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**FINDINGS AND DECISION
OF THE HEARING EXAMINER
CITY OF SEATTLE
UNDER DELEGATION FROM THE CIVIL SERVICE COMMISSION**

In the Matter of the Appeal of

KIRK ROLLINS

regarding alleged wrongful discharge
by Seattle Public Utilities Department

Hearing Examiner file:
CS-02-006

CSC References:
02-01-014

Introduction

The Director, Seattle Public Utilities, terminated the employment of Kirk Rollins and Mr. Rollins appealed that decision to the Civil Service Commission as is provided for in SMC 4.04.250L.3. The Civil Service Commission, pursuant to the authority of SMC 4.04.250L.7, delegated this appeal to the City Hearing Examiner for hearing.

This matter was heard before the Hearing Examiner on February 3, 2003. Parties present at the hearing were: the appellant, Kirk Rollins, *pro se*; and, the Director, Seattle Public Utilities (SPU or Department), by Valerie Heide-Mudre, SPU Labor Relations Coordinator.

For the purpose of this decision, all section numbers refer to the Seattle Municipal Code (SMC) unless otherwise indicated.

After due consideration of all the evidence presented at hearing, the following shall constitute the findings of fact, conclusions, and decision of the Hearing Examiner on this appeal.

Findings

Background

1. The appellant here, Kirk Rollins, was hired by Seattle Public Utilities (SPU) in August 2000 and was appointed to the water pipe worker apprentice program in September 2000. [Exhibit 2]
2. Mr. Rollins failed to pass a "pre-duty" drug test administered on November 28, 2001. After considering the recommendation that Mr. Rollins' employment be terminated, the Director of SPU, in a letter to Mr. Rollins dated December 14, 2001: 1) imposed a 30-day suspension; 2) required him to sign a "Last Chance Agreement"; and, 3) required him to fully participate and successfully complete a substance abuse treatment

program. That letter notes that the disciplinary action was being taken in lieu of termination and if Mr. Rollins did not sign the agreement and/or did not fully participate and successfully complete a substance abuse treatment program, he would be terminated from employment with SPU. [Exhibit 2]

3. The Director's letter notifying Mr. Rollins of this decision advised that he could appeal this disciplinary action through the grievance and arbitration procedures of the union contract and with an appeal to the Civil Service Commission. [Exhibit 2]

4. The Last Chance Agreement [Exhibit 2] provides that Mr. Rollins' employment would be terminated if he fails any test for the presence of drugs or fails to comply with the requirements of the drug rehabilitation program.

5. Mr. Rollins met with and was evaluated by a Substance Abuse Professional (SAP), as required by the Last Chance Agreement. He successfully attended and completed the Alcohol & Drug Information School that the SAP referred him to. On January 24, 2002, the SAP recommended that Mr. Rollins be returned to safety sensitive duty and be subject to 18 unannounced follow-up drug tests over the next two years, as well as remaining part of the random drug testing pool. [Exhibit 3; Testimony of Rollins]

6. The City's Drug Testing Coordinator, Bill Allen, proposed a schedule for the 18 unannounced follow-up tests recommended by the SAP. The Medical Review Officer (MRO), Dr. Wilson, approved the schedule. It is understood that the scheduled test dates were advisory rather than mandatory. [Exhibit 4; Testimony of Allen and Wilson]

Test Results

7. Mr. Rollins was required to report for seven unannounced follow-up drug tests on the following dates in 2002: March 28, May 20, June 13, June 21, August 5, September 24, and October 9 [Exhibit 5]. Except for March 28th, the testing occurred on a day when Mr. Rollins was on alternative duty and/or out on Worker's Comp. (It appears that Mr. Rollins had an on-the-job injury early in May 2002 that resulted in his being away from work on "time loss" (*i.e.*, Worker's Comp), alternative work assignment, or a combination of the two, through October 2002 [Exhibit 8].)

8. Mr. Rollins passed all but one of the tests noted in Finding #7. All the results for those successful tests were negative for the presence of drugs. (The result of the September 24th test, although negative for the presence of drugs, was noted as a "dilute" specimen [Exhibit 6].) The one unsuccessful result came from the test administered on October 9, 2002. [Testimony of Allen, Wilson, and Rollins, Exhibits 7 and 10]

9. The laboratory results for the October 9, 2002 test indicated that the specimen provided by Mr. Rollins was a "substituted specimen". That is, the levels of creatinine and specific gravity in the specimen failed to meet the criteria "consistent with normal human urine". The Medical Review Officer, Dr. Wilson, investigated the result and contacted Mr. Rollins about it to determine if there was some physiological explanation

for the unsatisfactory levels of creatinine and specific gravity. Mr. Rollins challenged the test result and requested that the "split specimen" be tested. ("Split specimen" refers to the standard practice of dividing the original specimen in half at the time it is taken, storing the two separately so that, as in this case, the second can be tested in a different laboratory.) [Testimony of Wilson, Allen, Rollins; Exhibits 7 and 10]

10. The split specimen produced the same result (*i.e.*, showed measures of creatinine and specific gravity below the minimum of the range for normal human urine). After receiving the result of the split specimen test Dr. Wilson reconfirmed the determination that this was a substituted specimen. On October 22, 2002, Dr. Wilson reported this result to the City's Drug Testing Coordinator, Mr. Allen. [Testimony of Wilson and Allen; Exhibit 7]

11. Creatinine and specific gravity are two measurable properties of human urine and when they are present within a given range of concentrations, they indicate that a urine specimen has the characteristics associated with normal human urine. Specimens that have both creatinine and specific gravity at concentrations below the low end of the ranges are considered "substituted". (A "substituted" result suggests that a specimen has been diluted. An "adulterated" result contains a substance not expected in normal human urine and suggests that something has been ingested or added to the specimen to mask the presence of drugs.) [Exhibits 1 and 13; Testimony of Wilson]

12. The Medical Review Officer noted two conditions that are possible medical explanations for producing such extremely low concentrations: 1) diabetes insipidus, a life threatening kidney malfunction accompanied by extreme thirst); and, 2) psychogenic polydipsia (a disorder marked by obsessive consumption of water). Adding water to the specimen would be a non-physiological explanation for hyper-dilute results. [Testimony of Wilson; Exhibit 13]

13. Mr. Rollins testified that he did nothing different for the October 9th test than he had for the previous tests (see Finding #7) and that he followed all the requirements of the treatment program. He also noted that his family has a history of kidney problems including a sister who must have dialysis treatments. When he was interviewed over the telephone by Dr. Wilson regarding what conditions in his life might explain the results in the October 9th test, Mr. Rollins advised that he had been taking many vitamin supplements and had been eating a lot of spicy Asian foods. [Testimony of Rollins, Wilson]

14. Mr. Rollins saw his family physician after learning of the substituted specimen determination. He was concerned that there might be something medically wrong with him, as he had no other explanation for the October 9th test results. The results of the tests ordered by his doctor were "normal" (it is not in this record what this testing sought to measure or the specific results obtained). Mr. Rollins asserted that his doctor indicated that some nutritional supplements and/or types of food could cause "irregular" test results. No testimony or written explanation from the doctor was offered. [Testimony of Rollins; Exhibit 9]

15. In reaction to receiving the report of the result of the October 9th test, the Department of Licensing (DOL) suspended Mr. Rollins' Commercial Driver's License. He appealed that action and a DOL Hearings Officer reinstated the license on a finding that a substituted result is a "refusal" to test and that DOL does not have the authority to disqualify a driver based on a refusal to test. [Exhibits 11 and 12; Testimony of Rollins]

Action Appealed

16. Viewing the substituted result as a violation of Last Chance Agreement, after learning of the result (see Finding #10), SPU discharged Mr. Rollins. Neither party presented documentation of the date of discharge, but that he was discharged on that basis and that this action is the subject of this appeal is not disputed. (Mr. Rollins' appeal notes that a Loudermill hearing with the SPU Director was held on October 21, 2002.)

17. Mr. Rollins' appeal to the Civil Service Commission cites as the personnel rule he believes to have been violated was that he was "called in" (presumably for the October 9th drug test) when he was on "time loss compensation" (i.e., unable to work due to on-the-job injury and paid via Workers Comp). The 2002 Time Sheet Data printout [Exhibit 8] shows that he was on "time loss" (a paid status) on October 9th. No authority was presented or referred to at hearing that would support the contention that employees cannot properly be required to report for drug testing while on "time loss".

Personnel Policies and Other Regulations

18. SMC 4.77.030 provides that it is the City's policy to maintain a "Drug Free Workplace", including that:

In accordance with federal law, the City of Seattle is required to implement alcohol and drug testing and training programs for certain defined employees. Strict compliance with this policy is a condition of City employment. Violations will result in disciplinary action up to and including termination.

19. The City operates a drug and alcohol testing program for employees who must have a Commercial Driver's License (CDL) in order to operate commercial vehicles on the job. The "Drug & Alcohol Testing Program for DOT Covered Employees" [Exhibit 1] explains this program. One of the definitions for "Refusal to Submit (a "Prohibited Behavior" in the Program) is that: "The MRO reports that you have a verified adulterated or substituted test result." " [Exhibit 1, page 11] The testing program has a number of "Employee Expectations" [page 38] including the following:

* * *

4. Submit to all required alcohol and drug testing and cooperate with all aspects of the testing process.

5. Proceed immediately to the designated collection site when directed.

* * *

7. Do not engage in prohibited behavior or conduct that obstructs the testing process.
8. Test negative for the presence of alcohol and drugs."

20. Mr. Rollins attended an SPU "CDL Drug and Alcohol Training Program" training session on September 25, 2000 where a prior version of Exhibit 1 provided the "educational materials" used. [Testimony of Rollins; Exhibit 2]

21. The federal regulations [Exhibit 13, Section 40.145] regarding the Medical Review Officer's verification of test results involving substitution, include that the employee must be offered the opportunity to "present a legitimate medical explanation for the laboratory findings..." and:

(e) The employee has the burden of proof that there is a legitimate medical explanation.

* * *

(2) To meet this burden in the case of a substituted specimen, the employee must demonstrate that he or she did produce or could have produced urine, through physiological means, meeting the creatinine and specific gravity criteria...

(3) The employee must present information meeting this burden at the time of the verification interview...

* * *

(g) As the MRO, you must exercise your best judgment in deciding whether the employee has established a legitimate medical explanation.

(1) If you determine that the employee's explanation does not present a reasonable basis for concluding that there may be a legitimate medical explanation, you must report the test to the DER as a verified refusal to test because of...substitution...

* * *

(h) The following are examples of evidence an employee could present...

* * *

(1)(ii) Assertion by the employee that his or her personal characteristics (*e.g.*, with respect to race, gender, weight, diet, working conditions) are responsible for the substituted result does not, in itself, constitute a legitimate medical explanation...the employee must present evidence showing that the personal characteristics actually result in the physiological production of urine meeting the creatinine and specific gravity criteria...

* * *

(2)(ii) To establish there is a legitimate medical explanation, the employee must demonstrate that the cited medical condition actually results in the physiological production of urine meeting the creatinine and specific gravity criteria...

22. Section 40.191(b) of the federal regulations notes that "As an employee, if the MRO reports that you have a verified adulterated or substituted test result, you have refused to take a drug test."

23. The Personnel Rules, at 1.3.3, provide the following regarding discharge of an employee:

C. A regular employee may be suspended, demoted or discharged only for justifiable cause. This standard requires that:

1. The employee was informed of or reasonably should have known the consequences of his or her conduct;
2. The rule, policy or procedure the employee has violated is reasonably related to the employing unit's safe and efficient operations;
3. A fair and objective investigation produced evidence of the employee's violation of the rule, policy or procedure;
4. The rule, policy or procedure and penalties for the violation thereof are applied consistently; and
5. The suspension or discharge is reasonably related to the seriousness of the employee's conduct and his or her previous disciplinary history.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to the delegation by the Civil Service Commission, SMC 4.04.250.

2. The employ asserts that the discharge here was improper because: 1) he was required to report to be tested when he was out on "time loss" due to an on-the-job injury; and, 2) it was not specifically determined how the urine specimen was altered (*i.e.*, diluted).

3. There is no support for the appellant's contention that "covered employees" generally and/or employees in a program requiring follow-up or other unannounced drug tests specifically, cannot be required to be tested while on "time loss".

4. Based upon having failed the pre-duty test by testing positive for the presence of a controlled substance, Mr. Rollins could have been discharged from his job at SPU back in December 2001. The Director of SPU, rather than follow the "zero tolerance" type approach of immediate discharge, gave Mr. Rollins a last chance to remain an SPU

employee. One of the essential elements of the Last Chance Agreement was not failing any drug test. Termination of his employment would be the consequence of failing. The result of the October 9th test was a failing result.

5. It is not the Medical Review Officer's responsibility, or that of SPU management, to specify how the substituted result came about. Dr. Wilson, an expert witness, testified credibly that there are only two medical conditions that could produce the result here, and Mr. Rollins has neither. It was the employee's burden to present evidence that some personal characteristic or physiological condition that he has could, and did, produce this result. Mr. Rollins did not do that and the conclusion here must be the same as that of the Medical Review Officer: this was a substituted specimen.

6. A substituted test result is treated the same as a result that shows evidence of prohibited drug use. The federal regulations and the City's testing program both consider a substituted result to be a refusal to submit which is a prohibited behavior to be treated the same as a result showing the presence of illicit drugs.


7. The substituted test result was a justifiable cause for discharge consistent with the Last Chance Agreement and the City's Drug Free Workplace policy. SPU's discharge of Mr. Rollins was not in violation of Rule 1.3.3.C. Mr. Rollins knew failing a drug test would result in termination. Drug testing is important in the safe functioning of the employing unit. The test and the investigation to verify the result, were conducted fairly and based upon recognized standards.

8. This is a harsh result for Mr. Rollins, but there is not a basis in the evidence of this record for a different conclusion. The result of the October 9th test used up his last chance to remain an SPU employee.

Decision and Order

The personnel action taken by Seattle Public Utilities to terminate the employment of Kirk Rollins is **AFFIRMED**, his discharge did not violate the provisions of the Personnel Ordinance or the Rules adopted to administer that Ordinance.

Entered this 13th day of February 2003.


Meredith A. Getches
Hearing Examiner

CONCERNING FURTHER REVIEW

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is subject to review by the Civil Service Commission. To be timely, the petition for review must be filed with the Civil Service Commission no later than ten (10) days following the date of issuance of this decision, as provided in Civil Service Commission Rules 7.01 and 7.03.