to provide information supporting her assertions that her positive test result was due to medication she had been prescribed.

Grievant did not testify during the hearing. Even if, as Grievant argued, she did not smoke marijuana or otherwise use marijuana for recreational purposes, and she only used medication containing marijuana as prescribed by her health care provider, Grievant's usage of medication containing marijuana was prohibited under the Agency's policy. The Agency's policy specifically prohibited employees that carry and/or possess firearms from using marijuana, marijuana products, cannabis oil, and cannabis products. There are no exceptions in the policy for prescription use of marijuana by employees who are required to carry or possess firearms.

That the Medical Review Officer asked Grievant to provide information as part of their process for evaluating the test results and the Agency asked for information as part of its investigation and consideration of appropriate discipline, does not, as Grievant suggests, change the application of the Agency's policy in this case.

Grievant appeared to suggest that at the time that she was randomly tested for drugs, she may not have been "certified" to carry the firearm(s) required for her job. The unrefuted, credible testimony of the Former Assistant Warden, however, was that because Grievant had been on short-term disability leave her certification was extended to allow her to keep her job while she went through the process to renew her certification once she returned from leave.²² Regardless of whether Grievant's certification had been extended, however, her job required her to carry or possess a firearm, thus the Agency's policy prohibiting the use of marijuana applied to Grievant.

²¹ Virginia Department of Corrections Operating Procedure 135.4, Procedure IV.B.10.

²² Hearing Recording at 30:28-32:06, 38:51-39:38, 40:44-43:33.

It is not clear whether Grievant also was asserting that her use of prescribed medication was protected under the Americans with Disabilities Act. Any determination of whether an individual has a disability under the Americans with Disabilities Act is case and fact specific, and sufficient information for making such a determination was not provided in this case. Further, to the extent such argument had been made, it is important to note that while the Americans with Disabilities Act requires employers to provide reasonable accommodations for an employee's disability, it does not broadly shield employees from disciplinary action for their own misconduct.

The Agency has met its burden of proving that Grievant engaged in misconduct by using marijuana in violation of Operating Procedure 135.4.

Whether the Agency's discipline was consistent with law and policy

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."²³

Grievant's usage of marijuana was prohibited under the Agency's policy which authorized termination for such usage. Upon the issuance of a Group III Written Notice, an agency may terminate an employee.

The Agency's discipline was consistent with law and policy.

Due Process

During her questioning of Agency witnesses, Grievant appeared to suggest that the Agency may not have timely provided her with notice of its consideration of discipline and that the Agency made an error with respect to when it placed her on administrative leave pending its investigation. The Medical Review Officer confirmed Grievant's positive drug test result on February 29, 2024, and the Agency notified Grievant of its consideration of discipline related to the positive drug test on March 4, 2024, and placed Grievant on administrative leave two days later. There does not appear to have been delay in the Agency's actions that would have prejudiced Grievant. To the extent Grievant is arguing that the Agency did not afford her with sufficient due process, the hearing process cures any such deficiency. Grievant had the opportunity to present any evidence and arguments she wished during the hearing.

Mitigation

Virginia 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 Human Resource

²³ See Virginia Department of Corrections Operating Procedure 135.1.

Management....”²⁴ 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 Grievant of Group III Written Notice of disciplinary action with termination is **upheld**.

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 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.

²⁴ Va. Code § 2.2-3005.

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.²⁵

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

²⁵ 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.