Issue: Administrative Review of Hearing Officer's Decision in Case No. 10987; Ruling Date: July 14, 2017; Ruling No. 2017-4567; Agency: Department of Corrections; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution[1]

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2017-4567
July 14, 2017

The Department of Corrections (the "agency") has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 10987. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10987, as found by the hearing officer, are as follows:[2]

> The Department of Corrections employed Grievant as a Probation and Parole Officer at one of its locations. He began working for the Agency in 1991. No evidence of prior active disciplinary action was introduced during the hearing.
>
> Grievant became ill and was admitted to the Hospital. As part of its medical process for Grievant, the Hospital conducted a urine drug screen. The drug screen showed that Grievant was negative for cocaine on January 15, 2017. Grievant resumed working on January 23, 2017.
>
> Grievant was randomly selected for a drug test. A third party conducted the selection process and notified the Agency that Grievant's name had been selected for him to be drug tested.
>
> On January 30 2017, the Supervisor called Grievant to the office and informed him he was required to participate in a drug test. Grievant was provided with a vial to collect oral fluid. After providing an oral fluid sample, he sealed the vial and placed it in a package for a common carrier to transport to the lab. Grievant signed the "chain of custody" form and wrote the date of January 30, 2017 and time of 3:28 p.m. Because of the late hour of the day, the Supervisor gave the package to another employee to keep in the office until the common carrier could come the following day. The common carrier picked up the package

[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. The *Grievance Procedure Manual* has now been updated to reflect this Office's name post-merger as the Office of Equal Employment and Dispute Resolution.

[2] Decision of Hearing Officer, Case No. 10987 ("Hearing Decision"), May 26, 2017, at 2-3 (citation omitted).

the following day and it was delivered to the Laboratory. The Laboratory tested Grievant's oral fluid and concluded that it was positive for cocaine.

On February 6, 2017, the Medical Review Officer (MRO) received the test results from the Laboratory. The Agency was instructed to have Grievant call the MRO. On February 7, 2017, Grievant called the MRO's office and spoke with Dr. W. Dr. W conducted a "standard interview" where Dr. W advised Grievant of the MRO's role in the drug testing process. Grievant denied using cocaine. Dr. W asked Grievant what medications he was taking. Grievant did not know the names of the medications he was taking because his medications had recently changed and he did not know how to pronounce the names of the medications. Although Dr. W did not know the medications Grievant was taking, she concluded Grievant was unable to provide a valid medical explanation for the positive test result.

The Agency received a Drug Test Report dated February 7, 2017. It did not reveal the tests performed but indicated it was for Grievant's specimen and that the result was "Positive for: COCAINE ORAL FLUID". The report was signed by the Medical Review Officer.

Grievant was removed from employment on February 9, 2017.

Grievant knew that cocaine stays in a person's body for approximately 24 to 48 hours with respect to a urine sample. He knew he had not consumed or been exposed to cocaine in the 48 hours before January 30, 2017.

Grievant disputed the Agency's conclusion that he had consumed cocaine. He went to an HHS Certified Laboratory on February 13, 2017 and submitted a hair sample for a hair follicle drug test. His hair was cut by an employee of the testing laboratory and tested by the lab. The Drug Detail Report completed by the laboratory that tested Grievant's hair showed that Grievant was negative for cocaine. Based on the testimony presented, the "look back" period was 90 days for the hair follicle test. That look back period included January 30, 2017, the day the Agency claimed Grievant's oral fluids showed cocaine use. In other words, the hair follicle test showed that Grievant had not consumed cocaine at least 90 days before February 13, 2017 including time period covering the Agency's oral fluid test.

On or about February 9, 2017, the grievant was issued a Group III Written Notice with termination for testing positive for an illegal substance.[3] The grievant timely grieved the disciplinary action[4] and a hearing was held on May 23, 2017.[5] In a decision dated May 26, 2017, the hearing officer concluded that the agency had not presented sufficient evidence that the positive drug test was valid to show the grievant had used cocaine.[6] As a result, he rescinded the

[3] Agency Exhibit 1.
[4] Agency Exhibit 2; *see* Hearing Decision at 1.
[5] *See* Hearing Decision at 1.
[6] *Id.* at 1, 3-4.

Group III Written Notice with termination and ordered the grievant reinstated with back pay, less the ten-day suspension.[7] The agency now appeals the hearing decision to EEDR.

DISCUSSION

By statute, EEDR 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."[8] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[9]

Inconsistency with Agency Policy

In its request for administrative review, the agency asserts that the hearing officer's decision is inconsistent with agency policy. The agency appears to base this argument on the hearing officer's factual conclusion that "[t]he Agency followed its Alcohol and Other Drug Test policy but the results are not sufficient to support the disciplinary action."[10] The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[11] However, upon review of the agency's submission, EEDR is unable to find any argument, not otherwise addressed herein, that raises any way in which agency policy was not followed by the hearing officer. Accordingly, there is no basis to conclude that the hearing decision is inconsistent with policy.

Hearing Officer's Consideration of Evidence

The agency further contends that the hearing officer's decision is inconsistent with the evidence in the record. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[12] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[13] 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.[14] 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.[15] 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

[7] *Id.* at 4.
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Hearing Decision at 2.
[11] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[12] Va. Code § 2.2-3005.1(C).
[13] *Grievance Procedure Manual* § 5.9.
[14] *Rules for Conducting Grievance Hearings* § VI(B).
[15] *Grievance Procedure Manual* § 5.8.

based upon evidence in the record and the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

The hearing officer addressed the evidence in the record about the oral fluid drug test conducted by the agency, noting that "[t]he test report submitted by the Agency did not show if it was based on an initial screening only or both an initial screening with a confirmation."[16] The hearing officer went on to state that "[t]he Agency's policy describes a Screening Test as intended to eliminate negative oral fluid specimens from further analysis and a Confirmation test as a second analytical procedure performed on oral fluid to identify and quantify the presence of illegal drugs. The Hearing Officer cannot assume the Agency's Laboratory completed a confirmation test."[17] In finding that the agency had not shown by a preponderance of the evidence that the positive oral fluid drug test was valid, the hearing officer described the lack of evidence in the record to support the validity of the test:

> The Agency did not call Dr. W as a witness. It is unclear how Dr. W reached her conclusion without knowing the medications Grievant was taking. It is unclear why the MRO's Drug Test Report did not describe whether an initial and a confirmation test were completed on Grievant's oral fluid sample. It is unclear why the oral fluid test would be more reliable than the hair follicle test. It is unclear why the hair follicle test would be negative for cocaine while the oral fluid test on a specimen collected 13 days earlier would be positive. In short, the drug test provided by the Agency is no more reliable than the drug test provided by Grievant.[18]

In its request for administrative review, the agency generally argues that the results of its oral fluid drug test were sufficient to show that the grievant had used cocaine and the hearing officer failed to consider the evidence on this issue. The agency further disputes the results of the hair follicle drug test and the credibility of the grievant's testimony about the hair follicle test.

In support of its position, the agency cites to portions of Operating Procedure ("OP") 135.4, *Alcohol and Other Drug Testing*, to show that the oral fluid test was conducted properly. The hearing officer did not, however, find that the agency failed to follow OP 135.4 as the basis for rescinding the discipline.[19] Rather, he concluded that the evidence in the record was insufficient to show that positive result of the oral fluid test was valid. There is evidence in the record to support this determination. For example, the result of the oral fluid test states that the grievant's test was positive, but contains no information about the testing process, the precise test results, or the methodology used to conduct the test.[20] Dr. W, the MRO who spoke with the grievant, did not testify at the hearing. The agency presented evidence that its policy requires an initial test and a confirmation test for oral fluid samples,[21] but no agency witness was present when the oral fluid test was actually conducted and there is nothing in the record to verify whether an initial test and a confirmation test were completed.[22] Furthermore, the grievant

[16] Hearing Decision at 3.
[17] *Id.* at 3-4.
[18] *Id.* at 4.
[19] *See* Hearing Decision at 3-4.
[20] Agency Exhibit 1 at 3; *see, e.g.*, Hearing Recording at 27:58-29:38 (testimony of EEO Manager).
[21] Hearing Recording at 33:59-34:40 (testimony of EEO Manager).
[22] *E.g.*, *id.* at 28:30-29:38, 40:45-40:59 (testimony of EEO Manager).

testified that he told Dr. W he was taking blood pressure medications, but was unable to identify the specific medications he was taking because he was unable to spell their names.[23] EEDR has reviewed no evidence to show whether Dr. W considered this information or what impact the grievant's medications may have had on the oral fluid test. While the agency disagrees with the hearing officer's characterization of the evidence it offered at the hearing, EEDR has no basis to conclude that the hearing officer's findings of fact relating to the oral fluid test are inconsistent with the evidence in the record, or that the hearing officer failed to consider any evidence presented by the agency in reaching his decision.

The agency argues that the grievant is not an expert in the area of drug testing, and thus his testimony about the "90 day look back" period of the hair follicle test is not credible. In addition, the agency claims the evidence in the record is insufficient to show "that the grievant was really the individual" who provided a hair sample for the hair follicle test and that there is no evidence about the chain of custody or process by which the hair follicle test was conducted. At the hearing, the grievant described the process through which he provided a hair sample for the hair follicle test.[24] The grievant further testified that, when the hair follicle test was conducted, a nurse told him that a hair sample "goes back" 90 days and that this information is common knowledge.[25] That the grievant is not an expert witness does not inherently render his testimony about the hair follicle test unreliable.

The *Rules for Conducting Grievance Hearings* provide that "[t]he grievance hearing is not intended to be a court proceeding" and "the technical rules of evidence do not apply . . . ."[26] Consistent with this approach, "any evidence that tends to prove that a material fact is true or not true" should be admitted into the hearing record.[27] Hearing officers have the sole authority to weigh the evidence, determine the witnesses' credibility, and make findings of fact. The agency presented no evidence at the hearing to dispute the accuracy of the grievant's statements or to suggest that the hair follicle test was not accurate to show whether the grievant has used cocaine during the 90 days preceding the date on which it was conducted. In the absence of any such evidence, the hearing officer found that the grievant's testimony and the results of the hair follicle test were credible. Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. In this case, EEDR cannot conclude that the hearing decision was not based upon the evidence in the record and the material issues of the case. As a result, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings and declines to disturb the decision on this basis.

The agency asserts that the grievant did not request or obtain approval from the agency before the hair follicle test was conducted. EEDR has identified no evidence in the record to suggest that any such approval was necessary for the use of such a test for purposes of a grievance hearing. Indeed, one agency witness testified that there is no agency process to challenge or dispute the results of oral fluid drug tests, as the entire oral fluid sample is destroyed as part of the testing process.[28] Furthermore, the grievant was terminated on February 9, 2017.[29]

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[23] *Id.* at 1:36:38-1:38:28 (testimony of grievant).
[24] *Id.* at 1:51:56-1:56:20 (testimony of grievant).
[25] *Id.* at 1:42:28-1:43:18, 1:48:46-1:49:39 (testimony of grievant).
[26] *Rules for Conducting Grievance Hearings* § IV(D)
[27] *Id.*
[28] Hearing Recording at 31:33-31:56, 35:05-35:33 (testimony of EEO Manager).
[29] *See* Agency Exhibit 1.

The hair follicle test was conducted on February 13, 2017, when the grievant was no longer an employee of the agency.[30] Even if the grievant were somehow required to obtain approval or permission to conduct a second drug test, the agency has presented nothing to show that such a requirement would continue to be in force after the grievant's termination.

Finally, the agency argues that the hearing officer erred in stating that the hair follicle drug test was conducted by an "HHS Certified Laboratory."[31] While it appears the agency is correct that there is no evidence in record about the accreditation or certification of the lab that conducted the hair follicle test, EEDR cannot conclude that this error impacted the outcome of this case. Hearing officers must make "findings of fact as to the *material issues* in the case"[32] and to determine the grievance based "*on the material issues* and grounds in the record for those findings."[33] As discussed more fully above, EEDR has identified no evidence in the record to show that the hair follicle test was inaccurate, regardless of whether the lab was an "HHS Certified Laboratory." Remanding this case to the hearing officer for reconsideration of this point would have no effect on the outcome of the case, as there is nothing to suggest that these details about the lab that conducted the hair follicle test had any impact on his decision.

In summary, EEDR finds that the record supports the hearing officer's conclusion that the agency had not shown by a preponderance of the evidence that the positive result of the oral fluid test was valid. Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EEDR cannot conclude that the hearing officer's decision constitutes an abuse of discretion in this case. Because the hearing officer's findings in this case are based upon evidence in the record and the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EEDR declines to disturb the hearing decision on the bases raised by the grievant in his request for administrative review.

Burden of Proof

The agency also appears to argue that the hearing officer failed to apply the correct burden of proof in rendering his decision. As the agency correctly notes, it was required to show by a preponderance of the evidence that the disciplinary action issued to the grievant was warranted and appropriate under the circumstances.[34] It appears that the agency's position is based upon its assertion that the evidence it presented was sufficient to demonstrate the grievant engaged in the conduct described on the Written Notice. EEDR finds the agency's argument to be without merit.

The hearing decision sets forth that "[t]he burden of proof is on the Agency to show by a preponderance of the evidence that it's [sic] disciplinary action against the Grievant was

[30] Grievant's Exhibit B.
[31] Hearing Decision at 3.
[32] Va. Code § 2.2-3005.1(C) (emphasis added).
[33] *Grievance Procedure Manual* § 5.9 (emphasis added).
[34] *Id.* § 5.8.

warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not."[35] The hearing officer concluded that the agency had not met this burden on the basis of the evidence presented at the hearing.[36] While the agency may disagree with that decision, such disagreement is not a basis on which EEDR may conclude that the hearing officer failed to comply with the grievance procedure. Accordingly, EEDR declines to disturb the decision on this basis.

Newly-Discovered Evidence

Finally, the agency has presented additional evidence that is not part of the hearing record to challenge the credibility of the grievant's testimony about the hair follicle drug test and the reliability of the hair follicle test itself. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[37] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[38] However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[39]

In this case, the agency has provided no information to support a contention that of the additional information it has offered should be considered newly discovered evidence under this standard. The agency has presented nothing to indicate that it was unable to obtain this evidence prior to the hearing. To the contrary, the agency received the grievant's list of witnesses and proposed exhibits in advance of the hearing, and thus had notice that the grievant planned to present the results of the hair follicle test at the hearing. The agency had the ability to offer all relevant evidence and call all necessary witnesses at the hearing. It was the agency's decision as to what evidence should be offered to demonstrate that the discipline was warranted and appropriate under the circumstances, including anything necessary to rebut the evidence offered by the grievant in defense of his position. While the agency may now realize it could, or should, have presented additional information, this is not a basis on which EEDR may remand the

[35] Hearing Decision at 2 (citations omitted).
[36] *Id*. at 3-4.
[37] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).
[38] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[39] *Id*. at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

decision. Accordingly, there is no basis to re-open or remand the hearing for consideration of additional evidence.[40]

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EEDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[41] 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.[42] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[43]

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[40] To the extent this ruling does not address any specific issue raised in the agency's request for administrative review, EEDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.
[41] *Grievance Procedure Manual* § 7.2(d).
[42] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[43] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).