STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ESCAMBIA COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-8012
	)	
WILLIAM DALE KITE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on October 27, 2010, in Pensacola, Florida.

APPEARANCES

For Petitioner: Joseph L. Hammons, Esquire
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For Respondent: Anthony D. Demma, Esquire
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STATEMENT OF THE ISSUE

The issue for determination is whether Mr. Kite ingested cocaine subsequent to his entry into a Return to Work Agreement with the Escambia County School Board on or about August 17,

2009. For the reasons explained more fully below, Mr. Kite should be reinstated to his position.

PRELIMINARY STATEMENT

Respondent, William Dale Kite, a welding instructor with the Escambia County School Board (School Board) was terminated from his employment subject to his opportunity to contest charges of misconduct against him as authorized by Chapter 120, Florida Statutes. On August 4, 2009, Respondent was required to submit to a reasonable suspicion drug screen based on reports from other employees that he appeared to be impaired at work. The drug screen on that date resulted in a positive indication of cocaine. The School Board offered, in accordance with its policies and Collective Bargaining Agreement, the opportunity for Respondent to enter into a Return to Work Agreement (RTW Agreement) whereby he would be allowed to continue his employment with the School District if he would undergo evaluation and treatment for substance abuse and successfully complete all terms and conditions of the agreement. Those terms and conditions included the requirement that he remain free from unlawful drug use during any time the agreement was in force.

On May 17, 2010, Respondent was directed to submit to a random urine drug screen. Because of miscommunications between the School Board and the drug testing facility, Respondent did not receive the full panel urine test customarily requested by

the School Board on May 17 and, when he returned on May 18, 2010, was required to undergo a drug screen based on a hair sample. This was at the direction of School Board Risk Management. The hair sample tested positive for cocaine. Respondent, however, disputes that the cocaine was ingested during the time the RTW Agreement was in force and represents that his last cocaine use preceded the implementation of the agreement on August 17, 2009. He requested a hearing to challenge the termination action approved by the School Board. The hearing was conducted on October 27, 2010, in Pensacola, Florida.

At the hearing, Petitioner presented the testimony of Kevin Windham, Carley McCorvey, and Charles H. Moorefield, III, M.D. (via deposition), and offered eight exhibits into evidence. Respondent testified on his own behalf and presented the testimony of Coulson Barfield and William R. Sawyer, Ph.D. (via deposition), and offered three exhibits into evidence.

A Transcript was filed on November 15, 2010. Petitioner and Respondent subsequently filed their proposed findings of fact and conclusions of law on December 3, 2010.

References to statutes are to Florida Statutes (2010) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner is responsible for the public education of students grades K-12 in Escambia County, Florida.

2. At all times relevant to these proceedings Respondent, William Dale Kite, was employed by the School Board as a welding instructor. He is fifty years of age.

3. On August 4, 2009, Respondent was required by his employer, the School Board, to submit to a drug screen based upon reasonable suspicion. Other employees at work had reported observing behavior indicating Respondent was impaired. He submitted to the drug screen and tested positive for cocaine.

4. As a result of testing positive for cocaine, and pursuant to the School Board's policies and Collective Bargaining Agreement, Respondent was offered an opportunity to enter into a RTW Agreement. The RTW Agreement was executed August 17, 2009. The agreement specifically provides, among other things, as follows:

> I understand that a repeat drug offense will be grounds for termination.
>
> I understand, acknowledge and agree that my failure to comply with the provisions of this Agreement, including my failure to remain drug/alcohol free shall constitute grounds for my termination from employment with the Escambia County School District and waive any entitlement to my employment, benefits or compensation, thereof, effective my date of termination.

> I further understand, acknowledge and agree that I waive any/all rights to challenge a subsequent termination action premised on a *repeat* positive drug/alcohol test through the provisions of Article III - Resolution of Grievances and Problems other than based on the accuracy of the alcohol screening test.

(italics in original)

5. On December 7, 2009, Respondent signed an addendum to the RTW Agreement acknowledging his return to work, and his continuing obligation to comply with the original RTW Agreement and subsequent addendums. Prior to December 7, 2009, Respondent, in accordance with the RTW Agreement, had been on suspension without pay while he completed the initial evaluation and treatment obligations under the RTW Agreement.

6. As a condition of the RTW Agreement, Respondent was obligated to submit to random drug screens and to be responsible for the costs of those drug screens.

7. Respondent had received random drug screens during the term of the RTW Agreement in November 2009 and January 2010, and had tested negative for cocaine on both occasions.

8. On May 17, 2010, Respondent was directed by Kevin Windham, Petitioner's Director of Risk Management, to submit to a random drug screen. Mr. Windham had attempted to send, via facsimile, to the drug testing facility, ProHealth, a request for a nine-panel urine drug screen.

9. ProHealth did not receive the facsimile request for the nine-panel urine drug screen by the time Respondent had reported for a drug screen. Without instructions from the employer, the drug testing facility administered what it described as a "personal" request for drug screen based on information provided by Respondent that he thought he was to be tested for cocaine and marijuana.

10. Respondent had never previously seen the paperwork from the School Board when he presented himself for a drug screening. He knew nothing of the number of panels to be tested or anything other than he was at least to be tested for the presence of cocaine.

11. This two-panel urine drug screen produced a negative result for cocaine and marijuana.

12. When Mr. Windham learned the School Board requested drug screen had not been received by ProHealth and that Respondent had not been tested with a nine-panel urine drug screen, he contacted Respondent by telephone and told him to return to the drug testing facility to complete the full test.

13. Mr. Windham spoke with Respondent between 3:15 and 3:20 in the afternoon advising Respondent he must return to the drug testing facility for the requested test before 5:00 p.m. Although instructed to return, Respondent did not do so because he was nearing his home in Molino, about 25 miles north of

Pensacola where the drug testing facility was located. He assumed he could return first thing in the morning for the test since the two-panel test actually completed was negative for cocaine and marijuana.

14. Respondent did not fail to return the afternoon of May 17 because he had anything to hide since he had tested negatively for cocaine in the two-panel test. He just felt like getting home for the evening after a full day at work.

15. When Mr. Windham learned that Respondent did not go back for the desired nine-panel urine test, he took steps to have Petitioner subjected to a five-panel hair sample testing the next morning to include testing for extended opiates.

16. By Medical Review Officer (MRO) report of May 26, 2010, Kevin Windham was advised the hair samples had tested positive for cocaine. Petitioner's belief was that the hair sample test was designed to cover a period of one to three months for drug detection, therefore indicating that Respondent had ingested cocaine after entering into the RTW Agreement on August 17, 2009, nine and one-half months earlier.

17. When told of the positive result for cocaine, Respondent stated that he had not used cocaine after August 17, 2009, the date he entered into the RTW Agreement.

18. Respondent admits that he was introduced to cocaine in the late 1970's. He utilized cocaine over the years "once a

year or so." Respondent denied using cocaine after signing the RTW Agreement on August 17, 2009. He testified he last used cocaine in Miami in late July of 2009. He also acknowledged that he was aware that if he used cocaine while subject to the RTW Agreement, he would be terminated.

19. Hair sample tests are capable of detecting cocaine usage that occurred from several months up to years earlier, depending upon the lab procedure used, the length of the hair sample, and related hair growth factors.

20. The hair sample that was taken from Respondent was retrieved on the morning of May 18, 2010, by Carley McCorvey, a medical assistant with the drug testing facility, ProHealth.

21. Ms. McCorvey had been trained to retrieve hair samples from three different sections of the back of a subject's head. The samples were to be retrieved from the back of the head at a level between the ears. One section is the middle, and the other two are on the left and right sides of the back of the head at the ear level. The sample from Respondent was supposed to be retrieved by Ms. McCorvey by cutting the hair as close to the scalp as possible.

22. Ms. McCorvey believed the hair samples she cut were about an inch in length. Respondent believed the samples she took were longer, from an inch-and-a-quarter to an inch-and-a-half.

23. Regardless of the length, the sample was placed in a foil pouch and sent to an offsite laboratory for testing.

24. The length of the sample hair taken is important, however, for determining how long before the sample was taken that the subject, in this case Respondent, had ingested cocaine.

25. At the time of the May 18, 2010, hair sample test performed on Respondent, ProHealth Medical Assistant Carly McCorvey had only worked in that capacity for approximately four months, and she had only previously taken hair samples as many as five times. Ms. McCorvey was both inexperienced and inattentive to the proper protocol in dealing with Mr. Kite that day, as evidenced by her failure to note the correct date on the hair sample chain of custody form. She also subsequently failed her test to become a certified medical assistant. Ms. McCorvey did not know Respondent at the time she conducted the hair test on him, and she did not learn of this litigation until the day before her deposition, so there is no reason to believe she had any specific recollection of exactly how she cut Respondent's hair when asked about it months later.

26. Respondent clearly recalls that the hair sample taken by Ms. McCorvey was not clipped close to his scalp, but was a cut made closer to the end of the hair. Although he could not see Ms. McCorvey actually snipping the hair from his head, he testified that he did not feel the cold of the scissors on his

head and that she took the sample from the thickest part of his hair which would have been two to three inches long. He believes she clipped the hair on the outside of the clip, rather than underneath the clip.

27. Respondent's hair was maintained at a length of more than two inches in the area of his head from which the May 18, 2010, hair samples were taken. Due to the nature of his male pattern baldness and slow rate of hair growth, his barber, Mr. Coulson "Cole" Barfield, cuts very little of his hair in that area to allow the longer hair (over two-and-a-half inches) to cover and flow evenly into the shorter, closer cropped hair farther down the back of Respondent's head. Respondent's hair growth patterns closely resemble those of individuals who had the slowest rate of hair growth in multiple, scientific studies performed concerning this subject.

28. According to his barber, Respondent's hair grows slowly enough that he gets it cut only every three to four months. Respondent's hair was close to its longest state on May 18, 2010, as he needed a hair cut within a week or two after the hair samples were taken. He did not get his hair cut again until late September 2010.

29. Both Petitioner and Respondent relied upon expert testimony to support their respective positions concerning whether the hair sample collected by Ms. McCorvey at ProHealth

proved Respondent had ingested cocaine while under the RTW Agreement.

30. Dr. Charles H. Moorefield, the medical review officer (MRO), testified on behalf of Petitioner with regard to the hair sample and laboratory results from the drug screen of May 18, 2009. Dr. Moorefield is a physician licensed to practice medicine in the State of Florida with board certification in family practice. He is a diplomat with the National Board of Medical Examiners, a certified MRO, and a certified Workers' Compensation Provider. Dr. Moorefield was certified as a MRO on February 7, 1993. Since that time he has served as a MRO with respect to drug screens on a daily basis.

31. As a MRO, Dr. Moorefield reviews positive drug screens with the donor to determine if there is a medically acceptable reason for the positive result. In this case he reviewed Respondent's positive result for cocaine from the hair sample retrieved May 18, 2010.

32. Dr. Moorefield contacted Respondent by telephone to determine if he could provide any information that would otherwise explain a positive result for cocaine. He also offered Respondent the opportunity to have the specimen sent to another lab for drug testing.

33. Respondent offered no explanation that would otherwise explain the positive result for cocaine on the hair sample that

was retrieved on May 18, 2010. He stated that he had not used cocaine since July 2009.

34. With regard to drug tests using hair samples, Dr. Moorefield testified that the appropriate procedure is to sample the hair from as close to the scalp as possible, and place the hair sample in a foil pouch with the sample oriented in a way so that the laboratory could identify the end from the sample cut closest to the scalp. Samples retrieved in this manner can determine whether cocaine has been ingested by the person giving the sample for a period of approximately 90 days.

35. Dr. Moorefield never met Respondent, never obtained any information about his pattern or rate of hair growth, and did not take or analyze the hair sample in question. Therefore, everything about Dr. Moorefield's opinion as to how recently Respondent ingested cocaine is completely dependent upon matters outside of his observation or personal review.

36. Dr. Moorefield has little or no experience or training in areas related to toxicological analysis or hair sample testing issues, and he engaged in no research about hair growth studies for purposes of his testimony.

37. William P. Sawyer, a Ph.D. toxicologist, testified on behalf of Respondent. Dr. Sawyer is the "chief toxicologist" with Toxicology Consultants and Assessment Specialists, LLC, of Sanibel, Florida. Dr. Sawyer received photographs of Mr. Kite's

hair growth patterns and reviewed and relied upon several respected hair growth rate studies in formulating his opinion that this hair test likely detected only cocaine residue in Mr. Kite's hair from his July-August 2009, cocaine use.

38. Dr. Sawyer criticized the testing of the entire hair sample for cocaine rather than "sectioning" it into segments to be tested individually to determine whether and, if so, when cocaine may have been ingested by the subject. Assuming the hair tested was of sufficient length to look back at nine months of cocaine ingestion, and by testing the entire length of the hair sample, the tester could not determine when cocaine had been ingested, only the fact that it had been ingested at some time during the period of hair growth.

39. According to Dr. Sawyer's report of August 31, 2010, the growth rate for human hair ranges from .24 to .59 inches per month. Based upon the slower growth rate, a hair length sample from Respondent of 2.16 inches would include hair produced nine months earlier.

40. By the time of his deposition testimony, which was introduced into evidence at hearing, however, Dr. Sawyer identified an even slower growth rate from a study done by Valente that would allow a nine-and-a-half month growth of hair to be as little as 1.87 inches. In rendering his opinion that the hair sample testing positive for cocaine from Respondent

could result from cocaine ingestion nine-and-a-half months previous to the sample being taken, Dr. Sawyer assumed, for purposes of his opinion, that the hair sample would be as long as two inches.

41. Dr. Sawyer explained in his report how using a growth rate of .24 inches per month, the longest period of time the sample could test positive for cocaine prior to the sample being retrieved would be exactly nine months. This is the result of multiplying .24 inches per month times nine months for a total of 2.16 inches as reflected in his report. Dr. Sawyer admitted that, if the sample were only an inch-and-a-half, using a growth rate of .24 inches per month the sample would only be good for 6.3 months prior to the sample being retrieved.

42. Under Dr. Sawyer's analysis, using even the slowest growth rate for human hair identified in any study, the Valente study, a hair sample that does not reach or exceed an inch-and-a-half cannot reach a period of more than nine months earlier than when the sample was retrieved on May 18, 2010.

43. Based upon the testimony of Respondent and his barber, Respondent's hair growth rate falls at the lower end of the spectrum. Using the slowest growth rate offered by any witness at the hearing, the sample would have to be nearly two inches in length to support the ingestion of cocaine at least nine months prior to the May 18, 2010, hair retrieval date.

44. The hair sample retrieved on May 18, 2010, was an inch-and-a-quarter to an inch-and-a-half in length. If that hair sample had been clipped close to his scalp, and if the length of that sample had not exceeded an inch-and-a-half, then Petitioner would have established that Respondent ingested cocaine while he was under the RTW Agreement.

45. Respondent's hair was greater than an inch-and-a-half in length based upon his testimony, his barber's testimony, and the photographs entered into evidence.

CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, and 120.57(1), Fla. Stat.

47. In this proceeding, Petitioner seeks to terminate the Respondent's employment. Petitioner bears the burden of proof, and the standard of proof is by a preponderance of the evidence. McNeill v. Pinellas County Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996) (citing Dileo v. Sch. Bd. of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990)).

48. Respondent's July-August 2009, cocaine use is not at issue, and the parties agree that he can lawfully be terminated under the RTW Agreement if he is found to have ingested cocaine after entering into the RTW Agreement. Therefore, the outcome of this matter rests only upon the question of whether the

School Board has provided sufficient evidence to overcome Respondent's unequivocal denial of any subsequent use of cocaine; the negative urine test results from November 2009, January 2010, and May 17, 2010; the testimony of Cole Barfield about Respondent's hair growth and haircut patterns; and the expert toxicological testimony of Dr. Sawyer that plausibly explains how the May 18, 2010, hair sample test could be positive even if Respondent did not ingest cocaine after August 2009.

49. The School Board presented no testimony from anyone who can corroborate Respondent's alleged use of cocaine after August 2009, and there is nothing in this record about Respondent's job performance or behavior after his December return to the classroom that expresses or confirms concerns that he has continued to use illegal drugs. Further, Respondent subjected himself to a urine test, as ordered, on the afternoon of May 17, 2010, and the negative result of that test definitively shows that he had not used cocaine during the recent time period the random urine test was intended to take into account in the first place. It is undisputed that Mr. Kite's urine would have been tested correctly (the nine-panel screen) but for Petitioner's failure to timely inform the ProHealth staff by fax of the precise testing it wanted performed. It is also undisputed that Respondent's May 17,

2010, urine sample would have tested negative for cocaine use, irrespective of how many other substances were checked for in addition to cocaine, had the drug testing facility timely received the proper paperwork. In effect, Respondent was punished for not returning nearly 25 miles to the drug testing facility on May 17, 2010, late in the afternoon after a full day's work, knowing he had already received a negative result on the screen for cocaine, the banned substance that led to his entering into the RTW Agreement in the first place.

50. To compound matters, when Respondent returned to the drug testing facility, rather than undergoing a urine screening, he was informed he would have to give a hair sample to be tested. The sample was taken by an inexperienced medical assistant who had collected only about five hair samples previously for testing. The assistant incorrectly marked the date on the sample as May 17 rather than May 18. Also, according to the testimony of Respondent, she may have snipped the sample outside the hair clip attached to Respondent's head rather than below the clip against his scalp. He did not feel the cold scissors against his scalp when the sample was taken. From the testimony and evidence at hearing, hair of a sufficient length was present on Respondent's head to allow a sample of at least two to three inches to be taken if the cut was properly made in the thickest part of his hair between his ears.

51. Ms. McCorvey, the medical assistant who retrieved the hair sample from Respondent, had not thought about the actual collection of the hair sample from at least May 18 until she learned that her deposition would be taken, in October. During that time she performed countless drug screenings and could not reasonably be expected to remember any particular one in any great detail. Respondent, on the other hand, had his life changed significantly by the May 18 drug screening and, understandably, recalls every detail.

52. Neither expert witness who testified via deposition about the hair sampling process and appearance of banned substances in the sample actually reviewed the sample taken from Respondent on May 18, 2010. Everything they relied upon in their analyses of the sample was based upon reports, photographs, and information supplied by counsel for the respective parties. While both are highly qualified in their fields, the most helpful testimony they offered was that hair grows at a variety of rates, from less than .24 inches per month to over half an inch per month. The familiarity and great detail of Respondent's barber, Cole Barfield, with his hair and the slowness of its growth, however, as well as Respondent's recollection of the hair sampling procedure, is impossible to ignore. The length of hair was present on the relevant area of

Respondent's head to allow a sample to be taken of at least two inches.

53. The testimony of both Dr. Sawyer and Dr. Moorefield is credible concerning hair growth rates. When their testimony is combined with Mr. Barfield's, no question exists as to the fact that Respondent's hair growth rate is slow. The concern over whether the medical assistant clipped the entire length of Respondent's hair from the scalp outward is real. It is not reasonable to conclude that she could only have clipped an inch-and-a-quarter to an inch-and-a-half of hair when the length greatly exceeded two inches on the rear of Respondent's head if she had actually retrieved the sample in the manner she was trained to do so. This is further supported by Respondent's testimony that he clearly recalls not feeling the scissors near his scalp at the time of the retrieval.

54. The preponderance of the evidence in this matter establishes that Respondent's hair in the areas sampled was approximately two-and-a-quarter to two-and-a-half inches long on May 18, 2010; that Ms. McCorvey clipped his hair with the one half inch clip secured near the roots; and that she cut samples of approximately an inch-and-a-quarter to an inch-and-a-half that stretched from the side of the clip closest to the end of Mr. Kite's hair to the end of his hair in each location.

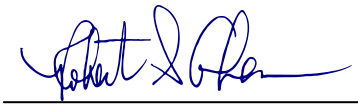
55. For all of the reasons noted above, Petitioner has failed to prove by a preponderance of the evidence that Respondent ingested cocaine at any time after August 2009, and therefore has not proved that it had just cause to terminate his employment. As a consequence, Respondent should be reinstated to his former position and reimbursed his back pay and any back benefits to which he would have been entitled had his employment not been terminated by the School Board.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Escambia County School Board enter a final order reinstating William Dale Kite to his former position, awarding him back pay, and awarding him those benefits to which he would have been entitled as an employee had he not been terminated.

DONE AND ENTERED this 17th day of December, 2010, in Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.