HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 56-04

DECISION

In The Matter of the Appeal of:

STEVE WILLIAMS, Appellant,

v.

Agency: Department of Parks and Recreation, and the City and County of Denver, a municipal corporation.

The hearing in this appeal was held on December 1, 2004 before Hearing Officer Valerie McNaughton. Appellant was present and represented by Nora V. Kelly, Esq. Assistant City Attorney Robert Nespor appeared on behalf of the Agency. Having considered the evidence and stipulations of the parties, the Hearing Officer makes the following findings of fact, conclusions of law and enters the following decision:

FINDINGS AND ANALYSIS

I. NATURE OF APPEAL

This is an appeal of Appellant's dismissal from his position as a Recreation Coordinator for the Department of Parks and Recreation (the Agency) on April 19, 2004 based upon the results of a random drug test given pursuant to a Stipulation and Agreement.

At the hearing in this appeal, Appellant stipulated to the admissibility of Agency's Exhibits 1 – 3 and pages 1 – 15 of Exhibit 5. The Agency stipulated to Exhibits A and C. Pages 16 and 17 of Exhibit 5 were admitted without objection. Dr. Stephen Hessl, Medical Review Officer for the city's drug testing program, testified about the drug testing process. At the conclusion of his testimony, the parties agreed to recess the hearing to allow Appellant to have the preserved split-sample of his urine specimen tested at an agreed-to certified laboratory. Appellant subsequently waived his request for testing of the sample. The matter was set for prehearing conference, at which time the parties stipulated to all previously submitted exhibits, and agreed to submit the matter on the stipulations and written briefs on the legal issues. The parties also stipulated to the following facts:

1. At all times pertinent herein, Appellant was a Recreation Coordinator for the Department of Parks and Recreation.

2. On July 7, 1998, Appellant tested positive for marijuana metabolites following post-accident testing.

3. As a result of that testing, Appellant was suspended for four (4) weeks and entered into a Stipulation and Agreement allowing random (urine) drug screening, signed on or about August 11, 1998.

4. On Appellant's first day back to work from that suspension, September 9, 1998, he was subjected to two drug screens, three hours apart, the first of which was considered negative and the second considered positive.

5. Appellant was dismissed from employment with the City and County of Denver on September 25, 1998. That dismissal was appealed to the Career Service Board Hearing Officer, the Career Service Board, the Denver District Court and the Colorado Court of Appeals, resulting in a reversal of Appellant's dismissal.

6. Appellant was reinstated to his position on October 16, 2003. Mr. Williams was required to consent to random drug testing as a condition of reinstatement.

7. On March 31, 2004, Appellant was subjected to a random (urine) drug screen. The preliminary result of that drug screen was positive for THC. The final result was also confirmed positive for marijuana metabolites at 19ng/ml. Upon notice of the drug screen results, the Agency placed Appellant on investigatory leave, effective March 31, 2004.

8. On April 8, 2004, the Appellant was given notice that the Agency was contemplating disciplinary action against him. A pre-disciplinary meeting with Appellant was held on April 15, 2004, whereat Appellant was given the opportunity to respond to the Agency's allegations of misconduct.

9. On April 19, 2004, Appellant was given notice that the Agency was dismissing him for misconduct in violation of the Career Service Rules and Executive Order 94, as set forth more fully in the notice of termination.

10. On April 29, 2004, Appellant filed his appeal to the Hearing Officer of the Career Service Board contesting his dismissal.

11. Mr. Williams did not hold a public safety sensitive or security sensitive position.

12. The testing done on March 31, 2004 was a random drug test and was not based upon any suspicion of drug use.

II. EVIDENCE

The evidence in this appeal is that Appellant first tested positive for marijuana metabolites on July 7, 1998 following an on-the-job accident resulting in property damage. [In re Williams, CSA 140-98, p. 3 (12/9/99).] On August 11, 1998, Appellant signed a Stipulation and Agreement in order to avoid termination for violation of the City's Alcohol and Drug Policy. [Exh. 3, Enclosure 1, Executive Order No. 94; and Exclosure 2, Stipulation and Agreement.]

Executive Order No. 94 states that "[a] first time violation of this policy, which does not result in a dismissal . . . shall result in a lesser disciplinary action in conjunction with a Stipulation and Agreement for treatment." A second offense during an employee's career with the city or its agencies results in dismissal. Id, pp. 12 -13. The Order sets the illegal drug cut-off level for marijuana metabolites at 15 ng/ml. Id, p. 17.

As a condition of his continued employment with the Agency, Appellant agreed to cooperate in a drug treatment plan and to a four-week suspension. [Exh. 3, Enclosure 7, Suspension letter dated Aug. 7, 1998.] He also agreed to abstain from the use of illegal drugs and to submit to urine and other drug screening at the employer's request until the parties both agreed in writing that it was no longer needed. [Exh. 3, Enclosure 2, Stipulation and Agreement.]

On September 25, 1998, Appellant was dismissed from his employment because he tested positive on one of two drug screens given three hours apart on his first day back from his suspension. Appellant appealed that dismissal. The Hearing Officer reversed the dismissal and reinstated Appellant, ordering that Appellant "shall continue to be subject to the Stipulation and Agreement" upon his reinstatement. [In re Williams, supra, p. 12. The Colorado Court of Appeals ultimately upheld the decision of the Hearing Officer, and Appellant was reinstated in October 2003.

Pursuant to the Stipulation and Agreement, Appellant was again subject to a random drug screen, which was positive for THC, marijuana metabolites. Testing by a federally certified laboratory established the result at 19 ng/mL, using Gas Chromatography/Mass Spectrometry Technique (GC/MS), which is known as the gold standard for drug identification in forensic drug testing. [Testimony of Dr. Stephen Hessl.] Appellant was terminated for violation of the terms of his Stipulation and Agreement, Executive Order No. 94 and related offenses. Exh. 2.] This appeal followed.

III. ISSUES

The parties stipulated that the following are the only issues in this appeal:

1. Whether the termination violated Career Service Rule (CSR) § 16-40D, and

2. Whether Appellant's March 31, 2004 drug testing violated his Fourth Amendment right to be free from an unreasonable search and seizure.

IV. ANALYSIS

1. Consideration of Discipline Older Than Five Years

Appellant first contends the Agency violated CSR § 16-40D by taking into consideration the August 1998 suspension in its decision to terminate Appellant in April 2004. CSR § 16-40D states that: "Personnel decisions relating to progressive discipline shall not take into account any disciplinary action which is more than five (5) years old, unless one or more disciplinary actions other than verbal warnings occurred within the five (5) year period."

The termination action at issue in this appeal was not imposed as a product of progressive discipline. Rather, termination was mandated as a second violation of Executive Order No. 94. "If it is determined after the appropriate predisciplinary meeting that any of the following situations apply; the employee shall be dismissed . . . for the following conduct. . . . 9. The employee violates Executive Order 94 for the second time in the employee's career with the City and County of Denver and/or its agencies." [Exh. 3, Enclosure 1, Executive Order 94, pp. 12 - 13.] After Appellant's first violation, he voluntarily signed a Stipulation and Agreement requiring treatment and consent to unannounced drug testing. [In re Williams, supra, Findings of Fact, pp. 3 – 4.] The Stipulation and Agreement by its terms continued until revoked by the parties. [Exh. 3, Enclosure 2, p. 3.] The April 2004 dismissal action was taken pursuant to Executive Order No. 94's requirement that an employee shall be dismissed for a second violation of the city's drug policy. The dismissal notice asserted that the Agency did not consider the August 1998 suspension as prior disciplinary history, and Appellant has presented no evidence disputing that assertion.

Appellant's interpretation of CSR § 16-40D would prohibit the Agency from using events occurring over five years ago for any purpose. Such an interpretation would invalidate Executive Order No. 94 (IV) (A) (9), which mandates dismissal for a second violation "*in the employee's career* [with the city] [emphasis added]." The rules stating the purpose and operation of progressive discipline are clear: "The type and severity of discipline depends on the gravity of the infraction." CSR § 16-10. "Wherever practicable, discipline shall be progressive. . . . This rule should not be interpreted to mean that progressive discipline must be taken before an employee may be dismissed." CSR § 16-20 2). The policies and rules of the city should be interpreted to be consistent with one another if such a reading would not do violence to the plain meaning of either. Since CSR § 16-40D and Executive Order 94 can be read to be consistent, I find that the former does not invalidate Executive Order 94's language mandating dismissal for second violations "in the employee's career." Therefore, the Agency did not violate CSR § 16-40D by relying upon the 1998 discipline as the first violation of Executive Order No. 94.

2. Fourth Amendment and Random Drug Test

First, Appellant argues that the Agency violated the Fourth Amendment's prohibition against unreasonable search by administering a random drug test to Appellant without a compelling state interest. The Agency responds that Appellant waived his rights under the Fourth Amendment by his acceptance of the August 1998 Stipulation and Agreement. Appellant rejoins that the consent was involuntary because it was obtained under threat of loss of a public benefit; i.e., Appellant's government employment, citing University of Colorado v. Derdeyn, 863 P.2d 929 (Colo. 1993).

None of the cases cited by Appellant support his argument, since the actions that were claimed to be consent constituted only mute submission to an otherwise unconstitutional search, given on pain of loss of a job or participation in a government benefit. University of Colorado, id; American Federation of Government Employees v. Weinberger, 651 F.Supp. 726 (S.D.Ga. 1986); Schaill v. Tippecanoe School Corp., 864 F.2d 1309 (7th Cir. 1988); Bolden v. SEPTA, 953 F.2d 807 (3rd Cir. 1991); and Ford v. Dowd, 931 F.2d 1286 (7th Cir. 1991). The constitutionality of Executive Order 94 has been upheld by the Colorado Supreme Court.

Here, Appellant submitted to the random drug test based on his previous written agreement to do so. Such agreements have been held to support the voluntariness of a consent to a random test. Jinzo v. City of Albuquerque, 1999 US App. LEXIS 14912 (10th Cir. 1999); Mararri v. WCI Steel, 130 F.3d 1180 (6th Cir. 1997). Constitutional rights may be waived if done knowingly and without duress. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Settlement agreements that provide a last chance for correction of behavior or rehabilitation are a well-accepted part of public employment practice. McCall v. USPS, 839 F.2d 664 (Fed.Cir. 1988); Stewart v. USPS, 926 F.2d 1146 (Fed Cir. 1991).

Second, Appellant contends that his consent to random drug testing as a part of the 1998 Stipulation and Agreement was involuntarily given because his refusal would have resulted in the loss of his employment. The Agency argues that Appellant's difficult choice did not render his apparent consent involuntary. Both parties concede that the voluntariness of a consent is a question of fact. Schneckloth, supra, at 226.

Appellant did not testify in this appeal or submit other evidence as to the circumstances surrounding his decision to sign the 1998 Stipulation and Agreement. The parties stipulated that Appellant "was suspended for four weeks and entered into a Stipulation and Agreement allowing random (urine) drug screening, signed on or about August 11, 1998" as a result of testing positive for marijuana metabolites on July 7, 1998 following post-accident testing. [Prehearing Order (2/10/05); Agency's Prehearing Statement (6/10/04)]. During Appellant's earlier appeal which resulted in his reinstatement, the hearing officer made the following findings as to that issue:

> At the hearing in the case at bar, the appellant admitted entering into the stipulation and agreement and that it was done in lieu of

> dismissal. He also testified on direct examination from the City Attorney that he entered into the agreement willingly. He admitted that he had 48 hours to think about the agreement before signing it, but that he decided to accept the terms of the agreement within an hour. He also testified that he understood the terms of the agreement. The stipulation and agreement provided that appellant would 'abstain' from the use of illegal drugs and alcohol. Appellant also agreed to submit to breath, urine or blood screening at the request of the employer for a period of at least one year.

[In re Williams, supra, Findings of Fact, pp. 3 – 4.]

The prior appeal concerned Appellant's actions taken as a result of his obligations related to the Stipulation and Agreement. Specifically, Appellant was required to submit to a random drug test on his first day back to work after his suspension in September 1998. Appellant did so on that day without claiming the agreement was involuntary. The resulting termination was ultimately reversed, and Appellant was ordered reinstated subject to the agreement's ongoing requirement to submit to random drug tests. In October 2003, just prior to Appellant's reinstatement, the Assistant City Attorney wrote a letter to Appellant's attorney in which he emphasized that Appellant remained subject to random drug tests in his reinstated position. [Exh. 4.] Appellant worked for five months before a random drug test was administered.

It is noteworthy that Appellant did not challenge the voluntariness of his consent to the 1998 agreement until the hearing in this appeal, which was held on December 1, 2004. Appellant accepted the benefit of the Stipulation and Agreement to return to work in 1998, and again in October 2003, despite his knowledge that the agreement required submission to random drug tests. I find that the Appellant's consent to the agreement was in fact voluntary, and that the drug testing of Appellant on March 31, 2004 did not violate his Fourth Amendment right to be free from unreasonable search and seizure.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered that the dismissal action of the Agency dated April 19, 2004 is AFFIRMED.

Dated this 6th day of
May, 2005

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Valerie McNaughton
Hearing Officer
Career Service Board

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CERTIFICATE OF DELIVERY

I hereby certify that I have forwarded a true and correct copy of the foregoing **DECISION** by MAILING same this 7th day of May, 2005, addressed to:

Nora V. Kelly, Esq.
1776 Lincoln St., S. 810
Denver CO 80203

Steve Williams
1005 South Jamaica St, # 312
Aurora, CO 80012

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the interoffice mail this 6th day of May, 2005, addressed to:

Robert D. Nespor
Assistant City Attorney
Litigation Section

Alvin Howard
Department of Parks and Recreation

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