Issue: Group II Written Notice (failure to follow established written policy) and termination due to accumulation; Hearing Date: 09/03/03; Decision Issued: 09/04/03; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 5787

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5787

Hearing Date: September 3, 2003
Decision Issued: September 4, 2003

PROCEDURAL ISSUE

Despite repeated attempts to contact grievant by telephone, the Hearing Division was unable to reach him. After the hearing officer set the hearing date, he sent grievant a Notice of Hearing with instructions regarding documents and witnesses, and requested that grievant contact the Hearing Officer for an explanation of the hearing process. Grievant failed to contact the hearing officer prior to the hearing. He also failed to submit any documents or witness list or demonstrate in any other way that he was taking an interest in the hearing process.

APPEARANCES

Grievant
Resident Engineer
Representative for Agency
Two witnesses for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Has the agency discriminated against the grievant?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued for failure to follow established written policy.[1] The grievant's employment was terminated as part of the disciplinary action because of an accumulation of previous disciplinary actions. Grievant failed to participate in the second-step resolution meeting. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2]

The Virginia Department of Transportation (Hereinafter referred to as "agency") has employed the grievant as a transportation operator for 14 years. Grievant has two previous active disciplinary actions. He received a Group I Written Notice for failing to report to work without proper notice to his supervisor.[3] Grievant was given a Group III Written Notice for violation of the policy prohibiting the use of illegal controlled substances.[4] Grievant did not file grievances from either of these two disciplinary actions within the 30-day time limit.

On January 30, 2003, grievant was found sleeping on the job and exhibiting impaired behavior. There was reasonable suspicion that grievant was under the influence of an illegal controlled substance. Pursuant to agency policy, grievant was given a drug test that produced a positive test result for cocaine. Following validation testing on a split sample, grievant was given a Group III Written Notice on February 13, 2003 and suspended for two weeks.[5] The agency agreed not to remove grievant from employment if he agreed to undertake a specified rehabilitation program.

The agency's Fitness-for-Duty Coordinator met with grievant and conducted an assessment of his situation and the likelihood of him successfully completing the program. There was some doubt about his chances for success because grievant initially was in denial about his substance abuse, and because he appeared not to be fully motivated to aggressively work at program compliance. Nonetheless, grievant signed a written Compliance Agreement in

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[1] Exhibit 2. Written Notice, issued May 13, 2003.
[2] Exhibit 1. Grievance Form A, filed June 12, 2003.
[3] Exhibit 9. Written Notice, issued September 13, 2002.
[4] Exhibit 5. Written Notice, issued February 13, 2003.
[5] Exhibit 6. Memorandum from Safety Engineer Manager to Resident Engineer, February 19, 2003.

which he agreed to 12 specific steps that he would have to comply with to avoid removal from employment.[6] Among the requirements were: abstention from alcohol and drugs, compliance with recommendations from the Fitness for Duty Coordinator, completing the treatment program, attending self-help group meetings, and weekly contact with the Fitness for Duty Coordinator. He was to be evaluated at the end of a 30-day period.[7] Grievant understood that the burden was on him to successfully complete the program if he wanted to return to work.

Grievant failed to meet program requirements during the 30-day period. He admitted to consuming alcohol daily during the treatment program.[8] He did not attend any self-help meetings with Alcoholics Anonymous (AA) during the 30-day period; the Coordinator had directed him to attend twice a week. He met with his treatment counselor only once – on March 11, 2003 – during the four-week period. He did not contact the Coordinator weekly as required; she received one call from him during the four weeks – on March 5, 2003.

On March 26, 2003, grievant met with the Coordinator and grievant's manager (maintenance manager) to assess progress. The treatment counselor had reported to the Coordinator that it was useless to continue seeing grievant because grievant had poor motivation. Grievant contended that he had not understood the requirements. It was decided to give grievant yet another chance to complete the rehabilitation program. The Coordinator again carefully explained grievant's obligations and her expectations. Grievant was told that he could use an agency telephone to contact the Coordinator so that he would not have any personal long-distance telephone expense. He was told again to meet weekly with the treatment counselor, and to attend AA meetings twice weekly. He was told to contact the Coordinator each week during the 30-day extension.

During the period from March 26 to April 25, 2003, grievant again failed to comply with the rehabilitation program requirements. He continued to consume alcohol daily. He went to the treatment counselor only one time in 30 days – on April 1, 2003. He attended only four AA meetings – between April 15 and 24, 2003.[9] The Coordinator received only two contacts from grievant – April 3 and 23, 2003. During one of the telephone conversations with the Coordinator, grievant became upset and hung up on her.

On April 25, 2003, the Coordinator and grievant's manager met with grievant again for an assessment of the 30-day extension period. Grievant was given 10 more days within which to demonstrate compliance. During those 10 days grievant attended two AA meetings and met with his treatment counselor one time. The treatment coordinator reported on April 29, 2003 that grievant

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[6] Exhibit 3. Fitness for Duty Program Compliance Agreement, signed February 26, 2003.
[7] Of the several hundred employees who have been through the rehabilitation program, about 99 percent successfully complete the program and return to work in 30 days. Only three, including grievant, have failed to complete the program.
[8] Exhibit 4. Treatment Provider Progress Report, April 1, 2003.
[9] Exhibit 12. Self-Help Group Attendance form.

continued to deny that he had a substance abuse problem.[10] Grievant did not contact the Coordinator during this period. The Coordinator had directed grievant to provide documentation of AA meeting attendance at the end of each 30-day period; however, he never provided the Coordinator with documentation to show that he had attended AA meetings.[11] The Coordinator advised Human Resources that grievant had repeatedly failed to comply with the terms of the rehabilitation program to which he had agreed. The agency then decided that grievant should be removed from employment and he was discharged on May 13, 2003.

APPLICABLE LAW AND OPINION

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).

Code § 2.2-3000 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. The grievant must prove his claim of discrimination by a preponderance of the evidence.[12]

To establish procedures on Standards of Conduct and Performance 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

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[10] Exhibit 4. Treatment Provider Progress Report, April 29, 2003.
[11] Grievant gave the form to his supervisor on the day he was removed from employment.
[12] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

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.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature than Group I offenses, and are such that an accumulation of two Group II offenses normally should warrant removal from employment. Failure to comply with established written policy is a Group II offense.[13]

Grievant agreed to abstain from the use of alcohol but admitted to consuming alcohol daily during the program. He agreed to complete a treatment program that required weekly visits to a treatment counselor but he made only three visits during a nine-week period. Grievant agreed to attend AA meetings twice per week but attended only seven of 18 meetings. He agreed to contact the Program Coordinator weekly but only spoke with her on three occasions during the nine weeks. Accordingly, the agency has demonstrated by a preponderance of evidence that the grievant failed to complete his rehabilitation treatment program pursuant to the compliance agreement he signed on February 26, 2003.

Grievant asserted a variety of excuses for his failure to comply with the program requirements. He stated that he missed one meeting with the treatment counselor because his truck broke down; however grievant had no valid excuses for not meeting with the counselor during five other weeks. Grievant claims he did not attend AA meetings during the first four weeks because he misunderstood the program requirements. However, grievant signed a written agreement to attend such self-help meetings, and the Coordinator testified persuasively that she had made this requirement clear to grievant when he signed the agreement. Grievant contended that he had called the Coordinator and left messages but that she never returned his calls. However, two agency witnesses testified credibly that the Coordinator always returned calls promptly. The Program Coordinator's function is to have regular weekly contacts with all employees who are in rehabilitation programs; it is not plausible that she would fail to return messages left by -this single client.

Grievant suggested that the Coordinator did not treat him fairly because he was offended by the way in which she talked with him. The Coordinator was disappointed in grievant's failure to demonstrate compliance during the first 30-day rehabilitation period. In the evaluation meeting at the end of that period, she talked very firmly to grievant to assure that he understood the requirements and the critical necessity that he comply with those requirements. While grievant may

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[13] Exhibit 13. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

have been offended by a female talking firmly to him, both the Coordinator and grievant's supervisor concurred in the necessity for emphasizing to grievant that he was being given a last chance to comply.

Discrimination

Grievant alleged discrimination on the basis of color and bearing. To sustain a claim of discrimination, grievant must show that: (i) he is a member of a protected group; (ii) he suffered an adverse job action; (iii) he was performing at a level that met his employer's legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee's protected status.[14] Grievant is a member of a protected group (African-American), he was removed from employment and, his job performance was satisfactory. While these facts satisfy the first three prongs of the above test, grievant failed to present any testimony or evidence to show that his race was a factor in his discharge. There is more to proving discrimination than merely making an unsupported allegation. Therefore, grievant has not borne the burden of proof with regard to his claim of discrimination.

Grievant's failure to comply with the written compliance agreement is a Group II offense. Because grievant had two other active disciplinary actions, one of which was a Group III Written Notice, the cumulative effect of his disciplinary actions is cause for removal from employment.

DECISION

Grievant failed to demonstrate that the agency's decision to terminate his employment was discriminatory.

The disciplinary action of the agency is affirmed.

The Group II Written Notice and termination of employment on May 13, 2003 are hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

[14] *Cramer v. Intelidata Technologies Corp.*, 1998 U.S. App Lexis 32676, p6 (4th Cir.1998) (unpub).

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[15] 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.[16]

[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]

David J. Latham, Esq.
Hearing Officer

[15] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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