

**STATE OF IOWA
EXECUTIVE BRANCH
SUBSTANCE ABUSE POLICY GUIDELINES FOR SUPERVISORS
Last Update: 02/2011**

I. Background

Drug abuse and use, including alcohol (hereinafter, the use of the term “drugs” includes alcohol) at the workplace are subjects of immediate concern in our society. These problems are extremely complex and ones for which there are no easy solutions. From a safety perspective, the users of drugs may impair the well being of all employees and the public at large. Furthermore, employees have the right to work in a drug-free environment and to work with persons free from the effects of drugs. Drug abuse or use may also result in damage to state property.

Employees who use illegal drugs or abuse other controlled substances on or off duty, tend to be less productive, less reliable and prone to greater absenteeism resulting in the potential for increased costs, delay and risk in carrying out a department’s mission.

The State of Iowa is committed to maintaining a safe workplace free from the influence of drugs. In managing this issue, federal and state laws, case law, rules and regulations, the collective bargaining agreements and arbitration decisions must be considered. These policy guidelines on substance abuse have been developed to assist supervisors and managers in dealing with alcohol and drug related issues.

II. Legal, Administrative and Contractual Considerations

The requirements upon which the state’s substance abuse policy and these guidelines are based include the following legal, administrative and contractual considerations.

A. Legal Authority

1. The Iowa Civil Rights Act (Chapter 216A of the Iowa Code); the Federal Rehabilitation Act (29 USC § 794); and the Americans with Disabilities Act (42 USC § 104(a)):

These state and federal statutes all include a prohibition against discrimination in employment based on a bona fide condition of disability. A person with a disability may be protected by this legislation on the basis of a “physical or mental impairment” that substantially limits a major life activity such as working. A recovering substance abuser who is rehabilitated or undergoing rehabilitation would fall within this definition. However, under the Rehabilitation Act, the definition of a person with a disability, for purposes of employment, does not include someone whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment by reason of such current alcohol or drug abuse would constitute a direct threat to property or the safety of others. Similarly, the Americans with Disabilities Act (ADA) which became effective July 1, 1992, also states that a person who currently uses illegal drugs, comes to work under the influence of alcohol, or uses alcohol at the workplace is not a person with a “disability.”

An employer may hold a substance abuser to the same standards of job performance as other employees, even if unsatisfactory performance is attributable to the employee’s drug use or alcoholism (ADA, 42 USC Section 104(c)(4)). Thus, an employer may discipline a substance abuser for poor job performance.

2. Drug-Free Workplace Act of 1988; State of Iowa's Executive Order #38:

The intent of the federal Drug-Free Workplace Act of 1988, and the State of Iowa's Executive Order #38 is to provide an alcohol and drug-free work environment. Executive Order #38 requires state employees to report to work in appropriate mental and physical condition and prohibits the "unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance on the employer's premises or while conducting the employer's business." Additionally, pursuant to the Drug-Free Workplace Act, a criminal drug statute conviction for a violation which occurred in the workplace must be reported to the employer within five (5) days of conviction. The department must report the conviction to the federal granting agency administering the federal grant for which the employee was directly engaged in the performance of work within ten (10) days of the notification.

3. Under Iowa Department of Administrative Services – Human Resources Enterprise Rules (IAC 11-54.7[3]), the only pre-employment drug testing authorized is for Department of Corrections' correctional officer positions. Pre-employment drug testing of Department of Public Safety peace officer candidates is provided for under procedures administered by the Department of Public Safety.

Further, DAS-HRE rule 11.54.7(1) states, "Employees shall not report to work while under the influence of alcohol or illegal drugs. The unauthorized use, possession, sale, purchase, manufacture, distribution, or transfer of any drug or alcoholic beverage while engaged in state business or on state property is prohibited. Employees who violate this policy are subject to disciplinary action up to and including discharge."

B. Labor Agreements

The current collective bargaining agreements must be reviewed to determine any limitations or procedural requirements regarding substance abuse or the Employee Assistance Program (EAP) for employees covered by that Agreement.

III. Procedures

A. On-the-Job Use, Abuse or Misconduct

1. Evidence of Use/Abuse

a. On-The-Job Use:

This situation involves either a direct observation of employee use on-the-job or circumstantial evidence such as an open bottle or can, or the smell of an alcoholic beverage on the employee's breath; a discarded needle or other drug paraphernalia, etc.

b. Coming to Work Under the Influence:

This situation arises when the employee reports to work or returns from lunch or breaks, etc., and appears to be under the influence of alcohol or drugs.

Arbitrator Charles Carnes gave a description of the symptoms of intoxication or impairment in General Felt Industries v. International Association of Machinists and Aerospace Workers, 74 LA 972, 975 (Carnes 1979):

Most arbitration cases of this sort seem to apply a “subjective test” (probably because that is usually the only kind of evidence available). This test utilizes the classical signs of intoxication which are fairly well known to give a fair indication of the state and degree of influence. The signs are:

- speech -- thick, slurred, loud;
- flushed face;
- general appearance -- dishevelment, dirtiness, unkemptness;
- appearance of eyes -- red, watery, heavy lids, fixed pupils;
- breath -- foul, distinctive odor of various intoxicants;
- gait -- walking unsteadily, deliberately and overcarefully, swaying, weaving, stooped;
- behavior -- excessive silliness or boisterousness, etc.

Further, the Iowa Criminal Jury Instructions Section 2500.5 (6/88) allows a jury to conclude that a person is “under the influence” of alcohol or drugs when one or more of the following is true:

- 1) His/Her reason or mental ability has been affected;
- 2) His/Her judgment is impaired;
- 3) His/Her emotions are visibly excited;
- 4) He/She has, to any extent, lost control of bodily actions or motions.

Judgment must be exercised in response to the totality of the observed circumstances. The greater the number and more pronounced the signs, the greater the assumption of alcoholic or other chemical influence and thus, performance impairment.

c. Action to be Taken:

When the supervisor or other employees observe the above-referenced symptoms or observe an employee possessing or consuming alcohol, or possessing or using illegal drugs on the employer’s premises or while conducting the employer’s business, the supervisor must proceed as follows:

- (1) Conduct an investigation immediately. Witnesses are to be instructed to immediately reduce their observations to writing and to sign and date their statements. Carefully collect and preserve any relevant evidence. (State employees are entitled to protections of the U. S. Constitution (search and seizure clause). Before conducting ANY searches, contact your personnel officer.)
- (2) Fulfill the requirement of due process. The investigation must include a meeting with the employee and if the employee requests, a union representative, or if the employee is not covered by a labor agreement, a non-contract covered co-employee. The supervisor must present the allegations to the employee at this meeting and allow the employee an opportunity to respond to the charges and offer any mitigating circumstances. If possible, this meeting should take place prior to sending the employee home. If chemical dependency is raised as a defense in the investigation or if the supervisor reasonably believes that chemical dependency may be a mitigating factor, the disciplinary action may be held in abeyance pending the outcome of a chemical dependency evaluation (see Section III.D on Chemical Dependency).
- (3) Suspend the employee with pay pending investigation. This action must be reduced to writing in the form of a letter or memo and given (certified mail or hand delivered) to the employee. Further, if hand delivered, the employee must be asked to sign the letter to acknowledge its receipt. If the employee is unable or refuses to sign the acknowledgement of receipt, the supervisor must make note of that fact on the letter, and date and initial it. Place a copy of the letter in the employee's personnel file.
- (4) Assist the employee in making arrangements to be taken home. DO NOT allow the employee to drive home. If the impaired employee insists on trying to drive or operate a vehicle, call the appropriate law enforcement officials.
- (5) Impose discipline when warranted. After an investigation has been conducted and if the findings support the imposition of discipline, management must determine the degree of discipline to be imposed. Thereafter, a meeting to inform the employee of the disciplinary action to be imposed must be held. Because this meeting is not investigatory, but is only to inform the employee of the action to be taken, union representation is not appropriate. Keep in mind, however, that if this meeting deviates from merely informing the employee of a disciplinary action to a discussion of the merits of the investigation, the nature of the meeting has changed and the employee has the right, if requested, to have a union representative present (refer to Weingarten Rights in the Managers and Supervisors' Manual, Section 11.20(B)(3 and 5).
- (6) If the employee raises chemical dependency as a mitigating factor, see Section IIIC.

2. Indirect Manifestations of Substance Abuse

When dealing with issues of deteriorating job performance, or tardiness or absenteeism, if the supervisor suspects that substance abuse may be the cause of the problem, the supervisor should consult with the Iowa Employee Assistance Program (EAP) and the DAS-HRE personnel officer assigned to the department to discuss the employee's symptoms. If they determine that there is a reasonable likelihood that substance abuse is the basis of the employee's problem, a plan of action needs to be developed. The work performance and behavior problems need to be well documented. When counseling the employee regarding his/her work performance, the supervisor should describe the problems and suggest that the employee seek assistance (refer to EAP) in resolving any personal problems interfering with work. The supervisor should not diagnose the problem (e.g., "I think you are an alcoholic").

A supervisor should take disciplinary action as necessary, and put the employee on notice that a lack of improvement in job performance or attendance will lead to further disciplinary action up to and including discharge. (For further guidance, see Section 9.25.)

3. Illegal Possession, Sale, Distribution, Manufacture of Drugs or Alcohol On-the-Job or on the Employer's Property

If the supervisor becomes aware of, or reasonably believes or suspects illegal possession, sale, distribution, or manufacture of drugs or alcohol, the appropriate authorities should be called to handle the situation. On the capitol complex, call Capitol Police (281-5608); elsewhere call the local law enforcement authorities.

Management must conduct an independent investigation of the situation in order to determine the appropriate disciplinary action, regardless of the status or outcome of any criminal investigation. Information obtained in the administrative investigation under threat of loss of job or other discipline is not admissible in a criminal proceeding.

Arrest and incarceration may necessitate temporary removal of the employee from the job. Leave without pay or reassignment of duties are possible alternatives based on the circumstances. If there is a nexus between the offense and the employee's job, termination on the basis of the behavior leading to the employee's arrest may be appropriate following an independent investigation. However, conviction of charges of illegal possession, sale, distribution, or manufacture of drugs or alcohol while conducting the employer's business or while on the employer's premises (including state-owned vehicles) shall result in discharge.

Again, the Drug-Free Workplace Act of 1988 requires that any employee's conviction of a criminal drug (not alcohol) offense which occurred in the workplace must be reported to the employee's supervisor within five (5) days after the conviction. The department must report the conviction to the federal agency administering the grant for which the employee was directly engaged in the performance of work within ten (10) days of notification.

B. Off-Duty Misconduct

For an arbitrator to sustain discipline for off-duty misconduct resulting from drug or alcohol abuse/use, the employer must show that there is a clear nexus between the off-duty misconduct and the employee's job. That conduct must adversely affect the employer's business or reputation, threaten the welfare of other employees, or render the employee unfit to perform his/her duties. Inland Container Corp. v. United Paperworkers of America, 28 LA 312 (Ferguson 1957).

Jobs that require employees to enforce laws or supervise those convicted of breaking the law have an apparent nexus between the job and off-duty unlawful misconduct. For such employees, use, possession, sale, distribution, or manufacture of illegal or controlled substances is grounds for summary discharge without consideration of chemical dependency as a mitigating circumstance after an independent investigation substantiating the allegations. However, there must be clear notice to employees that this penalty will be imposed for such an infraction.

Depending on the circumstances (the employee's work history and the nexus between the offense and the employee's job), behavior leading to arrest or a conviction of Operating While Intoxicated (OWI), or public intoxication may be grounds for discipline or discharge. Following an administrative disciplinary investigation, if an employee is found to have operated a state vehicle while impaired, regardless of on or off duty, the employee will be discharged.

When an employee whose job duties require him/her to possess a valid driver's license, chauffeur's license, or commercial driver's license (CDL) loses his/her license due to drug or alcohol offense and cannot get a work permit, the employee shall be immediately discharged on the grounds that the employee no longer meets the minimum qualifications for the job. Management however, should assist the employee in obtaining a work permit.

If an employee is incarcerated after a conviction of a drug or alcohol offense and is unavailable for work, the employee will be discharged unless extenuating circumstances exist. If extenuating circumstances exist, the appointing authority may, at his or her discretion, grant a leave of absence without pay or annual leave for the period of a limited incarceration. However, it is the employee's responsibility to notify the employee's supervisor and the employee must request the leave of absence. Employees who are absent from duty for three consecutive workdays without proper authorization from the appointing authority may be considered to have voluntarily terminated employment.

If a department has employees in positions which have a strong nexus between the job and off-duty drug or alcohol offenses, work rules must incorporate requirements to report such arrests or convictions and must give notice of the penalty to be imposed if the independent investigation substantiates the alleged offense.

C. Chemical Dependency as a Mitigating Factor

As the substance abuse policy states, the discipline for offenses is discharge absent mitigating circumstances. Mitigating factors include the length of employment, the employee's work history and performance. Chemical dependency (drug or alcohol) may be considered a mitigating circumstance. If chemical dependency is raised as a defense in the investigatory meeting, or if the supervisor has a reasonable belief that chemical dependency may be a mitigating factor, the discipline may (at management's discretion) be held in abeyance while the employee seeks an evaluation and treatment, UNLESS:

1. The employee's job is such that the offense would compromise his/her ability to responsibly perform the job duties or would compromise the employer's fulfillment of the agency's mission, or
2. The employee has previously violated this policy and been given a final written warning or is under a "Last Chance Agreement," or
3. The offense is so egregious that summary discharge is the appropriate action.

During the period of time when the employee is waiting for an evaluation or being evaluated to determine chemical dependency, he/she will not be permitted to work and will be placed on administrative leave. If the results of the evaluation conclude that the employee is not chemically dependent, the supervisor should proceed with discipline. If the employee is found to be chemically dependent, and it is the employee's first offense, the chemical dependency may be considered a mitigating factor and a "Last Chance Agreement" may be drawn up that would provide for lesser discipline if the employee successfully completes a treatment program, and agrees to abstain from the consumption of alcohol or use of drugs for a reasonable period of time (generally, two (2) years). Any time taken as leave without pay may be considered as part of the disciplinary action. Treatment time can be taken as sick leave upon request of the employee with appropriate documentation if accrued sick leave is available. The last chance agreement must be signed by the supervisor, the employee, and the union representative (if applicable).

An alternative action, depending on the circumstances, is to terminate the employee at the time of the offense and, following an evaluation and successful completion of treatment initiated by the employee, reinstate him/her with a written "Last Chance Agreement." (Call your personnel officer for assistance.)

D. Chemical Dependency Evaluations

It is the employee's responsibility to seek evaluation and to provide management with documentation of a chemical dependency evaluation and recommendations if the employee wants the chemical dependency to be considered as a mitigating circumstance.

Evaluations for chemical dependency must be conducted by a certified substance abuse professional at a licensed facility. Evaluations may be secured directly through a chemical dependency program. The Iowa Employee Assistance Program (EAP) (515-244-6090 or 1-800-327-4692) can assist with securing an evaluation.

Some facilities provide evaluations at no cost. Some charge a fee which may or may not be covered by the employee's health insurance. EAP is familiar with the state's health insurance coverage and can be most helpful in securing evaluations. Any fees for evaluations not covered by health insurance are the responsibility of the employee.

IV. Summary

The State's intent is to provide a drug and alcohol-free workplace. These guidelines are designed to assist supervisors and managers in dealing with these complex issues. Supervisors and managers may address specific questions or problems regarding the application of the Substance Abuse policy and these guidelines with your personnel officer.