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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health & Developmental Services
Ruling Number 2020-5034
January 30, 2020

The grievant has requested that the Office of Employment Dispute Resolution ("EDR")[1] at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11414. For the reasons set forth below, EDR remands the hearing decision to the hearing officer for reconsideration.

FACTS

The relevant facts in Case Number 11414, as found by the hearing officer, are as follows:[2]

> The Department of Behavioral Health and Developmental Services [the "agency"] employs Grievant as a Psychiatric Technician III at one of its facilities. He began working for the Agency in November 2014. No evidence of prior active disciplinary action was introduced during the hearing.
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> On November 10, 2014, Grievant received a summary of the DHRM Policy 1.05 governing Alcohol and Other Drugs.
>
> On May 28, 2019 at approximately 11:50 a.m., the Patient became combative. Grievant and approximately ten other staff responded to a call for assistance. The Patient was taken to the floor. Grievant was near the Patient's feet. The Patient kicked Grievant at least four times causing him injury. On May 29, 2019, Grievant noticed that his hand was swollen. He contacted Ms. W, a human resource employee. Ms. W told Grievant to go for medical attention at the office of a "workers' compensation doctor."

[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. 11414 ("Hearing Decision"), December 9, 2019, at 2-3 (citations omitted).

> Grievant held a safety-sensitive position. The Agency required Grievant to be tested for illegal drugs for the reason "post accident" according to the Human Resource Director.
>
> Grievant went to a workers' compensation doctor for treatment. The doctor "took [Grievant] out of work." Grievant was instructed to receive physical therapy. A Collection Site was located at the workers' compensation doctor's location. At the Agency's insistence, Grievant submitted urine samples at the Collection Site. On May 29, 2019 at approximately 2:40 p.m., Grievant completed a "Drug Testing and Custody and Control Form." The Collector certified, "I certify that the specimen identified on this form was given to me by the donor named at the top of this form and that it was collected, sealed, and prepared for transport to the laboratory." The sample was sent to a Laboratory for testing.
>
> The Laboratory completed the test and it was reviewed by a Medical Review Officer [MRO] who contacted Grievant. The MRO issued a Drug Test Report on June 10, 2019 indicating:
>
> > This is to confirm that the urine drug test done on the above individual is:
> > POSITIVE
> > Positive for: MARIJUANA METABOLITE
>
> Upon learning of the positive test result, the Agency took disciplinary action against Grievant.

On June 20, 2019, the agency issued to the grievant a Group III Written Notice of disciplinary action with suspension for 15 workdays, on grounds that he "tested positive for drugs."[3] The grievant timely grieved this disciplinary action, and a hearing was held on November 18, 2019.[4] In a decision dated December 9, 2019, the hearing officer upheld the agency's discipline based on the grievant's positive drug test.[5] The hearing officer found that the grievant's subsequent negative drug test was not sufficient evidence "that the May 29, 2019 drug test was in error."[6] Further, the hearing officer reasoned:

> Although the Agency should have notified Grievant of his right to have a second drug test of his original sample as a best practice, nothing in policy required the Agency to do so. Unless the Agency [has] failed to comply with policy, the Hearing Officer cannot reverse the Agency's disciplinary action.[7]

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[3] Agency Ex. 1, at 1.
[4] Hearing Decision at 1.
[5] *Id.* at 3-5.
[6] *Id.* at 4.
[7] *Id.* The hearing officer also did not find mitigating circumstances that would justify reduction of the penalty. *Id.* at 4-5.

The grievant has appealed 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."[8] 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 a party; the sole remedy is that the hearing officer correct the noncompliance.[9] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[10] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant maintains that he is innocent of the misconduct charged, *i.e.* prohibited drug use. Essentially, he challenges the results of the underlying drug test as inaccurate: "when I had the brief conversation with the person who never identified themselves as the MRO, I was not told there could be a second test performed. I believe had I been afforded this opportunity, this matter would have been straightened."[11]

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

[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[11] With his Request for Administrative Review, the grievant has included documents that he characterizes as evidence of medications that could potentially cause a positive drug test. Pursuant to the *Rules for Conducting Grievance Hearings*, "[t]he evidentiary record is generally closed at the conclusion of the hearing, unless the hearing officer has allowed for a period after the hearing for the receipt of additional evidence. . . . After the hearing officer closes the evidentiary record, additional evidence generally may not be admitted." *Rules for Conducting Grievance Hearings* § IV(G). The *Rules* provide a "narrow exception" for newly discovered evidence that "was in existence at the time of the hearing, but was not known (or discovered) by the party until after the hearing officer closed the evidentiary record." *Id.* Because it does not appear either that the hearing officer held the record open following the hearing or that the grievant is presenting his post-hearing documents as newly discovered evidence, EDR finds no basis to consider these documents on administrative review.
[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 on 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.

Agency Drug-Testing Practices

In this case, the hearing officer concluded as a matter of policy that the agency's Departmental Instruction 502, *Alcohol and Drug Program*, governed the agency's actions in this case.[16] Instruction 502 establishes circumstances and procedures for testing employees for the use of illicit drugs. These drug tests include analysis by an independent MRO who "is responsible for receiving and reviewing laboratory results generated by the drug and alcohol testing program and evaluates medical explanations for certain drug test results."[17] When the drug test is based on a urine sample, the tested employee has the right to have part of the sample re-analyzed. The agency's procedures as to split-sample testing include the following:

> When a drug test is positive for the presence of drugs, the MRO **shall** discuss the results of the test with the employee to determine the reason for the positive test result. **A positive test does not necessarily mean that the employee has used drugs in violation of this Instruction** . . . .
>
> Any employee may request analysis of the split urine sample through the MRO within 72 hours from the time of notification of a positive result, unless circumstances unavoidably prevent the employee from meeting this deadline. . . .
>
> When a test result is positive, the facility HR manager or HRDM Director in the central office **shall offer the employee an opportunity to explain, discuss, and request analysis of the sample findings with his supervisor and the HR manager before disciplinary action is taken** in response to this test result.[18]

Expressly acknowledging that a positive test result does not necessarily demonstrate misconduct, these provisions of Instruction 502 establish multiple internal checks on such results, starting with a requirement for the MRO to discuss the result with the employee in order "to determine the reason" for the result. This discussion allows for further testing if the MRO deems it appropriate or if the employee requests it. Further, upon receiving a positive test result, Instruction 502 requires agency management to "offer the employee an opportunity" to "request analysis" of the result.

In this case however, despite these multiple verification opportunities mandated by Instruction 502, the hearing officer's findings of fact do not reflect that the agency recognized these checkpoints. According to the hearing decision, the initial test "was reviewed by a [MRO] who contacted Grievant."[19] But there are no findings to the effect that an MRO "discuss[ed] the

[16] *See* Agency Ex. 5, at 27-42.
[17] *Id*. at 28.
[18] *Id*. at 37 (emphasis added).
[19] Hearing Decision at 3.

results of the test with the employee to determine the reason for the positive test result."[20] Subsequently, the hearing officer found, "[u]pon learning of the positive test result, the Agency took disciplinary action against Grievant."[21] Again, there are no findings to the effect that, prior to disciplinary action, management "offer[ed] the employee an opportunity to explain, discuss, and request analysis of the sample findings with the supervisor and the HR manager."[22] Thus, in light of Instruction 502's mandated measures to verify an initial positive test – which, by itself, "does not necessarily mean that the employee has used drugs" – EDR cannot conclude that the findings of fact articulated in the hearing decision are sufficient to determine that the agency's discipline was based upon a valid drug test result.[23]

In his request for review, the grievant specifically argues that, following the initial positive result, he should have been advised on his right to request a split-sample retest. EDR notes that the policy's framework aligns with the drug-testing regime adopted by the U.S. Department of Transportation.[24] Indeed, the agency's employee handbook provides:

> In accordance with the U.S. Department of Transportation and the Federal Highway Administration under the Code of Federal Regulations, [the agency] is required to comply with the procedures for administering drug and alcohol tests for employees . . . who hold safety-sensitive positions.[25]

These regulations impose substantial requirements on MROs to verify test results, including specific notices to employees:

> (a) As the MRO, when you have verified a drug test as positive for a drug or drug metabolite, . . . you must notify the employee of his or her right to have the split specimen tested. You must also notify the employee of the procedures for requesting a test of the split specimen.

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[20] *See* Agency Ex. 5, at 37. Indeed, the agency's only evidence tending to show that any discussion took place is a brief notation on the Drug Test Report: "MRO [] interview conducted." *See* Agency Ex. 1, at 7. The human resources director for the facility testified only that the MRO "could have" ordered re-analysis *if* he had reason to and that "I would assume that the things that [the grievant] told him, they have on record as something that would not affect this [result]." Hearing Recording at 55:15-32.

[21] Hearing Decision at 3.

[22] *See* Agency Ex. 5, at 37. Despite Instruction 502's mandate, the agency's "SOP-HR Procedures for Positive Drug Screens" checklist includes no prompt to offer such opportunity to the employee following the positive drug screen. *See* Agency Ex. 1, at 8-9.

[23] While not binding on EDR, the federal Merit Systems Protection Board's case law requires agencies pursuing discipline based on a positive drug test to "prove by preponderant evidence that the test was valid." Walls v. Dep't of Defense, 2016 MSPB LEXIS 3788, at *3-5 (M.S.P.B. June 28, 2016) (citing Ivery v. Dep't of Transp., 96 M.S.P.R. 119, at 127-28 (M.S.P.B. 2004)). When an agency has not followed its own rules for verifying the validity of a positive drug test, the Board may decline to sustain disciplinary action that is based only on such unverified drug test. *See Ivery*, 96 M.S.P.R. at 127.

[24] *See* Agency Ex. 5, at 27.

[25] Agency Ex. 5, at 5.

(b) You must inform the employee that he or she has 72 hours from the time you provide this notification to him or her to request a test of the split specimen.[26]

Here, the grievant held a safety-sensitive position that the employee handbook indicates would be subject to these federal regulations.[27] In any event, nothing in the record suggests that either the agency or its vendors distinguish between employees who are entitled to the above notifications and those who are not. Thus, based on the agency's policies in conjunction with the federal regulations, both the agency and the grievant could reasonably expect most of Instruction 502's verification checks – including notice of split-sample rights and procedures – to occur during the required MRO discussion, in accordance with the federal mandate.[28] However, the record contains no direct evidence regarding the substance of the verification interview cited on the MRO report (other than the grievant's testimony calling the substance of the interview into question).[29] The hearing decision also makes no findings as to whether, based on the evidence available, any verification measures were actually taken, either by agency management or by the MRO on the agency's behalf.

Accordingly, EDR must remand the hearing decision for the hearing officer's reconsideration of whether the agency established by a preponderance of the evidence that (1) the grievant engaged in misconduct, and (2) the discipline imposed was consistent with the requirements of Instruction 502.

As further guidance upon remand, should the hearing officer reverse the agency's discipline on either of the above grounds, the appropriate remedy will depend on the basis for reversal. The *Rules for Conducting Grievance Hearings* provide that, if the hearing officer determines that a disciplinary action was not consistent with law and policy, then the action should not be upheld.[30] However, should the reconsideration decision find that the agency misapplied or unfairly applied its policy, another appropriate remedy may be to "order the agency to reapply the policy from the point at which it became tainted" or "order the agency to

[26] 49 C.F.R. § 40.153. Under Instruction 502, agency management is responsible for "[w]orking with the Office of Administrative Services to secure the services of qualified laboratories, specimen collection sites, testing technicians and equipment, and MROs to meet applicable U.S. [Department of Transportation] regulatory requirements." Agency Ex. 5, at 29.
[27] Hearing Decision at 2; Hearing Recording at 11:45-13:30 (HR director's testimony).
[28] The agency's evidence is consistent with unchecked reliance on the MRO to verify the test results. The facility's human resources director testified: "It's not anybody's responsibility in HR to tell [the grievant] about the split test; it is [the grievant's] responsibility. The MRO could have suggested it." Hearing Recording at 42:15-42:45. EDR notes that Instruction 502 requires agency management to provide training to employees both upon "completion of new employee orientation" and "refresher training no less than once every two years thereafter." Agency Ex. 5, at 40-41. Training programs are to include "[d]iscussion of the Alcohol and Drug Program, Standards of Conduct, Employee Assistance Program, and the proper procedures to follow upon suspicion of abuse or misuse of alcohol or drugs," as well as "distribution of informational materials." *Id.* at 41. The record does not disclose whether the grievant has ever received such training or if it would have included information about split-sample testing.
[29] *See* Agency Ex. 1, at 7. As the hearing officer observed during the hearing, the fact that an agency drug test may be "done by somebody that no one's watching" is relevant to the agency's burdens to prove the employee's misconduct and the appropriateness of its disciplinary action. Hearing Recording at 59:50-1:00:15.
[30] *Rules for Conducting Grievance Hearings* § VI(B)(1).

implement . . . particular policy mandates."[31] Thus, for example, the hearing officer could determine that the policy became tainted after the grievant was not offered an opportunity to verify his positive test result. In that case, the hearing officer will have the authority upon remand to reopen the hearing record, direct such opportunities to be offered (if still possible), and admit into the record any evidence that, in his discretion, he determines is relevant to the original disciplinary action.[32] The hearing officer will have the authority to direct the parties as to any deadlines for complying with new orders and for the submission of additional evidence.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, this matter is remanded to the hearing officer for reconsideration and any 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).[33] Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.[34]

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.[35] 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.[36] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[37]

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[31] *Id.* § VI(C)(1); *see, e.g.*, EDR Ruling No. 2019-4927.
[32] If appropriate verification measures were to confirm the initial positive test results, EDR would anticipate the disciplinary action will be upheld; without confirmation, we would anticipate the discipline to be rescinded.
[33] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[34] *See Grievance Procedure Manual* § 7.2.
[35] *Id.* § 7.2(d).
[36] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[37] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).