Issue: Group III Written Notice with termination (refusal of drug testing); Hearing Date: September 18, 2001; Decision Date: September 19, 2001; Agency: Virginia Department of Transportation; AHO: David J. Latham, Esquire; Case Number: 5278; **Administrative Review: HO Reconsideration Request received 09/28/01; Reconsideration Decision issued 10/02/01; Outcome: No basis to reverse decision; Judicial Review: Appealed to the Circuit Court in Stafford County on 12/14/01; Outcome: HO's decision found contradictory to law. Decision reversed. Final Order dated 02/02/02 (CL01-510)**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Grievance No: 5278

Hearing Date: September 18, 2001
Decision Issued: September 19, 2001

APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
Facility Manager
Legal Representative for Agency
Two witnesses for Agency

ISSUES

Did the grievant's conduct on June 21, 2001 warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued on July 17, 2001 because he failed to provide a urine specimen as required by the drug and alcohol assistance program. As part of the disciplinary action, the grievant was also discharged from employment on July 17, 2001. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

The Virginia Department of Transportation (hereinafter referred to as "agency") has employed the grievant as an electrician for 12 years. His current title is Trade Technician III. His performance evaluations have either met or exceeded expectations. Grievant's work description requires him to maintain a valid Commercial Driver's License.[1]

The Commonwealth's policy on Alcohol and Other Drugs provides that employees shall abide by both the Commonwealth's policy and applicable disciplinary policies.[2] The agency has formulated its own policy on alcohol and drug testing that applies, among others, to "employees having a commercial driver's license for use in agency operations."[3] Grievant received a copy of this policy.[4] The policy provides that failure to cooperate with the collection process "(e.g., refusal to provide a complete specimen)"[5] invokes disciplinary action. The disciplinary section of the policy contains a section entitled, "Failure to submit to testing," that states, in pertinent part:

> The following action will be taken when employees fail to submit to a required test or fail to cooperate with the testing as outlined in this policy:
> - A Group III Notice shall be issued for failing to comply with established policy and applicable Federal and State regulations and the employee shall be rescheduled for another test.
> - A second refusal to submit to the required testing will result in the issuance of a Group III Notice under the Standards of Conduct and dismissed (sic).[6]

In July 1997, pursuant to its Drug and Alcohol Testing program, the agency tested the grievant's specimen for illegal and controlled substances. The test resulted in a positive finding for the presence of cocaine in the grievant's system. As a result, the agency issued to grievant a Group III Written Notice (later reduced to a Group I) and required that he be scheduled for unannounced

[1] Exhibit 6. Grievant's *Employee Work Profile*, signed April 27, 2001.
[2] Department of Human Resource Management Policy No. 1.05, *Alcohol and Other Drugs*, effective September 16, 1993..
[3] Exhibit 7. Virginia Department of Transportation (VDOT) *Drug and Alcohol Testing Policy,* revised May 15, 1995.
[4] Exhibit 5. Receipt signed by grievant, March 14, 1995.
[5] Exhibit 7, p. 9. VDOT *Drug and Alcohol Testing Policy,* revised May 15, 1995.
[6] Exhibit 7, p. 6. *Ibid.*

drug screens for a period of sixty months.[7] Between 1997 and April 2001, grievant was given drug screens on at least 12 occasions; all were negative.[8] On some occasions, grievant was sent to a local medical center to provide a urine specimen. On at least four occasions, a safety engineer came to the worksite and requested grievant provide the specimen, which was then sent to the same laboratory used by the medical center. During all of the previous testing, grievant never had any physical problem in providing a urine specimen at a collection site.

On Thursday, June 21, 2001, an agency safety engineer made an unannounced visit to the worksite, met with the grievant and told him he had to obtain a urine specimen from grievant. Grievant and the engineer started to walk to a conference room at approximately 8:35 a.m. Grievant advised the safety engineer that he had voided his bladder just a few minutes earlier and could not immediately provide a specimen. He requested permission to obtain bottled water from his locker. The engineer agreed and grievant obtained the bottle of water, estimated to be between 32 and 40 ounces. They went to the conference room where grievant consumed approximately 10-12 ounces of water and they talked until approximately 10:00 a.m. At that time, they went to a restroom where grievant said he was unable to provide a specimen. The restroom contains two stalls and one urinal. The grievant chose to stand at the urinal while the engineer waited around the corner of a stall, out of sight from the grievant.

They returned to the conference room where grievant consumed some additional water estimated at between 2 and 6 ounces. At approximately 11:00 a.m., grievant and engineer returned to the restroom under the same circumstances described in the preceding paragraph. Grievant again stated that he was unable to produce a specimen. At this time, grievant stated that he had worked his 40 hours for the week, that he had an appointment for which he was late and that he was going to leave the worksite. The engineer advised grievant that if he left without providing a specimen, it would be considered the same as a positive test. The grievant left and walked back to his workshop. The engineer immediately advised the facility manager who called grievant and requested that he come to the facility manager's office before leaving the worksite. When grievant came to the facility manager's office at about 11:15 a.m., the facility manager again advised grievant that leaving early from the test site would be considered equivalent to testing positive and that he could be discharged from employment. Grievant was also told that discharge might possibly be avoided if grievant went to a physician and the physician was able to ascertain some medical reason that would explain why grievant could not provide a specimen. Grievant then left the worksite at about 11:25 a.m.

It is not known what grievant did after leaving the worksite and grievant has refused to state with whom he allegedly had an appointment, at what time the alleged appointment was scheduled or what the nature of the alleged

[7] Exhibit 4. Memorandum from Senior Safety Engineer to Facility Manager, July 28, 1997.
[8] Exhibit 11. Memoranda from Employee Safety and Health Engineer, various dates.

appointment was. At approximately 2:50 p.m. on the same day, grievant contends that he went to the local medical center at which he had provided specimens on previous occasions and requested a drug test. He provided a specimen and left the facility at about 3:10 p.m. The test result was negative. Grievant has a twin brother but denies that his brother took the test in grievant's place.

The grievant was not scheduled to work from June 22 through June 25, 2001. Grievant was scheduled to work on June 26, 2001 but called in sick; he cannot recall the reason for his illness on that date. On June 27, 2001, the agency learned that grievant had not requested any physician to examine him regarding grievant's alleged inability to provide a specimen on June 21, 2001. The agency then sent grievant to a local physician who interviewed and examined grievant. The examining physician sent her findings to a physician designated by the agency as its Medical Review Officer (MRO). The MRO reviewed the findings and concluded that grievant's examination was normal and that there was no medical reason for grievant's failure to provide a urine specimen.[9] During the hearing, grievant denied having an enlarged prostate gland or any other physical condition that impedes voiding. On July 17, 2001, the agency issued a Group III Written Notice and discharged him from employment.

On Sunday, June 17, 2001, grievant traveled from Fredericksburg to Williamsburg for a work-related conference and recorded three hours of travel time for the 102-mile trip.[10] On Tuesday, June 19, 2001, grievant recorded 10 hours of conference time and three additional hours of travel time to return to Fredericksburg. The final day of the conference began at 8:00 a.m. and checkout time at the hotel was 12:00 noon. Grievant was in the conference from 8:00 a.m. to 12:00 p.m., checked out and drove home. Even assuming it actually took him three hours to drive home, grievant cannot account for what he did in the remaining six hours he said he was working on that date.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 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

[9] Exhibit 3. Letter from Medical Review Officer to agency, July 10, 2001.
[10] Exhibit 10. Grievant's Employee Time Entry Form, June 17, 2001. Mileage taken from official 2000-2001 Virginia Map Mileage Distance Chart.

and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.1-116.05(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 § 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[11]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.1-114.5 of the Code of Virginia, the Department of Personnel and Training[12] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards 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. Section V.B.1 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal [from employment]. One example of a Group III offense is violation of Policy 1.05, Alcohol and Other Drugs.

Grievant alleges that the safety engineer limited the amount of water grievant could drink on the morning of June 21, 2001. Grievant contends the engineer told him not to drink "too much" water. The engineer denies limiting grievant's consumption of water in any way. This variance must be resolved by examining the credibility of both grievant and the engineer. The hearing officer concludes that the engineer is a more credible witness than grievant for three reasons. First, the engineer readily agreed to allow grievant to obtain a large bottle of water and to drink freely from it whenever grievant chose to do so.

[11] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.
[12] Now known as the Department of Human Resource Management (DHRM).

Second, the grievant contended he had to leave the collection site at 11:00 a.m. because he had already worked for 40 hours in that calendar week. The only evidence proffered by grievant to support this assertion was time sheets reflecting that he had traveled for three hours on June 17, worked for ten hours on June 19 and traveled another three hours the same day. It is simply not credible that a 102-mile trip on an interstate highway would require three hours. More significantly, grievant is unable to account for six of the hours he charged as work time on July 19, 2001. Thus, there is no credible evidence that grievant had worked his 40 hours by 11:00 a.m. on June 21, 2001; at most he had worked only 34 hours. This falsification of state time sheets significantly taints grievant's credibility.

Third, grievant contends he had an important appointment that required him to leave work at 11:00 a.m. However, grievant refused to provide any information about the nature of the appointment even after he was told that leaving the collection site would likely result in his discharge from employment. At the hearing, even after multiple explanations from the hearing officer as to the significance of his refusal to explain his sudden departure, the grievant adamantly refused to provide any information. Because grievant failed to provide any valid reason for leaving the work site when he did, the hearing officer must conclude either that grievant had no appointment or, that grievant considered his appointment to be more important than the preservation of his employment. For these three reasons, it is more likely than not that grievant was allowed to drink as much or as little water as he desired.

Grievant contends that the request for his specimen on June 21, 2001 was not conducted in strict adherence to procedures outlined in a Handbook for Federal Workplace Drug Testing Programs.[13] The agency's policy does reference this Handbook as being applicable to the agency's drug testing program. Nonetheless, assuming that it is applicable, the deficiencies alleged by grievant are moot. For example, grievant contends that a bluing agent was not added to the toilet bowl. However, grievant did not use a toilet stall but chose to utilize a urinal when he attempted to give a specimen. Thus, bluing agent could not have been used. Grievant also objects that he was not given a copy of the custody and control form. However, grievant did not provide a specimen and therefore there was no specimen over which to exert custody and control and hence no need for grievant to sign the form.

The agency has shown that grievant was given ample opportunity to provide a urine specimen and that he failed to provide such a specimen. Grievant was permitted to drink as much water as he desired but drank no more than one pint of water. Neither the grievant nor an examining physician were able to offer any physical reason that prevented grievant from providing a specimen. Moreover, grievant elected to end the collection process early by leaving the collection site after only 2½ hours. Both of the reasons he gave for

[13] Exhibit 16.

leaving early are not credible. Given these factors, the agency has demonstrated, by a preponderance of the evidence, that grievant failed to cooperate with testing.

Having concluded that disciplinary action is warranted, the level of discipline must be examined. The facility director relied on the agency's human resources representative in determining what course of action to take. He had been told that failure to provide a specimen was tantamount to a second offense and that the required discipline is a Group III Written Notice and dismissal. It appears that the agency relied on the disciplinary action subsection of its policy headed Drugs.[14] That subsection provides that a second confirmed positive drug test will result in discharge. However, the instant case does not involve a positive drug test because a specimen was not obtained.

Therefore, this case must properly be adjudicated under the third subsection of disciplinary action – Failure to submit to testing. That subsection (cited on page 2 of this Decision) provides that dismissal is required only for a *second refusal* to submit to required testing. In the instant case, grievant had never previously failed to provide a specimen for testing. Therefore, the June 21, 2001 failure to submit was the first refusal, not the second. The appropriate discipline for a first refusal is a Group III Written Notice and rescheduling for another test.

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice issued to the grievant on July 17, 2001 is AFFIRMED. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

Grievant's removal from employment is RESCINDED. Grievant shall be reinstated to his position with back pay and benefits. The agency shall reschedule grievant for additional, unannounced drug testing as appropriate pursuant to the requirements of all applicable policies.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set 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.

[14] Exhibit 7, top of page 6. *Ibid.*

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.
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.

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 **10 calendar** days of the **date of the original hearing decision.** (Note: the 10-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 10 days; the day following the issuance of the decision is the first of the 10 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 10 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 HRM, 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.

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David J. Latham, Esq.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5278

Hearing Dates:	September 18, 2001
Decision Issued:	September 19, 2001
Reconsideration Received:	September 28, 2001
Response to Reconsideration:	October 2, 2001

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 10 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of the request must be provided to the other party. 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.[15]

The Grievance Procedure Manual further provides that a hearing officer's decision becomes final as follows:

> A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such request; or,

[15] § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.[16]

OPINION

The agency raises two issues in its request for reconsideration of the Decision. First, the agency takes issue with the decision's requirement to schedule drug testing for the grievant following his reinstatement. Second, the agency contends that the decision's interpretation of agency policy defies logic. These two issues are addressed separately below.

Unannounced Drug Testing

The agency correctly observes that grievant is required to comply with the *unannounced* follow-up tests of the Employee Assistance Program. In fact, agency policy provides that, in the event of a confirmed positive drug test, "Employees shall also be subject to increased, unannounced testing for a period up to 60 months."[17] In recognition of this requirement, the Hearing Officer stated in the Decision, "The agency shall reschedule grievant for additional, unannounced drug testing as appropriate pursuant to the requirements of all applicable policies."(Underscoring added).[18]

When the agency schedules drug testing, such testing may be either announced or unannounced. Since the safety engineer who conducts these tests travels from Richmond to the out-of-town location where grievant works, it is assumed that the engineer schedules a date on which to make this trip. However, the engineer does not announce the date and purpose of his trip to grievant. Thus, the scheduling of such testing does not preclude it from also being unannounced.

Failure to Submit to Testing

Prior to rendering the decision in this case, the Hearing Officer gave considerable attention to interpretation of the agency's Drug and Alcohol Testing Policy. The policy cites several statutory and regulatory authorities, the most pertinent of which appears to be 49 Code of Federal Regulations 40 – Procedures for Transportation Workplace Drug and Alcohol Testing Programs. This federal regulation requires employers to remove employees who test positive for controlled substances from performing safety-sensitive functions.[19] Thus, the regulation's primary concern is assuring, for those with commercial driver's licenses, that persons who test positive for drugs are not allowed to drive commercial-type vehicles. However, the federal regulation does not address whether such employees should be transferred to other positions, or whether they should be disciplined, or removed from employment. The federal government therefore leaves to individual employers what other actions, beyond removing the employee from safety-sensitive functions, should be taken.

Here, the agency developed its own policy on drug and alcohol testing that appropriately incorporates the federal requirement to remove from safety-sensitive

[16] § 7.2(d) *Ibid.*
[17] Exhibit 7. Virginia Department of Transportation *Drug and Alcohol Testing Policy*, revised May 15, 1995.
[18] Page 7, *Decision of Hearing Officer*, September 19, 2001.

functions those employees who test positive on drug tests. The agency has also included a disciplinary policy. In this case, a preponderance of the evidence established that the grievant's early departure from the collection site constituted a failure to cooperate with the collection process.[20] The agency's policy provides that:

> If the employee refuses to cooperate with the collection process (e.g., refusal to provide a complete specimen, complete paperwork, initial specimen container) the collection site shall inform VDOT's representative and shall document the non-cooperation on the urine custody and control form. See section titled "Disciplinary Action."[21]

The Disciplinary Action section of the agency's policy contains three distinct subsections that address: Alcohol, Drugs, and Failure to submit to testing. The subsection on Alcohol provides for sanctions for those who commit a First Offense (as defined in the Alcohol Section) and for removal from employment for a Second Offense. The second subsection addresses Drugs and defines the term "Offense" differently from the Alcohol subsection but also provides for specific sanctions for Offenses. It is instructive to observe that the term "Offense" is found only in the Alcohol and Drug subsections of the Disciplinary Action section; it is <u>not</u> found in the third subsection (Failure to submit to testing) nor in any other portion of the policy.

The third subsection of Disciplinary Action addresses Failure to submit to testing and states:

> The following action will be taken when employees fail to submit to a required test or fail to cooperate with the testing as outlined in this policy: A Group III Notice shall be issued for failing to comply with established policy and applicable Federal and State regulations and the employee shall be rescheduled for another test.[22]

The discipline meted out to grievant was based on the agency's Drug and Alcohol Testing Policy. In evaluating the appropriateness of such discipline, the Hearing Officer is guided by the language in that policy. As written, the policy provides for three distinct disciplinary actions dependent upon whether the issue is alcohol, drugs, <u>or</u> a failure to submit to testing. One of the general principles of writing is that when a word such as offense is capitalized, the term "Offense" has a certain, defined meaning. Indeed, in this policy, "Offense" is found only in two subsections and is given a very specific definition in each subsection. The policy does <u>not</u> define "Offense" to include a failure to submit to testing. Had the author of the policy intended failure to submit to be deemed an "Offense," the definition of the term could easily have been changed to include such language.

Another general principle in policy writing is that topics discussed in separately identified subsections are separated for a purpose. Here, the author addressed

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[19] 49 CFR 40.23(a) & (b).
[20] 49 CFR 40.193(b)(3) provides that if the employee leaves the collection site before the collection process is complete, this constitutes a refusal to test. In this case, grievant left the collection site prior to the required three-hour test period. Given the definition in the preceding sentence, grievant's refusal to test fits within the Agency Policy definition of "failure to cooperate."
[21] Exhibit 7, p. 9. *Ibid.*
[22] Exhibit 7, p. 6. *Ibid.*

disciplinary actions for three different situations. If the author had intended to treat the disciplinary action for failure to submit to testing similarly to the other two subsections, the definitions of "Offense" could have been written to include "a positive test result *or* a failure to submit to testing." That the author elected to provide a separate set of sanctions for failure to submit to testing suggests that a first failure to submit should be treated differently from a second positive drug test.

The agency correctly observes that an employee without a prior positive test would be discharged after a second refusal to submit (total of two violations) while the grievant in the instant case would not be dismissed until after his third violation (positive test plus two refusals). While such a result appears illogical, it is consistent with the policy as currently written. The agency states that, "a second refusal (without a prior positive test) should also warrant dismissal."[23] In fact, the phrase "without a prior positive test" does not appear in the policy. The policy states, "A second refusal to submit to the required testing will result in the issuance of a Group III Notice under the Standards of Conduct and dismissed (sic)."[24] While the agency might like to infer that this phrase is part of the policy, it is not currently written in that manner.

Had the grievant tested positive a second time, it is undisputed that the policy would mandate immediate dismissal. Such dismissal is warranted when there is unchallenged scientific evidence in the form of both a screening test and a confirmatory test demonstrating that an employee has twice violated the drug-free rules. However, when the violation is a failure to produce a specimen, there is no proof that the employee was using drugs. The uncertainty inherent in the latter situation justifies having a separate subsection of the policy that gives a second chance to an employee who fails to produce a specimen (notwithstanding a prior positive test).

Accordingly, it is concluded that the agency's policy, *as currently written*, requires that a failure to submit to testing must be adjudicated under the third subsection of the Disciplinary Action section. That subsection provides for discharge only upon a second refusal to submit to testing. As this was the first refusal, the appropriate discipline is a Group III Written Notice and additional unannounced testing.

However, even if the policy were to be interpreted in the manner advocated by the agency, there are three mitigating factors in this case. First, grievant had always cooperated fully with the random unannounced testing in the past. He had been tested 12 times over a period of four years with negative results in each case. Second, grievant went to the medical provider that performs drug tests for the agency less than four hours later, produced a specimen and obtained a negative test result. While this test is not acceptable because the grievant was not observed for a period of time and for other reasons, it nevertheless has some limited circumstantial value.

Finally, the testing procedure in this case was not in complete compliance with federally mandated procedure. That procedure requires the collection site person to "urge the employee to drink up to 40 ounces of fluid" (Underscoring added).[25] Although grievant was allowed to drink fluid, the safety engineer did not urge or direct grievant to drink more than he chose to. In fact, grievant drank only 12-16 ounces of water. Since

[23] Page 2, *Request for Reconsideration*, September 28, 2001.
[24] Exhibit 7, p.6. *Ibid.*
[25] 49 CFR 40.193(b)(2).

grievant told the safety engineer that he had voided immediately prior to being summoned for the test, it was incumbent upon the engineer to direct grievant to drink a greater amount of fluid. Had this procedure been followed, grievant would likely have had no choice but to produce a specimen.

DECISION

After careful consideration of the agency's request for reconsideration, it is concluded that there is no basis to reverse the Decision issued on September 19, 2001.

APPEAL RIGHTS

A hearing officer's decision becomes a final hearing decision with no further possibility of administrative review when all timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.[26]

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 of the Department of Employment Dispute Resolution before filing a notice of appeal.

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David J. Latham, Esq.
Hearing Officer

[26] § 7.2(d). *Grievance Procedure Manual,* effective July 1, 2001.