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STATE PERSONNEL DIRECTOR OFFICIAL COMMUNICATION

SPDOC No. 23-06

TO: ALL APPOINTING AUTHORITIES, HUMAN RESOURCES OFFICERS,
AND RECOGNIZED EMPLOYEE ORGANIZATIONS

FROM: JOHN GNODTKE, STATE PERSONNEL DIRECTOR 

DATE: MAY 12, 2023

SUBJECT: **PROPOSED AMENDMENTS TO RULE 2-7, DRUG AND ALCOHOL TESTING, AND REGULATIONS 2.07, DRUG AND ALCOHOL TESTING, AND 2.10, DRUG TESTING COMPLAINTS BY NON-EMPLOYEES**

**THIS DOCUMENT IS AVAILABLE UPON REQUEST IN ALTERNATIVE FORMATS.
FOR FURTHER INFORMATION CALL 517-284-0115.**

In the 1980s, the commission adopted a testing policy outside its rules to provide guidelines on drug and alcohol testing of classified employees. In 1998, the commission amended its rules to specifically (1) require preemployment drug-testing of newly hired classified employees, (2) allow reasonable-suspicion and follow-up testing of classified employees, and (3) allow random-selection and post-accident testing of classified employees in test-designated positions. The rules define these test-designated positions as those (1) requiring a commercial driver's license or operating certain vehicles, equipment, and machinery, (2) with law enforcement powers or allowed to carry a firearm on duty, (3) providing healthcare services, (4) working with prisoners, probationers, or parolees, (5) with unsupervised access to controlled substances, or (6) handling hazardous or explosive materials. Also in the late 1990s, collective bargaining agreements added provisions allowing similar reasonable-suspicion, follow-up, random-selection, and post-accident drug-testing of exclusively represented employees. Federal law also requires preemployment and employee testing of some test-designated positions operating certain vehicles.

The 1998 rules directed the state personnel director to establish prohibited levels of drugs in regulations. Those regulations—and collective bargaining agreements—called for testing under procedures established under federal law. While the regulations technically allow agencies to request approval to test for any drug in schedule 1 or 2 of the state's public health code, the default testing protocol used by the state since 1998 has tested for five classes of drugs: marijuana, cocaine, opiates, amphetamines, and phencyclidine.

Recent years have seen changes across the country in state laws regulating controlled substances. Michigan voters legalized marijuana's medicinal use in 2008 and recreational

use by adults in 2018. In light of these changes, commissioners have requested circulation for public comment of potential regulation amendments to end the pre-employment-testing requirement for marijuana for classified employees hired into non-test-designated positions. Ending this pre-employment testing for marijuana would not affect the availability of reasonable-suspicion or follow-up testing for marijuana of classified employees, including candidates who become employees.

Because of ongoing testing requirements under federal law and safety considerations related to test-designated positions, the proposed amendments would preserve the status quo for pre-employment, random-selection, post-accident, follow-up, and reasonable-suspicion testing for those positions.

The potential change to regulation 2.07, § 4.B.1.b for which public comment is sought is:

- b. **Drugs included.** Rule 9-1 defines drugs as those included in schedule 1 or 2 ~~of controlled substances~~ at MCL 333.7201, et seq. Hundreds of drugs are covered under schedules 1 and 2, but it is not feasible to test routinely for all of them. When a drug test is required, an appointing authority shall require testing for marijuana, cocaine, opiates, amphetamines, and phencyclidine, except that an appointing authority shall not require testing for marijuana for a pre-employment drug test of a new hire to a position that is not test-designated. ~~Before~~ If an agency requires testing for other drugs, it must first obtain written approval from the director. A request must include the agency's proposed initial test methods, testing levels, and performance test program. When conducting reasonable-suspicion or post-accident testing, an agency may require testing for any drug listed in schedule 1 or 2.

Staff has identified a related issue determined by rule that would require commission action to modify. Since Proposal 1 took effect in December 2018, approximately 350 applicants for classified positions have tested positive for marijuana in preemployment testing. Rule 2-7.4(b)(1) requires rescission of the conditional employment offer and a three-year sanction from appointment to other state positions in such a situation. While many of these sanctions have since lapsed, a few hundred remain in effect. The commission could adopt rule language allowing amnesty through rescission of continuing sanctions based on a preemployment drug test for a non-test designated position with a positive result for marijuana. Such action would not result in employment for these candidates but would allow them to apply for classified positions rather than waiting three years after being sanctioned.

The potential new rule 2-7.4(c) for which public comment is requested is:

- (c) Rescission of marijuana sanctions. A person with an active three-year sanction based on a positive result for marijuana from a pre-employment drug test for a non-test-designated position may request the sanction's prospective rescission as provided in the regulations.

If such an amendment were adopted, updates could be made to rule references in regulations 2.07 and 2.10 and the following new § 3.E could be added to regulation 2.10:

E. **Marijuana sanctions.** A person with an active three-year sanction based on a positive result for marijuana from a pre-employment drug test for a non-test-designated position under rule 2-7.4(b)(1) can have the sanction prospectively rescinded by email request to MCSC-OCSC@mi.gov. The request should identify the person's full name and, if available, the date that the sanction was imposed. Civil service staff shall provide written confirmation of the sanction's rescission.

Comments on the proposed amendments may be emailed to MCSC-OGC@mi.gov or sent to Office of the General Counsel, Michigan Civil Service Commission, P.O. Box 30002, Lansing, Michigan, 48909. Comments must be received by June 23, 2023.

Attachments