Issue: Group III Written Notice with Termination (violation of drug/alcohol policy); Hearing Date: 04/02/12; Decision Issued: 04/05/12; Agency: DMV; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9791; Outcome: Full Relief; **Administrative Review: AHO Reconsideration Request received 04/16/12; Reconsideration Decision issued 04/23/12; Outcome: Original decision affirmed; Administrative Review: EDR Admin Review request received 04/16/12; EDR Ruling No. 2012-3310 issued 05/18/12; Outcome: AHO's decision affirmed; Administrative Review: DHRM Admin Review received 04/16/12; DHRM ruling issued 06/07/12; Outcome: AHO's decision affirmed; Attorney's Fee Addendum issued 06/18/12 awarding $5,187.60.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9791

Hearing Date: April 2, 2012
Decision Issued: April 5, 2012

PROCEDURAL HISTORY

Grievant, a motor carrier compliance agent with the Dept. of Motor Vehicles ("Agency") was issued a Group III Written Notice on December 28, 2011, and terminated from employment. The offense was violation of Department of Human Resource Management ("DHRM") Policy 1.05, Alcohol and Other Drugs. Grievant timely filed a grievance to challenge the Agency's action. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On March 14, 2012, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. At the pre-hearing conference, the hearing was scheduled at the first date available between the parties and the hearing officer, April 2, 2012, at which time the grievance hearing was held at the Agency's offices.

The Agency submitted exhibits that were, without objection from the Grievant, admitted into the grievance record, and they will be referred to as Agency's Exhibits, numbered respectively. The Grievant had no exhibits in addition to the Agency's exhibits. The hearing officer has carefully considered all evidence presented.

No other active disciplinary actions were noted for the grievance record.

APPEARANCES

Grievant
Counsel for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the termination memorandum?
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?

The Grievant requests rescission of the Written Notice and job reinstatement.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

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.

The Agency relied on the Standards of Conduct, promulgated by DHRM, Policy 1.60, which provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards of Conduct 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. The Agency uses these Standards of Conduct and considered this offense among the most severe level (Group III), for which a first offense normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace, or other serious violations of policies, procedures, or laws. Agency Exh. 7.

DHRM Policy Number: 1.05 - Alcohol and Other Drugs - provides the following violations:

A. The unlawful or unauthorized manufacture, distribution, dispensation, possession, or use of alcohol or other drugs in the workplace;
B. Impairment in the workplace from the use of alcohol or other drugs, except from the use of drugs for legitimate medical purposes;
C. A criminal conviction for a:
    1. violation of any criminal drug law, based upon conduct occurring either on or off the workplace; or
    2. violation of any alcohol beverage control law or law that governs driving while intoxicated, based upon conduct occurring in the workplace; and
D. An employee' failure to report to his or her supervisor the employee's conviction of any offense, as required in Report Convictions.

Agency Exh. 4.

Virginia courts have held that being "under the influence of alcohol," is established when any person has consumed enough alcoholic beverages to "so affect his manner, disposition, speech, muscular movement, general appearance or behavior, as to be apparent to observation." *Thurston v. Commonwealth*, 15 Va. App. 475, 483, 424 S.E.2d 701, 705 (1992) (quoting *Gardner v. Commonwealth*, 195 Va. 945, 954, 81 S.E.2d 614, 619 (1954)). Therefore, where the Commonwealth offers no chemical test results of an accused's blood or breath, the issue becomes whether the accused is under the influence, which has "'to be determined from all of the evidence of his condition at the time of the alleged offense.'" *Leake v. Commonwealth*, 27 Va. App. 101, 110, 497 S.E.2d 522, 526 (1998) (quoting *Brooks v. City of Newport News*, 224 Va. 311, 315, 295 S.E.2d 801, 804 (1982)).

Another way to describe the employer's burden is that it must show intoxication with evidence that the subject would exhibit impairment in such areas as reaction time, depth perception, peripheral vision, stability, balance, and judgment.

Although not controlling here, in the employment context, Virginia has adopted the criminal drunk driving standard of .08% from Va. Code § 18.2-266 for defending workers' compensation claims on the ground of willful misconduct. Va. Code § 65.2-306. For purposes of barring workers' compensation benefits, the employer has the burden of proof, as the employer does in a disciplinary grievance.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions. The operable facts, as opposed to conclusions, are not materially in dispute and are summarized effectively in the Agency's written notice. Agency Exh. 6. The written notice charged that on December 13, 2011:

> Employee reported to work while under the influence of alcohol, a violation of DHRM Policy Number 1.05. Employee is a motor carrier size and weight compliance agent. His work is to weigh commercial vehicles, check for untaxed fuel, ensure height compliance for motor carrier vehicles and interact with drivers of the vehicles, the Virginia State Police and coworkers and managers. Upon reporting to work, a Commercial Vehicle Enforcement Officer (CVEO) smelled alcohol on the employee. A Virginia State trooper was called and indicated to employee that the trooper smelled alcohol. Employee explained that he had 3-4 beers at lunch some 4-5 hours earlier, but was not inebriated and was find to work. Employee volunteered to take a breathalyzer test. The breathalyzer registered .06 alcohol. The supervisor was called to the work site, talked with the employee and employee was sent home pending investigation. Employee was not permitted to drive himself home, he was driven home.

As circumstances considered, the Agency described on the written notice:

> It is the mission of DMV to promote security, safety, and service through the administration of motor vehicle and tax related laws. It is the primary focus of the motor carrier program and that administration to assist in the enforcement of the code of Virginia. Reporting to work while under the influence of alcohol

> undermines the employee's position and the program in which he worked. Employee's BAC [blood alcohol concentration] was .06. The existing drug and alcohol policy addresses "impairment in the workplace" from the use of alcohol or drugs. No mitigating factors exist that would serve to reduce this.

The Grievant had several years service with the Agency. The Grievant's job duties required making accurate mathematical computations to determine if carriers are complying with size and weight laws, rules and regulations; reconciling transactions; appearing in court in support of citations; and varied other responsibilities. Agency Exh. 1. The Grievant signed for his receipt of DHRM Policy on Alcohol and Other Drugs on March 15, 2005. Agency Exh. 5. The Agency's witnesses testified consistently with the facts alleged in the Written Notice. Agency Exh. 3 (witness statements).

In addition, the claimant's direct supervisor testified regarding his observations of the Grievant during the time in question. The supervisor testified that he was called in to work after the police determined the Grievant had a BAC of .06%. The supervisor spent between 30 and 50 minutes with the Grievant before his ride home arrived. The supervisor noted at the time that he did not notice any altered behaviors or the smell of alcohol. The supervisor recalled that he detected what he believed was the smell of deodorant and mouthwash. The supervisor also noted that the Grievant's eyes were bloodshot and consistent with conditions related to lack of sleep. Agency Exh. 2.

The Agency's witnesses established that that the policy violation was "impairment in the workplace from the use of alcohol," and that motor carrier drivers are considered intoxicated for driving purposes with a BAC of .04% and higher.[1] This standard was voiced by Agency witnesses as justification for concluding the Grievant was intoxicated at work. Actually, it is unlawful to operate a motor carrier with <u>any</u> level of BAC.[2] The Agency's regional manager

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[1] **Va. Code § 46.2-341.24. Driving a commercial motor vehicle while intoxicated, etc.**

> A. It shall be unlawful for any person to drive or operate any commercial motor vehicle (i) while such person has a blood alcohol concentration of 0.08 percent or more by weight by volume or 0.08 grams per 210 liters of breath as indicated by a chemical test administered as provided in this article; (ii) while such person is under the influence of alcohol; (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a degree which impairs his ability to drive or operate any commercial motor vehicle safely; (iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to drive or operate any commercial motor vehicle safely; or (v) while such person has a blood concentration of any of the following substances at a level that is equal to or greater than: (a) 0.02 milligrams of cocaine per liter of blood, (b) 0.1 milligrams of methamphetamine per liter of blood, (c) 0.01 milligrams of phencyclidine per liter of blood, or (d) 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood.
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> B. It shall be unlawful and a lesser included offense of an offense under provision (i), (ii), or (iv) of subsection A of this section for a person to drive or operate a commercial motor vehicle while such person has a blood alcohol concentration of 0.04 percent or more by weight by volume or 0.04 grams or more per 210 liters of breath as indicated by a chemical test administered in accordance with the provisions of this article.

[2] **Va. Code § 46.2-341.31. Driving commercial motor vehicle with any alcohol in blood.**

testified that she considered the alcohol policy a "zero tolerance" situation. It is not clear whether the regional manager considered a zero tolerance approach to require termination for every violation of Policy 1.05, or whether every violation will generate some level of discipline. Policy 1.05 specifically states that discipline for a violation subjects the employee to the full range of disciplinary actions, including discharge, depending on a case-by-case determination of the severity of the violation and mitigating circumstances. Agency Exh. 4.

The Grievant also testified consistently with the facts asserted in the Written Notice, adding that after he drank beer at lunch, he installed exterior Christmas decorations at a family member's house using a 15 foot extension ladder without difficulty or incident. He testified that, at his election, he was reporting to work earlier than originally scheduled at the request of the employer. Before reporting to work at 6:00 p.m., the Grievant showered and used mouthwash. The Grievant's normal shift started at 10:00 p.m. The Grievant, however, denied he was impaired at work.

A lawyer familiar with the defense of drunk driving cases testified that the preliminary breath test (PBT) administered to the Grievant was not admissible in courts for the prosecution of driving under the influence charges, as such tests are not calibrated for accuracy. Consistent with the lawyer's opinion, no documentary evidence of the breath test was submitted into the grievance hearing record, perhaps because of the nature of the testing device. No one subjected the Grievant to a field sobriety test, directed to test physical or cognitive impairment.

Based on the evidence presented, I find that the Agency has failed to prove that the Grievant was impaired in the workplace from the use of alcohol or other drugs. Nothing in Policy 1.05 speaks to the smell of alcohol or bloodshot eyes satisfying the Agency's burden. At most, the reported smell of alcohol and bloodshot eyes put the Agency on notice to make reasonable inquiry, which it did. However, the evidence falls short of proving, by a preponderance of the evidence, that the Grievant was impaired in the workplace from the use of alcohol or other drugs, whether from evidence of observance of work performance or field sobriety tests, or other means. Assuming the breath test reading of .06 is admissible within a grievance hearing, nothing in Policy 1.05 establishes any presumption of intoxication at any level of BAC. There is no Agency policy presented, or charged in the Written Notice, that indicates evidence of BAC of .06 or higher establishes a presumption of intoxication. The applicable test in Policy 1.05 is "impairment." The record is void of any evidence of physical or cognitive impairment on the Grievant's part, regardless of degree. I find that the description of impairment provided in the *Thurston* case, *supra*, to be applicable. The Agency's burden is to show impairment in the workplace from the Grievant having consumed enough alcoholic beverages (or other drugs) to "so affect his manner, disposition, speech, muscular movement, general appearance or behavior, as to be apparent to observation." Merely bloodshot eyes and the disputed smell of alcohol are not enough evidence to prove impairment in the workplace. To

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No person shall drive a commercial motor vehicle while having any amount of alcohol in his blood, as measured by a test administered pursuant to the provisions of §§ 46.2-341.26:1 through 46.2-341.26:11. Any person found to have so driven a commercial motor vehicle shall be guilty of a traffic infraction.

hold otherwise would constitute re-writing applicable policy, which a hearing officer is powerless to do.

Accordingly, the Written Notice with termination must be reversed. Because of this result, the hearing officer need not address mitigation.

DECISION

For the reasons stated herein, I must reverse the Agency's Group III discipline and termination. Accordingly, the Grievant is reinstated to the same position, or if the position is filled, to an equivalent position, back pay (less interim earnings), full reinstatement of fringe benefits and seniority rights.

Further, because the Grievant has substantially prevailed on the merits of the grievance, Grievant is further entitled to seek a reasonable **attorney's fee**, which cost shall be borne by the agency. I find no special circumstances that would make an award unjust.

APPEAL RIGHTS

As the Grievance Procedure Manual sets 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.

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. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.

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. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

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 **15 calendar** days of the **date of the original hearing decision.** (Note: the 15-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 15 days; the day following the issuance of the decision is the first of the 15 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 15 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 DHRM, 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9791

Hearing Date: April 2, 2012
Decision Issued: April 5, 2012
Reconsideration: April 23, 2012

RECONSIDERATION DECISION OF HEARING OFFICER

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

The Agency seeks reconsideration of the original hearing decision. The request for reconsideration does not identify any newly discovered evidence, but, rather, argues the hearing officer reached incorrect legal conclusions, or misapplied/misinterpreted applicable policy. I consider the issues raised by the Agency on reconsideration to be the same as those addressed in the original decision.

The Agency complains that the decision used the terms "under the influence" and "impairment" interchangeably. If there is a distinction in degree, the applicable policy, DHRM Policy No. 1.05, does not define the meaning of "impairment." To the extent that proving "impairment" is a lesser burden than proving "intoxication," the Agency failed to allege (or prove) any specific physical or cognitive impairment. The Agency does not satisfy its burden with merely the subjective allegation that the suspicion of impairment rendered the Grievant unable to foster the public trust.

The Agency also argues on reconsideration that the hearing officer limited the concept of impairment to a physical one. Contrary to the Agency's assertion, the hearing officer

specifically considered the lack of evidence of impairment from both physical and cognitive perspectives, neither of which the Agency sufficiently proved. That factual determination was resolved in the Grievant's favor.

Finally, the Agency argues that the evidence supporting the suspicion of impairment satisfies its burden of proof. The Written Notice charged the grievant with violating applicable policy by being impaired. The evidence shows the Agency proved a reasonable *suspicion* of impairment. The applicable policy could have prescribed a presumption of impairment from a certain level of blood alcohol concentration (BAC), but the policy provides no such presumption, whether rebuttable or conclusive.

In sum, the Agency simply restates the arguments and evidence presented at the hearing, which were resolved in the Grievant's favor. For these reasons, the request for reconsideration is **denied.**

APPEAL RIGHTS

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

1. The 15 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 DHRM, 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
The Department of Motor Vehicles

June 7, 2012

The agency has requested an administrative review of the hearing officer's decision in Case No. 9791. For the reasons stated below, the Department of Human Resource Management (DHRM) will not intercede in the application of this decision. The agency head of DHRM, Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The PROCEDURAL HISTORY of this case, as listed by the hearing officer, is as follows:

> Grievant, a motor carrier compliance agent with the Dept. of Motor Vehicles ("Agency") was issued a Group III Written Notice on December 28, 2011, and terminated from employment. The offense was violation of Department of Human Resource Management ("DHRM") Policy 1.05, Alcohol and Other Drugs. Grievant timely filed a grievance to challenge the Agency's action. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On March 14, 2012, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. At the pre-hearing conference, the hearing was scheduled at the first date available between the parties and the hearing officer, April 2, 2012, at which time the grievance hearing was held at the Agency's offices.
>
> The Agency submitted exhibits that were, without objection from the Grievant, admitted into the grievance record, and they will be referred to as Agency's Exhibits, numbered respectively. The Grievant had no exhibits in addition to the Agency's exhibits. The hearing officer has carefully considered all evidence presented.
>
> No other active disciplinary actions were noted for the grievance record.

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The hearing officer identified the following as ISSUES in this case:

> 1. Whether Grievant engaged in the behavior described in the termination memorandum?

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?

The Grievant requests rescission of the Written Notice and job reinstatement.

****

The Agency relied on the Standards of Conduct, promulgated by DHRM, Policy 1.60, which provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards of Conduct 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. The Agency uses these Standards of Conduct and considered this offense among the most severe level (Group III), for which a first offense normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace, or other serious violations of policies, procedures, or laws. Agency Exh. 7.

DHRM Policy Number: 1.05 - Alcohol and Other Drugs - provides the following violations:

A. The unlawful or unauthorized manufacture, distribution, dispensation, possession, or use of alcohol or other drugs in the workplace;
B. Impairment in the workplace from the use of alcohol or other drugs, except from the use of drugs for legitimate medical purposes;
C. A criminal conviction for a:
    1. violation of any criminal drug law, based upon conduct occurring either on or off the workplace; or
    2. violation of any alcohol beverage control law or law that governs driving while intoxicated, based upon conduct occurring in the workplace; and
    D. An employee's failure to report to his or her supervisor the employee's conviction of any offense, as required in Report Convictions.

Virginia courts have held that being "under the influence of alcohol," is established when any person has consumed enough alcoholic beverages to "affect his manner, disposition, speech, muscular movement, general appearance or behavior, as to be apparent to observation." *Thurston v. Commonwealth*, 15 Va. App. 475, 483, 424 S.E.2d 701, 705 (1992) (quoting Gardner v. Commonwealth, 195 Va. 945, 954, 81 S.E.2d 614,619 (1954). Therefore, where the Commonwealth offers no chemical test results of an accused's blood or breath, the issue becomes whether the accused is under the influence, which has "to be determined from all of the evidence of his condition at the time of the alleged offense." Leake v. Commonwealth, 27 Va.

App. 101, 110,497 S.E.2d 522, 526 (1998) (quoting *Brooks v. City of Newport News, 224* Va. 311,315,295 S.E.2d 801, 804 (1982).

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The hearing officer identified and discussed the Offense as follows:

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions. The operable facts, as opposed to conclusions, are not materially in dispute and are summarized effectively in the Agency's written notice. Agency Exh. 6. The written notice charged that on December 13, 2011:

Employee reported to work while under the influence of alcohol, a violation of DHRM Policy Number 1.05. Employee is a motor carrier size and weight compliance agent. His work is to weigh commercial vehicles, check for untaxed fuel, ensure height compliance for motor carrier vehicles and interact with drivers of the vehicles, the Virginia State Police and coworkers and managers. Upon reporting to work, a Commercial Vehicle Enforcement Officer (CVEO) smelled alcohol on the employee. A Virginia State trooper was called and indicated to employee that the trooper smelled alcohol. Employee explained that he had 3-4 beers at lunch some 4-5 hours earlier, but was not inebriated and was find to work. Employee volunteered to take a breathalyzer test. The breathalyzer registered .06 alcohol. The supervisor was called to the work site, talked with the employee and employee was sent home pending investigation. Employee was not permitted to drive himself home, he was driven home.

As circumstances considered, the Agency described on the written notice:

It is the mission of DMV to promote security, safety, and service through the administration of motor vehicle and tax related laws. It is the primary focus of the motor carrier program and that administration to assist in the enforcement of the code of Virginia. Reporting to work while under the influence of alcohol undermines the employee's position and the program in which he worked. Employee's BAC [blood alcohol concentration] was .06. The existing drug and alcohol policy addresses "impairment in the workplace" from the use of alcohol or drugs. No mitigating factors exist that would serve to reduce this.

The Grievant had several years of service with the Agency. The Grievant's job duties required making accurate mathematical computations to determine if carriers are complying with size and weight laws, rules and regulations; reconciling transactions; appearing in court in support of citations; and varied other responsibilities. Agency Exh. 1. The Grievant signed for his receipt of DHRM Policy on Alcohol and Other Drugs on March 15, 2005. Agency Exh. 5. The Agency's witnesses testified consistently with the facts alleged in the Written Notice. Agency Exh. 3 (witness statements).

In addition, the claimant's direct supervisor testified regarding his observations of the Grievant during the time in question. The supervisor testified that he was called in to work after the police determined the Grievant had a BAC of .06%. The supervisor spent between 30 and 50 minutes with the Grievant before his ride home arrived. The supervisor noted at the time that he did not notice any altered behaviors or the smell of alcohol. The supervisor recalled that he detected what he believed was the smell of deodorant and mouthwash. The supervisor also noted that the Grievant's eyes were bloodshot and consistent with conditions related to lack of sleep. Agency Exh. 2.

The Agency's witnesses established that the policy violation was "impairment in the workplace from the use of alcohol," and that motor carrier drivers are considered intoxicated for driving purposes with a BAC of .04% and higher. This standard was voiced by Agency witnesses as justification for concluding the Grievant was intoxicated at work. Actually, it is unlawful to operate a motor carrier with any level of BAC. The Agency's regional manager testified that she considered the alcohol policy a "zero tolerance" situation. It is not clear whether the regional manager considered a zero tolerance approach to require termination for every violation of Policy 1.05, or whether every violation will generate some level of discipline. Policy 1.05 specifically states that discipline for a violation subjects the employee to the full range of disciplinary actions, including discharge, depending on a case-by-case determination of the severity of the violation and mitigating circumstances. Agency Exh. 4.

The Grievant also testified consistently with the facts asserted in the Written Notice, adding that after he drank beer at lunch, he installed exterior Christmas decorations at a family member's house using a 15 foot extension ladder without difficulty or incident. He testified that, at his election, he was reporting to work earlier than originally scheduled at the request of the employer. Before reporting to work at 6:00 p.m., the Grievant showered and used mouthwash. The Grievant's normal shift started at 10:00 p.m. The Grievant, however, denied he was impaired at work.

A lawyer familiar with the defense of drunk driving cases testified that the preliminary breath test (PBT) administered to the Grievant was not admissible in courts for the prosecution of driving under the influence charges, as such tests are not calibrated for accuracy. Consistent with the lawyer's opinion, no documentary evidence of the breath test was submitted into the grievance hearing record, perhaps because of the nature of the testing device. No one subjected the Grievant to a field sobriety test, directed to test physical or cognitive impairment.

Based on the evidence presented, I find that the Agency has failed to prove that the Grievant was impaired in the workplace from the use of alcohol or other drugs. Nothing in Policy 1.05 speaks to the smell of alcohol or bloodshot eyes satisfying the Agency's burden. At most, the reported smell of alcohol and bloodshot eyes put the Agency on notice to make reasonable inquiry, which it did. However, the evidence falls short of proving, by a preponderance of the evidence, that the Grievant was impaired in the workplace from the use of alcohol or other drugs, whether from evidence of observance of work performance or field sobriety tests, or other means. Assuming the breath test reading of .06 is admissible within a grievance hearing, nothing in Policy 1.05 establishes any presumption of intoxication at any level of BAC. There is no Agency policy presented, or charged in the Written Notice, that indicates evidence of BAC of .06 or higher establishes a presumption of intoxication. The applicable test in Policy 1.05 is "impairment." The record is void of any evidence of physical or cognitive impairment on the Grievant's part, regardless of degree. I find that the description of impairment provided in the *Thurston* case, *supra*, to be applicable. The Agency's burden is to show impairment in the workplace from the Grievant having consumed enough alcoholic beverages (or other drugs) to "so affect his manner, disposition, speech, muscular movement, general appearance or behavior, as to be apparent to observation." Merely bloodshot eyes and the disputed smell of alcohol are not enough evidence to prove impairment in the workplace. To hold otherwise would constitute re-writing applicable policy, which a hearing officer is powerless to do.

Accordingly, the Written Notice with termination must be reversed. Because of this result, the hearing officer need not address mitigation.

In his DECISION, the hearing officer stated the following:

For the reasons stated herein, I must reverse the Agency's Group III discipline and termination. Accordingly, the Grievant is reinstated to the same position, or if the position is filled, to an equivalent position, back pay (less interim earnings), full reinstatement of fringe benefits and seniority rights.

Further, because the Grievant has substantially prevailed on the merits of the grievance, Grievant is further entitled to seek a reasonable attorney's fee, which cost shall be borne by the agency. I find no special circumstances that would make an award unjust.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to

directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the instant case, the hearing officer rescinded the disciplinary action because the evidence did not support the allegations that the grievant was impaired based on his consumption of alcohol. DHRM Policy Number: 1.05 - Alcohol and Other Drugs - provides the following violations:

A. The unlawful or unauthorized manufacture, distribution, dispensation, possession, or use of alcohol or other drugs in the workplace;

B. Impairment in the workplace from the use of alcohol or other drugs, except from the use of drugs for legitimate medical purposes;

C. A criminal conviction for a:

1. violation of any criminal drug law, based upon conduct occurring either on or off the workplace; or
2. violation of any alcohol beverage control law or law that governs driving while intoxicated, based upon conduct occurring in the workplace; violation of any criminal drug law, based upon conduct occurring either on or off the workplace;

While the grievant admitted that he had consumed alcoholic beverages several hours prior to going to work, there was no evidence that his behavior showed any signs of impairment. Witnesses, including his immediate supervisor, stated that while the grievant's eyes were bloodshot and he had the smell of mouthwash on his breath, there was no indication that there was impairment. Except for the positive BAC, there was no other indicator that the grievant had consumed alcohol and the agency has not established a minimum BAC for intoxication for employees.

In the application of this policy, the hearing officer relied on several Virginia courts decisions regarding "under the influence of alcohol." Summarily, in denoting intoxication and impairment, he opined, "Another way to describe the employer's burden is that it must show intoxication with evidence that the subject would exhibit impairment in such areas as reaction time, depth perception, peripheral vision, stability, balance, and judgment". Thus, the application of this evidentiary standard was based on court decisions which govern the application of DHRM Policy No. 1.05.

Therefore, DHRM has no basis upon which to interfere with the application of this decision.

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Ernest G. Spratley

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ATTORNEY'S FEES ADDENDUM TO DECISION OF HEARING OFFICER

In the matter of: Case No. 9791

Hearing Date:	April 2, 2012
Decision Issued:	April 5, 2012
Reconsideration:	April 23, 2012
Attorney's Fee Addendum	June 18, 2012

ATTORNEY'S FEES ADDENDUM

Applicable law provides that an employee who is represented by an attorney and who substantially prevails on the merits of a grievance challenging his discharge is entitled to recover reasonable attorney's fees, unless special circumstances would make an award unjust. Rules for Conducting Grievance Hearings, effective August 30, 2004 (the "Rules"), Section VI(D); Va. Code § 2.2-3005.1.A. Accordingly, a hearing officer may order relief including reasonable attorney's fees in grievances challenging discharge if the hearing officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust. § 7.2(e) Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, effective August 30, 2004; the Rules, Section VI(D). For an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee. *Id.*

The decision reinstated the grievant. The decision was affirmed by administrative appeals to EDR (5/18/2012) and DHRM (6/7/2012). Accordingly, the hearing officer finds that grievant substantially prevailed in this case. The hearing officer also finds that there are no special circumstances that would make an award of attorney's fees unjust. Grievant's counsel submitted an attorney's fee petition dated June 12, 2012. The agency has responded to the fee petition, asserting argument that the fees petition exceeds that allowable. The hearing officer has the obligation to review the attorney's fee petition and award such fees as allowable.

The grievant's counsel's petition includes a total of 52 hours, from January 5, 2012, through June 11, 2012, at the asserted hourly rate of $225.00. The petition also seeks services of the expert legal witness, for $1,000. The third-step of the grievance resolution was received on February 9, 2012, and the grievant requested a qualification for a grievance hearing on February 10, 2012. Attorney's fees are only awardable for services related to a grievance hearing. Grievant's counsel's time records indicate he reviewed the third-step response on February 9, 2012. The next time entry is February 14, 2012, when he began preparation for the grievance

hearing. The time entry on June 11, 2012, relates to the receipt of the last administrative appeal decision. Thus, I find that the awardable attorney's fees begin for services starting February 14, 2012. The recorded hours from February 14, 2012, through June 11, 2012, are 39.6. The maximum allowable rate established by EDR is $131.00/hour. Witness fees, including expert witnesses, are not provided in the allowable attorney's fees. Thus, the requested witness fee is not awarded. As for the 39.6 hours described above, I find the attorney's fees to be reasonable and warranted. Upon review of the attorney hours indicated, and the issues involved in the matter, I approve the request of 39.6 hours of attorney time billed at $131/hour, for a total of $5,187.60.

AWARD

Grievant's counsel is awarded attorney's fees incurred from February 14, 2012, through June 11, 2012, in the amount of $5,187.60 (39.6 hours x $131.00 per hour).

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within ten (10) calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in § VII(B) of the Rules and may be appealed to the Circuit Court in accordance with § VII(C) of the Rules and § 7.3(a) of the Grievance Procedure Manual. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

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.

I hereby certify that a copy of this decision was sent to the parties' representatives by e-mail.

Cecil H. Creasey, Jr.
Hearing Officer