Issue: Administrative Review of Hearing Officer's Decision in Case No. 9239; Ruling Date: March 29, 2010; Ruling #2010-2522; Agency: Department of Corrections; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2010-2522
March 29, 2010

The Department of Corrections ("DOC" or "the agency") has requested an administrative review of the hearing decision in Case No. 9239. The agency has raised five objections which are addressed below. For the reasons set forth below, this Department will not disturb the decision.

FACTS

The facts of this case, as set forth in the hearing decision in Case Number 9239, are as follows:

> The Department of Corrections employed Grievant as a Captain at one of its facilities. The purpose of his position was: "Directs and supervises the work of all assigned subordinates ensuring that they function in a timely and effective manner in compliance with all institutional and Government Agencies." He had been employed by the Agency for approximately 15 years. Grievant had prior active disciplinary action. On April 25, 2006, he received a Group III Written Notice with suspension for being absent in excess of three days without proper authorization or a satisfactory reason. His work performance was otherwise satisfactory to the Agency.
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> The Agency maintains two lists from which it selects employees for random drug tests. The first list is of those employees holding Commercial Driver's Licenses. The Agency selects fifty percent of those employees for drug tests every year. The Agency only uses urinalysis testing for these employees. The second list is of security employees. A smaller percentage of these employees are tested randomly every year and they can be tested using an oral swab. On October 1, 2007, the Agency began using an oral fluid test for employees without CDLs because doing so was more cost effective and less time consuming for employees.
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> One of Grievant's interests was bodybuilding. In January 2009, he was taking supplements and drinking approximately two gallons of water per day. Grievant was on the list of employees with CDLs and was selected for a drug test.

> He went to the vendor lab and followed the requirements to submit a urine sample. The lab tested the sample and the results were sent to the Agency by email dated January 20, 2009. The results showed that Grievant was "Negative, Dilute". This meant that the sample was likely diluted. Under DOC Policy 5-55, Grievant should have been retested shortly after the Agency learned his first test was negative, dilute. Because of management problems in the Facility's Human Resource Office, no one insisted that Grievant immediately repeat the urinalysis testing. Several months later, the Agency's Central Office Human Resource Staff conducted an audit of the Facility's Human Resource Department. During that audit, the human resource auditors realized that Grievant should have been retested but that no urinalysis had been done. Grievant was then instructed to take the oral swab test. On April 8, 2009, a human resource employee showed Grievant how to remove the swab from the protective container, take a saliva sample from his mouth, put the swab in a vial, and seal the swab inside the vial. Grievant had completed the appropriate chain of custody document. Grievant placed the vial and chain of custody document in a bag and sealed it. That bag was placed in another bag and taken to the Facility's warehouse. An overnight carrier picked up the bag and delivered it to the testing lab. Employees at the lab opened the bag and tested the sample. An initial test was positive for marijuana. A confirmation test was also conducted which showed the sample was positive for marijuana. A Medical Review Officer spoke with Grievant regarding what drugs he was taking or other considerations that might affect the accuracy of the test results. The Medical Review Officer concluded that none of the information Grievant provided would explain the test result. On April 13, 2009, the Agency was notified that Grievant tested positive for marijuana. The Agency remove [sic] Grievant from employment based on the drug test results.[1]

Based on these Findings of Fact, the hearing officer reached the following Conclusions of Policy:

> The Agency is responsible for custody of convicted felons including those involved in the use or sale of illegal drugs. The Agency has established a zero tolerance for illegal drug consumption. DOC Operating Procedure 135.1(XII)(B) lists examples of offenses that could be considered Group III offenses. Rather than listing testing positive for drugs as one of those examples, the Agency created a subsection D and listed a positive drug test as the only item in subsection D. The Agency intended to create a prophylactic rule to establish its zero tolerance policy regardless of employee fault. The Agency intended to distinguish positive drug test results from other Group III offenses.
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> The downside of creating a prophylactic rule to establish a zero tolerance for illegal drug consumption is that the Agency must be held to a strict standard

[1] Decision of the Hearing Officer in Case 9239, issued January 7, 2010 ("Hearing Decision") at 2-3 (footnotes omitted).

for compliance with its own policy. In this case, the Agency did not comply with its own policies regarding drug testing.

DOC Procedure 5-55 sets forth the Agency's procedures for urinalysis and alcohol testing. Regarding random drug testing, the Procedure provides, "Employees who are confirmed to be positive will be dismissed from the Department of Corrections for, 'Illegal conduct which endangers the public safety, internal security, or affects the safe and efficient operation of the Department.'" DOC Operating Procedure 135.1(XII)(D) states, "An Illegal drug violation of Department Procedure 5-55 *Urinalysis and Alcohol Testing* will result in a Group III offense and termination."

The policy triggering Grievant's removal was DOC Procedure 5-55. This policy addresses urinalysis. It does not address oral fluid testing. The only urinalysis test Grievant took was in January 2009 in the result was negative. Thus, Grievant did not act contrary to DOC Procedure 5-55. Because the result was also "dilute", the Agency had the option of requiring Grievant to take a second test within 15 days of the first test. The Agency failed to do so. Instead, the Agency required Grievant to take an oral fluid test. The Agency has no policy governing the taking of oral fluid tests. There is no policy permitting the Agency to target a specific individual and require that individual to take an oral fluid test. There is no policy governing how the oral fluid sample is to be collected and processed. There is no policy establishing safeguards to ensure that the accuracy of the oral fluid test can be verified. There is no policy indicating that the Agency can remove an employee who tests positive for an illegal drug following an oral fluid test. The disciplinary action against Grievant cannot be upheld.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.[2]

Based on these conclusions, the hearing officer rescinded the Group III Written Notice and termination.[3]

[2] *Id.* at 3-5 (footnotes omitted).
[3] Hearing Decision at 5.

The agency requested that the hearing officer reconsider his decision and in his February 12, 2010 Reconsideration Decision the hearing officer affirmed the original decision.[4] In the Reconsideration Decision the hearing officer explained:

> Much of the evidence relating to a drug test is not available or not reliable. For example, the urine sample is transported but the persons transporting that sample are not available to testify regarding how the sample was transported. The lab technician who opened the sample and conducted the tests is not available to testify. Even if the lab technician was available to testify, it would be surprising if a lab technician who tests hundreds of samples in a week would be able to remember a particular sample and testify regarding how that specific sample was handled. In order to balance the assumptions made regarding the testing of drug samples, Federal regulations and the Agency's DOC Policy 5-55 contain procedural safeguards such as "chain of custody" processing and permitting a urine sample to be split into a second sample that may be retested by the employee after the first part of the sample is tested positive for an illegal substance. This enables a retest of the split sample to verify the earlier test. The Agency's compliance with procedural safeguards is essential to support enforcement of a zero tolerance.
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> The Agency's inability to draft clear and precise policy undermines its ability to enforce policy on its employees. This is especially true given that the Agency is attempting to enforce a zero tolerance policy.
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> In a memo dated August 10, 2007, the Human Resource Director informed Organizational Unit Heads that, "Effective October 1, 2007, the Department will begin implementing the statewide use of oral fluid testing for all Non-DOT drug testing. DOT employees (CDL Holders) will continue to be sent to an approved collection site for urine screening as required by Department of Transportation."
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> It is clear that the Agency has little understanding of the effect of the August 10, 2007 memo on DOC Policy 5-55. The August 10, 2007 memo does not mention DOC Policy 5-55. DOC Policy 5-55 was issued by the Agency Director. The August 10, 2007 memo was issued by the Human Resource Director. It is unclear what authority, if any, the Human Resource Director had to add to, modify, or reverse policy issued by the Agency Director. The Second Step Respondent wrote that the August 10, 2007 memo "superseded" DOC Policy 5-55. Black's Law Dictionary (5th ed.) defines supersede as "Obliterate, set aside, annul, replace, made void, inefficacious or useless, repeal." On the other hand, the Agency Representative insisted that the August 10, 2007 memo "supplemented" DOC Policy 5-55. When the Hearing Officer inquired of an

[4] Reconsideration Decision of the Hearing Officer in Case 9239, issued February 12, 2010 ("Reconsideration Decision").

Agency witness regarding the status of the Agency's policy for oral fluid testing, the witness responded that the policy was in development.

The question arises whether the August 10, 2007 memo supersedes DOC Policy 5-55 or is it an addition to DOC Policy 5-55, or is it the first draft of a separate written policy in development? If the August 10, 2007 memo supersedes DOC Policy 5-55, then DOC Policy 5-55 no longer exists. This means there would not be a provision to trigger Grievant's removal under DOC Policy 5-55. If the August 10, 2007 memo supplements DOC Policy 5-55, the memo would be a part of that policy. The provisions of DOC Policy 5-55 regarding obtaining a divided sample to protect employees would remain in effect. Since the Agency's method would not permit a divided sample, the Agency would have failed to comply with a material provision of DOC Policy 5-55 thereby undermining the Agency's position that Grievant should be removed from employment. If the August 10, 2007 memo is the first draft of a separate written policy, then the memo stands on its own. It does not contain a provision authorizing disciplinary action of removal. In short, there is no clear policy of which Grievant had notice that would justify his removal for a positive oral fluid drug test.

The Agency contends the Hearing Officer mistakenly concluded that Grievant did not violate DOC Policy 5-55. To establish that Grievant acted contrary to DOC Policy 5-55, the Agency would have to show that Grievant tested positive under a urinalysis test. Grievant's urinalysis test was negative dilute. It was not positive, and, thus, Grievant did not act contrary to DOC Policy 5-55. There is no basis to remove Grievant under DOC Policy 5-55.

The Agency contends DHRM Policy 1.05 prohibits the unlawful or unauthorized use of drugs in the workplace and that a positive drug test indicates such use. On the day of Grievant's oral fluid test, he was not in possession of marijuana and had not used marijuana while at work. A positive oral fluid test does not show use of marijuana in the workplace on the day of the test, it merely shows that trace chemicals remain in one's body from prior marijuana use. Grievant did not violate DHRM Policy 1.05. A positive drug test is not a violation of DHRM Policy 1.05.

The Agency argues that the methods used by the third party lab are nationally accepted methods for oral swab tests. The Agency contends the third party lab tested the oral fluid swab following its established procedures and safeguards.

Grievant presented expert testimony to rebut the claim that the Agency properly tested his oral fluid sample. The Hearing Officer did not address the merits of Grievant's oral fluid test because it is not necessary to address that issue. The Agency's inability to articulate a policy that defines the consequences of a

positive oral fluid test prohibits the Agency from disciplining employees who fail to oral fluid test.

The Agency argues that the Hearing Officer cannot require the Agency to revise its policy. The Agency's argument assumes that it has a clear policy. The Hearing Officer is not revising the Agency's policy but rather is applying DOC Policy 5-55 as it is written. DOC Policy 5-55 specifically states that it applies to urinalysis. Grievant did not act contrary to DOC Policy 5-55 because he did not have a positive urinalysis result for an illegal substance.[5]

DISCUSSION

A hearing decision is subject to both administrative and judicial review.[6] A challenge to the decision on the basis of state or agency policy must be made to the Director of the Department of Human Resource Management (DHRM).[7] A challenge to the decision on the basis of noncompliance with the grievance procedure must be made to the Director of this Department.[8] Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law.[9]

The Agency has raised five objections to this Department, which are addressed in turn below.

Objection 1

In Objection 1, the agency asserts that although Procedure 5-55 relates to urinalysis, "the process for obtaining a [drug] test is not the importance of procedure." The agency further contends that the hearing officer erred by disregarding other procedures and memoranda which are "all related to the Agency's stance against drugs in the workplace." The agency also asserts that "[t]he AHO proceeds to add his interpretation of the policies and procedures where potentially the policy is silent."

Beginning with the last objection first, interpreting state and agency policies, even where a policy is silent, is unquestionably a hearing officer responsibility.[10] A hearing officer is bound to make an initial determination of whether an agency's actions are consistent with law and policy,[11] with the DHRM Director having the final authority to interpret policy.[12] When policy

[5] Reconsideration Decision at 1-3 (footnotes omitted).
[6] *Grievance Procedure Manual* § 7.
[7] *Id*. at § 7.2(a)(2).
[8] *Id*. at § 7.2(a)(3).
[9] *Id*. at § 7.3(a).
[10] *See Rules for Conducting Grievance Hearings* § II ("the hearing officer is responsible for . . . [w]riting a decision that contains . . . conclusions of policy and law").
[11] *Rules for Conducting Grievance Hearings* § VI(B)("the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III

is silent or ambiguous, it is entirely appropriate and, indeed, necessary for the hearing officer to interpret policy in order to properly apply it to the particular facts of a case, subject to administrative review by the DHRM Director.

As to the objection that the hearing officer did not consider all related policies and procedures, this Department disagrees. Under the grievance procedure, a hearing officer is required to consider all applicable policies when deciding a case, and the hearing officer did so here. The hearing officer appears to have attempted to reconcile several seemingly relevant policies, a task made more difficult because the agency's oral fluid testing policy was in development at the time of the hearing.[13] Because the agency had not finalized a policy on oral fluid testing, the hearing officer was required to consider how other policies and memoranda related to and impacted the particular facts of this case. Based on a review of the hearing record and decision, we cannot conclude that he failed to consider all applicable policies. Whether his interpretation and reconciliation of the applicable policies is ultimately correct is for the DHRM Director to determine. Whether his holdings are correct as a matter of law is a question for the circuit court, to which either party can appeal once the decision becomes final.

As to the contention that "the process for obtaining a [drug] test is not the importance of procedure," without question an agency has significant latitude in choosing among reliable drug testing methods and developing policies related to such tests. In this case, however, the hearing officer held that once an agency adopts a policy, it must follow it.[14] The hearing officer found that the policy triggering the grievant's removal was DOC Procedure 5-55, the policy under which the grievant's original urine test was conducted. As the hearing decision reflects, Procedure 5-55 addresses urinalysis only (as does apparently Memorandum HR-2005-02, which is discussed under Objection 5). The agency required grievant to take an oral fluid test rather than following up with a second urine test.[15] The hearing officer held that "[t]here is no policy

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offense) and, finally, (iv) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances")

[12] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).

[13] Reconsideration Decision at 2. *See also* hearing testimony of the agency's Employee Relations and Employee Services Manager beginning at 47:00.

[14] Hearing Decision at 4. The hearing officer's holding that an agency must follow its own policy appears to have arguable support in analogous law. *See* Judicial Inquiry and Review Commission of VA v. Elliott 272 Va. 97; 630 S.E.2d 485 (2006). "When an administrative body is delegated rulemaking authority by the General Assembly, it is given broad discretion to determine the procedures it will employ in carrying out its legislative mandate, so long as the rules it adopts are not inconsistent with the authority of the statutes that govern it or with principles of due process." Elliott, 272 at 115, 630 S.E. 2d at 494. "Furthermore, it is an elementary principle of administrative law that agencies must follow their properly promulgated rules." *Id.* "For once an agency exercises its discretion and creates the procedural rules under which it desires to have its actions judged, it denies itself the right to violate these rules. If an agency in its proceedings violates its rules and prejudice results, any action taken as a result of the proceedings cannot stand.'" *Id.* (Internal citations omitted.)

[15] When the agency's Employee Relations and Employee Services Manager was asked during cross-examination, "Under the policy, can you just change the testing method?" She responded "Under the policy—if it—well—no, not really." Hearing recording beginning at 41:50. She went on to explain that the test "should have been a urinalysis." Hearing recording at 42:40. (Upon further questioning by the hearing officer, this witness qualified her statement that the test "should have been a urinalysis" by conditioning it upon her unexplained failure to know the nature of the original test (urinalysis) and the agency's previous failure to timely re-test the grievant.) Hearing recording at 48:00.

permitting the Agency to target a specific individual and require that individual to take an oral fluid test." In other words, the hearing officer seems to conclude that the authority to originally test the grievant derived from DOC Procedure 5-55 and, thus, the agency was bound by the terms of that policy in terms of further testing. The hearing decision indicates the agency was not free to disregard provisions of Procedure 5-55, which appear to require testing by the same methodology as the original test. (Another urine test under Procedure 5-55 would have allowed for follow-up testing by another lab—an opportunity that the grievant was apparently not afforded). While the agency's objections may raise questions of policy and law, we cannot conclude that the hearing officer's findings or holdings relating to the process of obtaining the second test were erroneous as a matter of compliance with the grievance process.

The process for obtaining a sample is important for a second reason. In deciding a drug test termination case, the hearing officer has the duty to consider all relevant evidence pertaining to the test including, but not limited to, the process for obtaining the sample, as well as the reliability of any testing of that sample. In this case, two witnesses testified as to the reliability of the test. One, a witness for the agency, the Laboratory Director of the vendor who processed the test, testified favorably as to the accuracy of the testing performed by his lab. A second witness, an expert witness for the grievant, testified that "I still say it does cast, cast a doubt on the reliability of the result."[16] The hearing officer did not reach any conclusions regarding the reliability of the grievant's particular test or the credibility of the two expert witnesses because he found for the grievant on other grounds. However, if this matter is remanded to the hearing officer by either the DHRM Director or the circuit court (should it be appealed to the court), the hearing officer shall address the agency's position that it properly tested the grievant's oral sample and the grievant's apparent position that reasons exist to call into question the reliability his test.[17]

Objection 2

In Objection 2, the agency asserts that the hearing officer erred by holding that because the agency did not have a policy governing oral fluid tests, the agency was prohibited from terminating the grievant's employment on that basis. The agency further contends that the hearing officer implied that a termination for a positive drug test can only be carried out under Procedure 5-55. The agency asserts that the vendor of the test provides procedures for employers in administering the test, which the agency asserts it followed. Finally, the agency asserts that "[t]he Grievant concurred with the Agency in how the test was administered to him."

[16] Hearing recording at 1:53.

[17] The hearing officer is authorized to make "findings of fact as to the material issues in the case" (Va. Code § 2.2-3005.1(C)) and to determine the grievance based "on the material issues and grounds in the record for those findings" (*Grievance Procedure Manual* § 5.9). 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, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

The hearing officer's holding that the agency was prohibited from terminating the grievant's employment due to the absence of a policy on the taking of oral fluid tests potentially implicates law and policy. However, it does not raise a question of compliance with the grievance procedure. When the decision is read as whole, a primary question is: under the agency's own policy could the agency require the grievant to take the oral swab test as a follow-up to his urine test? The hearing officer concludes "no," and there is record agency testimony consistent with that conclusion.[18] Therefore, the hearing officer was required to find another policy that supported the agency's actions. Finding none, the hearing officer essentially concluded that the agency had misapplied one of the two policies listed on the Written Notice: Procedure 5-55.[19] We find no procedural error with this apparent holding.

The next objection (that the hearing officer implied that a termination for a positive drug test can only be carried out under Procedure 5-55) is related to the previous objection. It is unclear whether the decision intends to go so far as to state that a termination for a positive drug test can only be carried out under Procedure 5-55 in any case or merely in this case. However, as reflected above, as a matter of procedure, we do not find erroneous the hearing officer's determination that, under the particular facts of this case, discharge under Procedure 5-55 was improper.

As to the agency's asserted compliance with the vendor's instructions regarding oral swab testing, that issue becomes moot in light of the hearing officer's conclusion that the agency was not permitted to test the grievant through oral testing, being bound under Procedure 5-55 to follow-up with urinalysis.[20] That conclusion is subject to review by the DHRM Director on the basis of policy, and possibly the circuit court on the basis of law.

As to the agency's contention that the grievant "concurred with the Agency in how the test was administered to him," a review of the hearing record did not reveal any evidence of any pre-hearing stipulation of fact as to the drug test. To the contrary, the grievant challenged in his grievance the "[l]ack of / and negligence of control and custody of oral sample," and he asserted that the "[a]gency falsified / failed to follow Drug Testing Custody and Control Form per instructions on front and back."[21] Thus, we find no merit in the agency's assertion that the grievant concurred with how he was tested.

Objection 3

The agency asserts that the hearing officer "demonstrate[s] a bias against employee drug testing" as shown by (1) "his acceptance of the grievant's expert witness testimony, while overlooking the Agency's expert witness' testimony and extensive experience in oral drug testing," and (2) his finding that "the marijuana could have been from use outside of the workplace."

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[18] *See* Note 15 above.
[19] The hearing officer found the second policy listed on the Written Notice—DHRM Policy 1.05—was not violated under the particular facts of this case. *See* discussion under Objection 3.
[20] See Note 15 above.
[21] Grievant's Grievance Form A, dated 5-13-09, Agency Exhibit 2.

As to the agency's overall assertion that the hearing officer has demonstrated a bias against drug testing, this Department disagrees. First, as discussed above, he made no finding as to which expert's testimony he found more credible. Second, whether a positive test resulted from use outside of the workplace normally would be irrelevant in a DOC case involving a positive urine drug test because DOC policy, Procedure 5-55, states that "[e]mployees who are confirmed to be positive will be dismissed from the DOC for '[i]llegal conduct which endangers the public safety, internal security, or affects the safe and efficient operations of the Department.'"[22] However, as the hearing decision reflects, the grievant was not terminated for a positive urine test. Rather, he was discharged for a positive oral swab test for which the hearing officer found "no policy permitting the Agency to target a specific individual and require that individual to take an oral fluid test."[23] The hearing officer further observed that the grievant was not afforded the option under Procedure 5-55 which grants him the opportunity to have a split sample to be tested by another laboratory.

Concluding that Procedure 5-55 did not authorize the grievant's discharge under the instant facts, the hearing officer was required to determine whether the only other policy cited on the Written Notice—DHRM Policy 1.05—supported the termination.[24] His policy interpretation that trace chemicals in one's body is not tantamount to use or impairment in the workplace, and thus not a violation of Policy 1.05 may be administratively reviewed by the DHRM Director.[25]

Objection 4

The agency asserts that the hearing officer "felt [that] he had discretion to make judgment about updating Agency policy while disregarding subsequent memorandum that made supplemental modifications to policy." The agency asserts that the hearing officer failed to consider memoranda and the agency's Standards of Conduct (Procedure 135.1), which the agency asserts should be read in tandem.

We find that the hearing officer exercised no improper judgment in deciding this case nor did he improperly disregard supplemental memoranda. As we recognized in the discussion regarding Objection 1, a hearing officer is required to consider all applicable policies when deciding a case. As previously discussed, we have concluded that the hearing officer did so. Again, his interpretations of state or agency policy are subject to review by the DHRM Director.

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[22] Procedure 5-55(G), Agency Exhibit 5. The hearing decision reflects that the agency sets forth in Procedure 135.1, a zero-tolerance policy for "an illegal drug violation of Department Procedure 5-55" (emphasis added), which includes positive urine tests. *See* Procedure 135.1 XII (D), Agency Exhibit 8.

[23] Hearing Decision at 4-5.

[24] April 15, 2009 Written Notice, Agency Exhibit 1.

[25] Policy 1.05 expressly prohibits the following: I. unlawful or unauthorized manufacture, distribution, dispensation, possession, or use of alcohol and other drugs in the workplace; II. impairment in the workplace from the use of alcohol or other drugs, (except the use of drugs for legitimate medical purposes); III. criminal conviction for: (i) a violation of any criminal drug law, based upon conduct occurring either on or off the workplace, or (ii) a violation of any alcoholic beverage control law, or law which governs driving while intoxicated, based upon conduct occurring in the workplace; and IV. failure to report to their supervisors that they have been convicted of any offense, as defined in III above, within five calendar days of the conviction. Agency Exhibit 5.

Objection 5

Finally, the agency challenges the hearing officer's conclusion of policy that the agency had 15 days to retest the grievant following his original test result of "negative/dilute." The agency asserts that a "[c]areful reading of procedure related to the 15 day window is applicable only to a timeframe in which the Grievant can request to have what's called a split sample re-test test following a 'positive' result." The agency goes on to state that "[s]ince the initial urine test was not positive, but 'negative and diluted' nor the Grievant made a request [sic] to re-test following that initial test, the AHO's interpretation of how to apply that portion of the policy/procedure 5-55 about testing 15 days after the initial test is incorrect."

As to the point that the grievant did not request to retest, according to the agency's own argument, the grievant had no right to a retest given that he did not have a "positive" test result. Moreover, while the hearing officer found in his original Hearing Decision that the agency had the option of requiring the grievant to retest within 15 days, he recognized in Footnote 1 of the Reconsideration Decision that Memorandum HR-2005-02 requires the agency to retest "as soon as possible," not within 15 days. The larger issue regarding Memorandum HR-2005-02 relates to the type of testing contemplated by that memo, which would appear to be urinalysis. Memorandum HR-2005-02 lists a single cross reference: "Procedure 5-55" which is the agency's urinalysis and alcohol testing policy.[26] Furthermore, HR-2005-02 describes outcomes for cases where subsequent tests are also "diluted," a form of adulteration seemingly avoided by oral testing. Thus, Memorandum HR-2005-02 could arguably support the hearing officer's conclusions that: (1) the agency had no policy that authorized the agency to have the grievant take an oral swab test as a follow-up to the original urine test; and (2) having created a drug testing policy, the agency must strictly comply with its own policy. In any event, however, a hearing officer's policy interpretations are reviewable only by the DHRM Director.

CONCLUSION, APPEAL RIGHTS, AND OTHER INFORMATION

For all of the reason set forth above, we will not disturb this decision. However, we note that the agency has appealed to the DHRM Director. If the DHRM Director remands the decision to the hearing officer, 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 reconsideration decision (i.e., any matters not previously part of the original decision).[27] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[28]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has

[26] HR-2005-02, Agency Exhibit 5.
[27] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[28] *See Grievance Procedure Manual* § 7.2(a).

issued his remanded decision.[29] Thus, if the DHRM decision is not remanded, the decision will become final on the date the DHRM decision is issued.

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.[30] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[31]

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Claudia T. Farr
Director

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