



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

DECISION OF HEARING OFFICER

In re:

Case number: 12168

Hearing Date: November 14, 2024
Decision Issued: December 4, 2024

PROCEDURAL HISTORY

On April 24, 2024, Grievant was issued a Group III written notice of disciplinary action for unsatisfactory performance and failure to follow supervisory instructions and/or policy for having marijuana products in her vehicle while on Agency property.¹

On May 16, 2024, Grievant timely filed a grievance to challenge the Agency's action. On July 31, 2024, the Agency reduced the Group III written notice to a Group I Written Notice of disciplinary action.² The outcome of the Third Resolution Step was not satisfactory to the Grievant and the matter advanced to hearing. On September 3, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On November 14, 2024, a hearing was held at the Facility.

APPEARANCES

Grievant
Agency Legal Advocate
Agency Legal Advocate
Agency Party Designee
Witnesses

¹ Agency Ex. at 1-3.

² Agency Ex. at 4-7.

ISSUES

1. Whether Grievant engaged in the behavior described in the Group I Written Notice of disciplinary action?
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. 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:

Grievant is the Chief of Housing and Programs at a Department of Corrections Facility. Grievant has been employed by the Agency for approximately 18 years. No evidence of prior active disciplinary action was introduced during the hearing.

As the Chief of Housing and Programs at the Facility, Grievant supervises the Facility's unit managers and oversees the entire treatment team, including counselors.³ Grievant had received training as a supervisor and had been informed that as a supervisor she could be held to a higher expectation of conduct relative to other employees.⁴

As the Chief of Housing and Programs at the Facility, Grievant also was one of the four Facility employees that comprised the senior leadership team for the Facility, including the Warden, Assistant Warden, the Major, and the Grievant.⁵

An interdiction was held at the Facility on the morning of February 23, 2024.⁶

³ Hearing Recording at 10:55-11:51.

⁴ Hearing Recording at 53:56-54:24.

⁵ Hearing Recording at 14:37-18:30.

⁶ Agency Ex. at 15-16.

The Warden described the interdiction on February 23, 2024, as a collaboration between state and local law enforcement and the Facility's special response team to prevent contraband from entering the Facility. During the interdiction, consistent with Agency procedures, a few Facility employees were made aware of the interdiction as needed to conduct the interdiction. As part of the interdiction every vehicle that came onto the Facility property during the interdiction was subject to search, including the vehicles of every Agency employee coming onto the property (with the limited exception of the few Facility employees who support the operations of the interdiction).⁷

During the interdiction, marijuana was found in Grievant's vehicle.⁸

Staff with firearms, ammunition, alcohol bottles, suspected marijuana, or marijuana paraphernalia were instructed to remove the items from state property. Staff who were found in possession of marijuana, including Grievant, were drug tested by human resources.⁹

On April 24, 2024, Grievant was issued a Group III written notice of disciplinary action for unsatisfactory performance and failure to follow supervisory instructions and/or policy for having marijuana products in her vehicle while on Agency property.¹⁰

On May 16, 2024, Grievant timely filed a grievance to challenge the Agency's action. On July 31, 2024, the Agency reduced the Group III written notice to a Group I Written Notice of disciplinary action.¹¹

CONCLUSIONS OF POLICY

Department of Corrections Operating Procedure 135.4, Alcohol and Drug Testing, sets forth prohibited employee conduct related to drug and alcohol and sets forth protocols for drug and alcohol testing.¹²

Operating Procedure 135.4 specifically prohibits Agency employees from:

[possessing] alcohol, marijuana, marijuana products, cannabis oil or cannabis products, including in their vehicles while on the grounds of any DOC Organizational Unit, including but not limited to Headquarters, Regional Offices, Institutions, Community Corrections facilities, the Academy for Staff Development, etc. Violations will result in the employee removal from duty and disciplinary action under Operating Procedure 135.1, Standards of Conduct.¹³

⁷ Hearing Recording at 18:30-25:48, 46:44-48:22.

⁸ Agency Ex. at 15-16 and Hearing Recording at 2:43-3:10 (During the hearing, the parties stipulated to the fact that during the interdiction marijuana was found in the Grievant's vehicle.).

⁹ Agency Ex. at 15-16 and see Hearing Recording at 18:30-25:48.

¹⁰ Agency Ex. at 1-3.

¹¹ Agency Ex. at 4-7.

¹² Agency Ex. at 46-69.

¹³ Agency Ex. at 55.

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

The facts of this case were largely undisputed. On February 23, 2024, the Agency conducted an interdiction at the Facility. During the interdiction, marijuana was found in Grievant's vehicle.

Operating Procedure 135.4 specifically prohibits Agency employees from possessing marijuana or marijuana products in their vehicles while on the grounds of an Agency Facility.¹⁴

On February 23, 2024, the vehicle Grievant drove onto Facility property contained marijuana. By entering Facility property with marijuana in her vehicle Grievant violated Agency policy and engaged in misconduct.

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."¹⁵

Violation of Operating Procedure 135.4 may be a Group I, Group II, or Group III offense. In this case, the Agency chose to mitigate Grievant's misconduct to a Group I offense. Group I offenses include misconduct that is less severe in nature, has relatively minor impact on business operations, but requires correction in the interest of maintaining a productive and well-managed work force.¹⁶

Grievant violated the Agency's policy prohibiting employees from bringing certain contraband, including marijuana and marijuana products onto Facility property, including in their vehicles. A violation of policy or a safety rule is normally considered a Group II offense.¹⁷ In this case the Agency mitigated Grievant's discipline to a Group I offense for violating policy and unsatisfactory performance. In order to prove unsatisfactory performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties in a manner that met with the Agency's expectations. This is not a difficult standard to meet. In this case, when Grievant was in a supervisory role and violated an Agency policy, her performance did not meet the Agency's reasonable expectations for performance, especially by a supervisor.

¹⁴ Agency Ex. at 55.

¹⁵ See Virginia Department of Corrections Operating Procedure 135.1.

¹⁶ See, Department of Corrections, Operating Procedure 135.1, Standards of Conduct, Procedure, XII.A.

¹⁷ DHRM Policy 1.60, Standards of Conduct, Attachment A.

Grievant argued that the Agency failed to engage in progressive discipline. Although agencies are encouraged to engage in progressive disciplinary action, agencies are not required to do so. Because of the Grievant's role in a senior leadership position at the Facility, it was reasonable for the Agency to hold Grievant to a higher standard with the expectation that she would set an example for appropriate behavior. The Agency elected to issue Grievant a Group I Written Notice and has presented sufficient evidence to support its decision.

Mitigation

Grievant argued that the issuance of a Group I Written Notice was too harsh given Grievant's years of good service with no prior disciplinary issues.

The Standards of Conduct provide that an Agency may reduce the level of a disciplinary action if there are mitigating circumstances, such as conditions that compel a reduction to promote the interests of consistency, equity and objectivity, or based on an employee's otherwise satisfactory work performance.

In this case, the Agency argued that it considered mitigating factors and that through the grievance process, the Agency had mitigated the discipline from a Group III written notice to a Group I written notice.

That the Agency could have further mitigated the discipline based on the facts of this case, but determined that it was inappropriate to do so, is not a reason for the Hearing Officer to conclude that the Agency's action exceeds the limits of reasonableness.

Grievant asserted that she was being treated differently because of the stigma associated with marijuana. Grievant asserted that other employees had been found to possess contraband in their vehicles while on the Facility's grounds but had not been disciplined in the same manner as Grievant. Grievant argued that other employees were treated differently from Grievant because they were found with different types of contraband, for example firearms or alcohol, and were not in a similar position to Grievant. Grievant, however, did not provide evidence demonstrating that employees similarly situated to Grievant received less or no discipline for the same or a similar infraction.

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 Management..."¹⁸ 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

¹⁸ Va. Code § 2.2-3005.

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 I Written Notice of disciplinary action 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.

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.¹⁹

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

¹⁹ 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.