

Issue: Group II Written Notice and suspension (violation of alcohol/drug policy);  
Hearing Date: 11/13/06; Decision Issued: 11/14/06; Agency: DJJ; AHO:  
David J. Latham, Esq.; Case No. 8450; Outcome: Employee granted full relief.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8450

Hearing Date: November 13, 2006  
Decision Issued: November 14, 2006

**APPEARANCES**

Grievant  
Court Services Director  
Representative for Agency  
Four witnesses for Agency

**ISSUES**

Did grievant's actions warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

**FINDINGS OF FACT**

Grievant filed a timely grievance from a Group II Written Notice issued because he tested positive for alcohol on a breath analysis device.<sup>1</sup> As part of the disciplinary action, grievant was suspended for three days, and was required

---

<sup>1</sup> Exhibit 1. Group II Written Notice, issued August 3, 2006.

to participate in counseling through the Employee Assistance Program. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.<sup>2</sup> The Department of Juvenile Justice (hereinafter referred to as "agency") has employed grievant as a probation officer for nine years.

State policy provides that impairment in the workplace from the use of alcohol is a violation that is subject to disciplinary action.<sup>3</sup> Agency policy provides that employees are subject to alcohol testing when the agency has reasonable belief that an employee may have alcohol in his system. Grievant had signed a consent form for such testing.<sup>4</sup> The policy requires that if initial test results are positive, a second confirmation test will be conducted that is more sensitive than the initial test.<sup>5</sup>

In 1988, grievant was treated for an alcohol abuse problem. Since that time he has not had a recurrence of the problem. He does not keep alcohol in his home and does not drink alcoholic beverages. On the evening of August 1, 2006, grievant was at home with his wife and was on-call for a community services board program from 5:00 p.m. to 10:00 p.m. He did not consume any alcohol and went to bed at 10:30 p.m. He awoke at 6:00 a.m. on August 2<sup>nd</sup> and went to work at about 7:30 a.m. At about 8:30 a.m., the office service assistant (OSA) arrived at work and saw grievant walking down the hall. He appeared to be staggering and went to his office. The OSA went to grievant's office and smelled what she believed to be alcohol. When she spoke to grievant, his speech was slurred. She notified the Chief of Security in the sheriff's office because she knew that grievant was scheduled to be in court at 9:00 a.m. Subsequently, at the instruction of the Security Chief, she called grievant's supervisor who was at another location that day.

Based on the OSA's information, the supervisor told her to allow grievant to appear in court for his cases. The supervisor then drove to grievant's work location, entered the courtroom, and smelled what he believed to be alcohol around the grievant. He asked grievant to leave the courtroom and noted that his speech was slower than normal and more controlled. He asked grievant if he had been drinking; grievant denied that he had been drinking. He asked grievant if he would be willing to take a breath analysis test and grievant agreed. The reading on the device was .206 (a reading above .02 is the cut-off level for issuance of disciplinary action)<sup>6</sup>. The supervisor then asked the OSA to drive grievant home. He suggested to grievant that if he had not been drinking, he

---

<sup>2</sup> Exhibit 2. *Grievance Form A*, filed August 8, 2006.

<sup>3</sup> Exhibit 3. Department of Human Resource Management (DHRM) Policy 1.05, *Alcohol and Other Drugs*, updated March 2004.

<sup>4</sup> Exhibit 2. *Notification of Receipt of DJJ Procedure 05-005, Employee Drug and Alcohol Testing Consent*, August 19, 2002.

<sup>5</sup> Exhibit 3. Section D.4, Administrative Directive 05-005, *Employee Drug and Alcohol Testing*, November 3, 2004.

<sup>6</sup> Exhibit 3. Section D.6, *Id.*

should go to his physician. No alcohol was found in grievant's office. The supervisor did not require grievant to have further testing to determine his blood alcohol level.

On July 24, 2006, grievant was seen by his physician and diagnosed with Type II (adult onset) diabetes mellitus. Because grievant had already been on a low-fat, reduced-sugar diet, the physician prescribed Metformin to control the diabetes. Grievant had already been taking two other medications for the treatment of anxiety. The initial dosage of Metformin is twice daily and must be taken with morning and evening meals.<sup>7</sup> The use of Metformin may result in rare side effects including: low blood sugar, anxiety, behavior change similar to being drunk, confusion, drowsiness, and slurred speech.<sup>8</sup> Grievant had been in the habit of not eating breakfast and took his morning dosage without food. After the August 2<sup>nd</sup> incident, grievant spoke with his physician's nurse on August 4<sup>th</sup>. She instructed him that he *must* take the medication with a meal and grievant has since been doing so.

#### 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

---

<sup>7</sup> Exhibit 4. MedlinePlus Drug Information: Metformin (Systemic), page 4 of 8.

<sup>8</sup> *Id.*, page 7 of 8.

circumstances. In all other actions grievant must present his evidence first and prove his claim by a preponderance of the evidence.<sup>9</sup>

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. The *Standards* 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 of Policy No. 1.60 provides that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from state employment. Violation of Policy 1.05, Alcohol and Other Drugs may be considered a Group I, Group II, or Group III offense depending upon the nature of the violation.<sup>10</sup>

The agency has shown that grievant exhibited the indicia of ingesting alcohol (slurred speech, unsteady gait, an odor of alcohol) and, that a breath analysis device recorded a level of alcohol that exceeds the permissible limit. It was reasonable for the agency to require grievant to submit to the initial breath analysis test. However, grievant denied that he had anything to drink either that day or on the preceding evening.

Grievant proffered an article written by a sociologist that points out the shortcomings of breath analyzers.<sup>11</sup> While some of the observations in this article appear to be correct (Breath analyzers only *estimate* blood alcohol content; they falsely identify acetone as ethyl alcohol), the article contains no footnotes or other documentation to substantiate the claims therein. The author of the article is reported to be critical of the prevailing views on alcohol use and critical of groups that advocate for the reduction of alcohol consumption.<sup>12</sup> Thus, while some of the views expressed in this article may have merit, the author is apparently not without his own personal bias. Grievant also offered an article labeled “§ 8.1.2 Nonspecific Analysis” that does not cite the author’s name or give any other attribution.<sup>13</sup> However, this article does include sources for many of the studies and conclusions cited. It supports, in a reasoned manner, the conclusions cited in Hanson’s article. It notes that acetone is commonly found on

---

<sup>9</sup> § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

<sup>10</sup> Exhibit 3. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

<sup>11</sup> Exhibit 4. *Breath Analyzer Accuracy* by David J. Hanson, Ph.D.

<sup>12</sup> See [http://en.wikipedia.org/wiki/David\\_J.\\_Hanson](http://en.wikipedia.org/wiki/David_J._Hanson) .

<sup>13</sup> Through research, the hearing officer determined that this article was written by a California attorney who specializes in defending drunk drivers. See Lawrence Taylor, Inc., Drunk Driving Defense at: [http://www.duicenter.com/books/dd\\_chemical.html](http://www.duicenter.com/books/dd_chemical.html) .

the breath of diabetics and in persons who are on a weight reduction diet, and that acetone can result in an odor of alcohol. The conclusion to be drawn from the available literature is that breath analyzers are not always totally accurate. This suggests that a prudent approach to determining intoxication is to obtain a second, confirming test that provides a more accurate result.

Agency policy requires that a second confirmation test be conducted using an alternate testing procedure that is more sensitive than the initial test. In the case of suspected alcohol intoxication, the appropriate test is a blood alcohol test. In this case, when grievant denied ingesting alcohol, the agency could have required him to provide a blood specimen so that his blood alcohol level could be accurately tested. Such a test would have definitively resolved whether grievant had been drinking or, whether his diabetic condition and prescription medication was causing the breath analyzer to falsely read high acetone levels as alcohol. The agency failed to require grievant to submit to a blood alcohol test and thereby failed to comply with its own policy.

While the agency's policy prohibiting the use of alcohol is prudent and reasonable, one test is not always perfect. The purpose of the policy is to assure that before an employee is disciplined, at least two separate types of tests are performed before concluding that grievant has violated the policy. In this case, grievant has presented a possible, plausible explanation of the breath analyzer results. The agency has not rebutted grievant's testimony and evidence that he does not drink, that he is diabetic, that he is taking medication for the condition, and that he erroneously failed to take the medication with a meal. The agency has also not rebutted grievant's suggestion that this combination of factors could have resulted in a false reading on the breath analyzer. Because the agency could have overcome this problem by following its own policy and requiring a blood alcohol test, its failure to do so must result in a finding that the agency has not borne the burden of proof to demonstrate a violation of the alcohol policy. Under these circumstances, the disciplinary action must be vacated.

### DECISION

The disciplinary action of the agency is reversed.

The Group II Written Notice issued on August 3, 2006 and the three-day suspension are hereby RESCINDED.

### 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. Address your request to:

Director  
Department of Human Resource Management  
101 N 14<sup>th</sup> St, 12<sup>th</sup> floor  
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director  
Department of Employment Dispute Resolution  
830 E Main St, Suite 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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.<sup>14</sup> 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.<sup>15</sup> You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

---

<sup>14</sup> 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).

<sup>15</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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]

*S/*David J. Latham

---

David J. Latham, Esq.  
Hearing Officer