Issue: Administrative Review of Hearing Officer's Decision in Case No. 9791; Ruling Date: May 18, 2012; Ruling No. 2012-3326; Agency: Department of Motor Vehicles; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Motor Vehicles
Ruling Number 2012-3326
May 18, 2012

The Department of Motor Vehicles (the "agency") has requested that the Department of Employment Dispute Resolution ("EDR") administratively review the hearing officer's decision in Case Number 9791. For the reasons set forth below, as a matter of compliance with the grievance procedure, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The relevant procedural history, facts, and conclusions as set forth in Case Number 9791 are as follows:[1]

> 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….
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> The written notice charged that on December 13, 2011:
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> 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

[1] Decision of Hearing Officer, Case No. 9791 ("Hearing Decision"), April 5, 2012, at 1, 4-6. (Some references to exhibits and footnotes from the Hearing Decision have been omitted here.)

> beers at lunch some 4-5 hours earlier, but was not inebriated and was find [sic] 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. The Grievant signed for his receipt of DHRM Policy on Alcohol and Other Drugs on March 15, 2005. The Agency's witnesses testified consistently with the facts alleged in the Written Notice.

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.

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. 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. 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.
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> 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.
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> 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.
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> 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.[2]

In an April 5, 2012 hearing decision, the hearing officer reversed the agency's Group III discipline with termination and fully reinstated the grievant to his former position, or if filled, to an equivalent position with fringe benefits and seniority rights.[3] The hearing officer denied the agency's request for reconsideration on April 23, 2012.[4] The agency now seeks administrative review from this Department.

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[2] Hearing Decision at 1.
[3] *Id*. at 7.
[4] *See* Reconsideration Decision of Hearing Officer, Case No. 9791 ("Reconsideration Decision"), April 23, 2012, at 2.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions … on all matters related to procedural compliance with the grievance procedure."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

The agency asserts that its decision to terminate the grievant "was within law and policy," it harbored "no unlawful motive," and the agency "determined that [the grievant's] conduct was so egregious that to allow him to continue in the Agency [sic] employ would constitute negligence with regard to the Agency's duties to the public and to other employees." Hence, the agency alleges that the hearing officer erred by not giving the appropriate deference to agency management.

In this case, the hearing officer concluded that the applicable test, as outlined in DHRM Policy 1.05, was to determine if the grievant was impaired in the workplace.[7] In making this determination, the hearing officer utilized an impairment standard adopted from Virginia courts cases involving driving under the influence of alcohol. Applying the evidence presented by the agency to that standard, the hearing officer determined the hearing record was "void of any evidence of physical or cognitive impairment on the Grievant's part, regardless of degree."[8] As such, the hearing officer held that the agency "failed to prove that the Grievant was impaired in the workplace from the use of alcohol or other drugs."[9] In his Reconsideration Decision, the hearing officer further elaborated:

> 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.[10]

Therefore, because the hearing officer found no evidence of impairment in the workplace, he reversed the agency's Written Notice with termination.[11]

The hearing officer relied, at least in part, on the grievant's supervisor testimony that during his thirty to fifty minute personal assessment of the grievant, he did not detect anything

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[5] Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Hearing Decision at 6.
[8] *Id*.
[9] *Id*.
[10] Reconsideration Decision at 2.
[11] Hearing Decision at 6-7.

from the grievant that would indicate he was under the influence of alcohol.[12] Moreover, the grievant's supervisor testified that although the grievant's eyes were slightly red and glassy, he did not smell alcohol on the grievant, but instead only smelled mouthwash and deodorant.[13] The hearing officer held that "[m]erely bloodshot eyes and the disputed smell of alcohol are not enough evidence to prove impairment in the workplace."[14]

Any factual determination relating to "impairment" is inextricably dependent upon the policy definition of impairment, and to the agency's second objection as well: that the hearing decision "has in effect rewritten the policy" because he replaced the agency's definition of "impairment" with definitions courts have used in the past. Specifically, the agency asserts that "[t]he courts definitions are not appropriate within the context of employment," and thus, the hearing officer allegedly placed an unreasonable burden upon the agency. The Department of Human Resource Management (DHRM) has the sole authority to make a final determination on whether the hearing decision comports with policy and, specifically, how "impairment" is defined under policy.[15] This issue has been raised with DHRM and only a determination by DHRM will establish whether the hearing officer erred in his interpretation of state policy.[16]

CONCLUSION AND APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[17] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[18] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[19]

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Claudia T. Farr
Director

[12] *See* Hearing Record at 56:45 through 58:00 (testimony of grievant's supervisor).
[13] *See* Hearing Record at 39:35 through 42:00 (testimony of grievant's supervisor).
[14] Hearing Decision at 6.
[15] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[16] The determination of what impairment means under policy is a DHRM determination. Factual findings based on record evidence, for instance, the hearing officer's findings based on the supervisor's testimony as to the absence of any observable evidence of impairment, are determinations left solely to the hearing officer and may not be disturbed by any other reviewer. *See, e.g.*, Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E. 2d 319 (2002).
[17] *Grievance Procedure Manual* § 7.2(d).
[18] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[19] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).