

Issue: Group II Written Notice with suspension (reporting to work under influence of alcohol); Hearing Date: 03/03/05; Decision Issued: 03/08/05; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 7997



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7997

Hearing Date: March 3, 2005
Decision Issued: March 8, 2005

PROCEDURAL HISTORY

On October 15, 2004, Grievant was issued a Group II Written Notice of disciplinary action with suspension from October 20, 2004 through October 21, 2004 for:

On August 26, 2004, [Grievant] reported for duty under the influence of alcohol. [Lieutenant] and [Nurse] independently smelled alcohol emanating from [Grievant]. When questioned, [Grievant] admitted to having 4 beers before coming in to work.

On October 25, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On February 10, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 3, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative

Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension for reporting to work under the influence of alcohol.

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. 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:

The Department of Juvenile Justice employs Grievant as a Juvenile Correctional Officer at one of its Facilities. No evidence of prior disciplinary action against Grievant was introduced at the hearing.

On August 26, 2004, Grievant consumed 4 beers between the hours of 10 a.m. and 1:45 p.m.¹ She called the Facility at 1:45 p.m. and said she was going to sleep and she might be a little late. She arrived for her scheduled shift at 6 p.m. At 8:58 p.m., a conflict arose among wards and Grievant had to physically restrain a ward. She had to exert significant physical effort causing her to sweat. An emergency was announced over the radio and several employees responded to Grievant's area. A nurse came to Grievant and asked if she was all right. The nurse noticed the odor of alcohol coming from Grievant. She mentioned this to the Lieutenant who had also responded to the emergency. The Lieutenant also noticed the odor of alcohol coming from Grievant.

Approximately 30 minutes following the conflict, the Lieutenant met with Grievant to discuss her injuries. He also asked Grievant if she had been drinking. Grievant responded that she had consumed four beers but insisted she was not drunk. She told the Lieutenant she would not come to work drunk.

Grievant was given the necessary paperwork and a urinalysis kit and instructed to go to a local hospital for drug and alcohol testing. When she arrived at that hospital

¹ Grievant's prior work shift ended at 10:00 a.m. on August 26, 2004. She went home at the end of her shift.

she was instructed that the hospital did not perform alcohol testing. Grievant spoke with agency managers who instructed her to go to another hospital. Grievant went to the second hospital and presented paperwork asking for a drug and an alcohol test. The hospital completed the drug test but failed to perform the alcohol test for some unknown reason.

CONCLUSIONS OF POLICY

Department of Human Resource Management Policy 1.05 governs *Alcohol and Other Drugs*. The objective of this policy is:

to establish and maintain a work environment free from the adverse effects of alcohol and other drugs. The effects of alcohol and other drugs in the workplace could undermine the productivity of the Commonwealth's workforce, one of Virginia's greatest assets. The adverse effects of alcohol and other drugs create a serious threat to the welfare of fellow employees and to Virginia's citizens. The Commonwealth, therefore, adopts the following policy and procedures to address alcohol and other drug problems in the public work force.

"Impairment in the workplace from the use of alcohol" is a violation of DHRM Policy 1.05.² Group II offenses include:

Violation of Policy 1.05, Alcohol and Other Drugs (considered a Group II offense depending upon the nature of the violation, such as reporting to work when impaired by or under the influence of alcohol, or the unlawful use of a controlled drug).³

When Grievant arrived to work at 6:00 p.m. she had a sufficient amount of alcohol in her body to influence her work performance. She was impaired in the workplace from the use of alcohol thereby justifying the issuance of the Group II Written Notice. An employee receiving a Group II Written Notice may also receive a suspension for up to ten workdays. Grievant's suspension of two workdays is appropriate.

Grievant contends she was not drunk when she came to work. No evidence (such as dizziness or vomiting) was presented to suggest Grievant was drunk. It is not necessary, however, for the Agency to prove Grievant was drunk in order to issue her a

² DHRM Policy 1.05(IV)(B).

³ DHRM Policy 1.60(V)(B)(2)(g).

Group II Written Notice. All the Agency must show is that Grievant was impaired by alcohol.⁴ The Agency has done so.

Grievant argues that by permitting her to drive herself to the first hospital the Agency has admitted that she was not impaired. Although the Agency recognizes its mistake, that mistake is insufficient to rebut Grievant's admission that she consumed four beers.

Grievant contends she cannot be disciplined unless the Agency establishes her blood alcohol content was .02. She relies on Agency Policy 05-005 which states, "The cut-off level for the testing and confirmation of the presence of alcohol is established at .02." This policy is not applicable because there was no alcohol test performed. There is no way to determine Grievant's blood alcohol content. The hospital and not the Agency was at fault for not having the alcohol test performed. Nothing in DHRM Policy 1.05 requires an alcohol test as a precondition to taking disciplinary action.

Grievant asserts that the Agency was untimely in its responses during the grievance Step Process. To the extent the Agency was untimely in its responses, the issue became moot once the case was assigned to the Hearing Officer.⁵

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

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. Please address your request to:

⁴ The difference between impairment and being intoxicated is a matter of degree. An employee may be impaired by alcohol without being intoxicated. An intoxicated employee is not only impaired but is impaired to a degree that the alcohol noticeably affects the employee's behavior.

⁵ "By proceeding with the grievance after becoming aware of a procedural violation, one may forfeit the right to challenge the noncompliance at a later time." Grievance Procedure Manual § 6.3.

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 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 15-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. 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.⁶

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.