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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2019-4927
June 4, 2019

The Department of Corrections ("the agency") has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM")[1] administratively review the hearing officer's decision in Case Number 11316. For the reasons set forth below, EDR remands the matter to the hearing officer for further proceedings as described below.

FACTS

The relevant facts in Case Number 11316, as found by the hearing officer, are as follows:[2]

> The Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. Grievant began working for the Agency in 1998. Grievant had prior active disciplinary action. On October 23, 2018, Grievant received a Group III Written Notice with disciplinary demotion for sleeping during work hours.
>
> The Agency's policy governing drug testing is available on the Agency's intranet.
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> On December 4, 2018, Grievant was one of seven employees randomly selected for drug testing.
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> On December 18, 2018, Grievant met with the OSS in the Human Resources Unit. The OSS told Grievant he needed to complete a Random Drug Screen. She removed the drug screen form from her desk along with the bottles

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

[2] Decision of Hearing Officer, Case No. 11316 ("Hearing Decision"), Apr. 25, 2019, at 2-5 (citations omitted).

containing swabs. Grievant filled out portions of the Form. The OSS opened the bag with two vials. She asked Grievant to write his employee number and the date on each vial. She asked Grievant to open the vial and pull out the first swab and then put it in his cheek. Grievant placed the first swab in the first vial. He repeated the process with the second vial. Grievant placed a label A on the first vial and a label B on the second vial. Grievant placed the vials in a bag and sealed the bag. The chain of custody form was also included. The sealed bag was placed in a mailing bag and the OSS called a delivery company. The delivery company arrived at the Facility and the OSS gave the bag to the driver. The bag was delivered to the Testing Lab on December 19, 2018.

An employee with the Testing Lab opened the bag and ensured that the vials' seals were intact. The employee assigned a lab number to the sample.

On December 23, 2018, the Testing Lab evaluated the first oral fluid sample for cocaine with a screening level of 5 NG/ML and a confirmation level of 2 NG/ML. The test showed Grievant's oral fluid sample was positive for cocaine. The quantitative value was 10 NG/ML.

The Testing Lab did not evaluate the second oral fluid sample. It was to remain stored in the Laboratory with the first oral fluid sample for a year.

Cocaine tends to stay in a person's system for one or two days. But it can be a longer period of time if the person is a chronic user of cocaine.

The Medical Review Officer (MRO) received the test results on December 23, 2018 at 5:17 p.m. The Medical Review Service notified the Agency on December 24, 2018 to have Grievant contact the MRO. On December 27, 2018, the MRO attempted to contact Grievant by telephone. Grievant did not answer the call. Grievant's voice mail was not set up so the MRO could not leave a message. On December 28, 2018, the MRO called and spoke with Grievant. The MRO advised Grievant of the laboratory findings and discussed with Grievant possible medical explanations for the results. Grievant denied using cocaine but was unable to provide a valid medical explanation for the result. The MRO noted Grievant's response to the test results:

no no no this don't make no sense.

The MRO's practice was that if an employee wanted a sample retest, the MRO would refer the employee to the Agency.

The MRO advised Grievant the results would be released to the Agency and referred Grievant to the Agency to discuss their policies. The MRO did not provide Grievant with a telephone number to call back the MRO.

Shortly after speaking with the MRO on December 28, 2018, Grievant called Facility staff. He said he needed to speak with someone in human resources.

Grievant's call was transferred to the Personnel Analyst. Grievant testified he asked the Personnel Analyst for a retest.

On December 28, 2018, the MRO released the results to the Agency. The Personnel Analyst testified she received the drug test results and was told to call Grievant. She testified she called Grievant on December 28, 2018 and was able to speak with him. She told Grievant that as of that day he was on administrative leave because of a positive drug test. She told Grievant he would have due process. Grievant asked what was due process. She told Grievant someone would call him.

The Personnel Analyst also testified that Grievant called her and said he had gotten a call from the MRO. Grievant said he had tested positive for something. Grievant asked her what he needed to do. The Personnel Analyst said I don't have access to that information and will have to call the HR Director who was on vacation to get that information. The Personnel Analyst then called the HR Director and told the HR Director that Grievant had gotten a call from the MRO. The HR Director looked at her email and said to tell Grievant he was being placed on administrative leave and explain to him due process. The Personnel Analyst called Grievant and told him that as of that day he was on administrative leave and he would receive due process. Grievant asked what was due process.

The Personnel Analyst testified that Grievant did not ask her for a retest. She testified that if Grievant had asked her for a retest she would have had to look at the policy because "I am not up on the policy."

Grievant met with the Warden on January 8, 2019. The Warden told Grievant he tested positive for cocaine and showed Grievant the Drug Test Report. Grievant denied the allegation and said he never used illegal drugs. During that meeting, Grievant received the telephone number of the MRO.

On January 8, 2019, Grievant met with his former attorney, Ms. M. Grievant told her about the drug test and showed her the paper given to him by the Warden. She told Grievant they should call the number on the drug screen report to see if a retest could be completed. They called the MRO at the telephone number given to Grievant by the Warden. They spoke with the Director of Medical Review Services, Mr. S. Grievant and Ms. M asked about having a retest completed. Mr. S informed Grievant and Ms. M that Grievant should contact the Agency to request a retest because such request needed to be received by the MRO from the Agency. Mr. S told them that once the MRO received a retest request from the Agency, the MRO would provide an authorization form for both the Agency and Grievant to sign. Following the telephone call with Mr. S, Grievant and Ms. M tried calling the Facility telephone number. No one was available and they were told someone would call Grievant later. Grievant left Ms. M's office.

> Grievant called the Facility HR Director to discuss having a retest completed. The Facility HR Director said that a retest could not be done because Grievant was asking for a retest more than 72 hours after receiving the test results from the MRO.
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> Hair testing shows whether a person has used cocaine in the prior 90 days. If a person uses cocaine one or two times, the cocaine may not be revealed by a hair test. A hair test would reveal usage by a chronic cocaine user. Testing hair on a person's body is not as reliable as testing the hair on the person's head.
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> 10 NG/ML of cocaine would not constitute a high level of cocaine use while the cocaine was in a person's body.
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> Grievant met with his Attorney who suggested Grievant go to an independent testing lab and have his finger nails clipped and tested. Grievant went to Lab US and asked the women there for a finger nail test. Grievant was told that his finger nails were not long enough to test. The women suggested Grievant's body hair be tested because it was more reliable than the hair on his head. Grievant complied with their suggestion. His body hair was collected on January 16, 2019 and tested for five illegal drugs including cocaine. Grievant was negative for cocaine with a screening cutoff of 500 pg/mg.

On or about January 16, 2019, the grievant was issued a Group III Written Notice with termination for a positive drug test in violation of agency policy.[3] The grievant timely grieved the disciplinary action and a hearing was held on April 4, 2019.[4] In a decision dated April 25, 2019, the hearing officer concluded that the agency had failed to follow its policy by not providing a retest of the grievant's oral fluid sample.[5] As a result, the hearing officer rescinded the Group III Written Notice with termination, ordered the grievant reinstated to his former position or an equivalent position, and directed the agency to provide the grievant with back pay, less any interim earnings.[6] The agency now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR 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."[7] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[8] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[9] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

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[3] *See id.* at 1.
[4] *See id.*
[5] *Id.* at 6.
[6] *Id.* at 7.
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

Hearing Officer's Consideration of Evidence

In its request for administrative review, the agency contends that the hearing officer was "plainly wrong" in determining that the grievant had requested a retest. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[11] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[12] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[13] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

EDR has thoroughly reviewed the hearing record and finds that there is evidence to support the hearing officer's finding that the grievant had requested a retest. The hearing officer correctly states that the critical determination is what occurred on the December 28, 2018 call between the grievant and the MRO.[14] The hearing officer has found credible the grievant's testimony that he requested a retest during this call.[15] On the other hand, the hearing officer appears to have found that the testimony of the MRO was not credible.[16] Given that the MRO was testifying only from notes and not based on an independent recollection of the December 28, 2018 call,[17] the hearing officer's conclusion cannot be considered arbitrary. Conclusions as to the credibility of witnesses are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[18]

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[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B).
[13] *Grievance Procedure Manual* § 5.8.
[14] Hearing Decision at 6. The agency's policy only provides that an employee can request a retest and that such a request "should" be directed to the MRO. Agency Exhibit 3 at 7. Any other steps that must be taken to actually effectuate such a request are not listed in the policy. *See, e.g.*, Hearing Recording at 16:54 – 18:59 (testimony of an agency witness describing the steps for requesting a retest, including referral by the MRO back to the agency for completion of a form and transmission of payment to the MRO). Accordingly, the hearing officer's determination that the grievant made a request for retest consistent with the policy's provisions is rightly based on what the grievant said to the MRO.
[15] Hearing Decision at 6; *see* Hearing Recording at 2:21:23 – 2:25:25 (testimony of grievant).
[16] *See* Hearing Decision at 6.
[17] Hearing Recording at 2:04:00 – 2:04:30 (testimony of MRO).
[18] *See, e.g.*, EDR Ruling No. 2014-3884.

EDR's review finds nothing to indicate that the hearing officer's consideration of the evidence was in any way unreasonable. Because the hearing officer's findings in this case are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EDR declines to disturb the decision on this basis.

Relief for Misapplication of Policy

The agency also challenges the hearing officer's order of reinstatement, arguing that a more appropriate remedy for the determination that the agency had misapplied policy would be to direct the retest to occur. The *Rules for Conducting Grievance Hearings* provides that if the hearing officer determines that a disciplinary action was not consistent with law and policy, then the action should not be upheld.[19] However, under the precise facts of this case, the hearing officer's determination was not that the disciplinary action itself was inconsistent with policy, but rather that the agency had misapplied or unfairly applied its policy in not providing the retest.[20] An appropriate remedy for such a misapplication or unfair application of policy is to "order the agency to reapply the policy from the point at which it became tainted" or "order the agency to implement . . . particular policy mandates."[21]

The hearing officer has determined that, based on his factual determinations, the retest was required by policy.[22] Because it does not appear that the hearing officer has considered whether to direct the agency to provide the retest at this stage, EDR remands this matter to the hearing officer to address this question. On remand, the hearing officer will have the authority to reopen the hearing record, direct the retest to occur, and admit into the record any evidence of the retest (and any other additional evidence from either party) that, in his discretion, he determines is relevant for consideration as it relates to the original disciplinary action. In short, if the retest is confirmed to be positive, we would anticipate the disciplinary action will be upheld; if the retest is negative, we would anticipate the disciplinary action will be rescinded.[23] The hearing officer will have the authority to direct the parties as to any deadlines for providing the retest and the submission of additional evidence.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, this matter is remanded to the hearing officer for additional proceedings to the extent described above. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original decision).[24] Any such requests must

[19] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[20] *See* Hearing Decision at 6.
[21] *Rules for Conducting Grievance Hearings* § VI(C)(1).
[22] Hearing Decision at 6.
[23] Based on the agency's request for administrative review, the second sample still exists and can be retested at this time. If the retest is unable to occur, we presume the hearing officer will adhere to his original determinations in rescinding the disciplinary action.
[24] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.

be **received** by EEDR **within 15 calendar days** of the date of the issuance of the remand decision.[25]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[26] 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.[27] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[28]

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[25] *See Grievance Procedure Manual* § 7.2.
[26] *Grievance Procedure Manual* § 7.2(d).
[27] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[28] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).