Issues: Demotion, Group II Written Notice with suspension (failure to follow policy), Group II Written Notice (failure to follow instruction), and Termination; Hearing Date: 12/17/07; Decision Issued: 01/09/08; Agency: DCR; AHO: Frank G. Aschmann, Esq.; Case No. 8635, 8684, 8685; Outcome: Partial Relief; **Administrative Review: HO Reconsideration Request received 01/24/08; Reconsideration Decision issued 01/31/08; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 01/24/08; Outcome pending**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case Nos. 8635/8684/8685

Hearing Date: December 17, 2007
Decision Issued: January 9, 2008

PROCEDURAL ISSUE

No procedural issues raised in regard to this hearing. Grievant's first issue presents a procedural issue as to the Agency's compliance with requirements for demotion.

APPEARANCES

Grievant
Grievant's Attorney
One Grievant Witness
Agency Presenter
Agency Representative
Four Agency Witnesses

ISSUES

1. Was the Grievant demoted in violation of policy?
2. Did the Grievant fail to follow established written policy in regard to credit card use such as to warrant a Group II Written Notice with a four day suspension?
3. Did the Grievant disregard authority, fail to follow a supervisor's instructions, misuse state property and be insubordinate such as to warrant the issuance of a Group II Written Notice with employment termination?

FINDINGS OF FACT

The Grievant was employed by the Department of Conservation and Recreation (hereafter DCR) as a Chief Ranger and then as a State Park Ranger. Both positions are classified as Natural Resource Specialist 2. A Chief Ranger is a FLSA exempt position and required to be on site and on call, therefore, housing is provided with the position. A State Park Ranger is a FLSA non-exempt position and housing is not provided.

Grievant is a college educated, long time employee of DCR with more than 20 years of service. The Grievant has held numerous positions in the Agency, all Chief Ranger or higher, during his career and requested a transfer in 1995 to the Park. The Grievant is qualified as a law enforcement officer and served in that capacity as part of his duties. The Grievant is trained in water plant operations and performed those duties along with natural resource management, building and grounds maintenance, supply management, employee training and supervision, public relations and station operation. The Grievant has a long list of accomplishments at the

Park and received highly positive performance evaluations until 2005 and many public commendations.

In 2005, there was a change of Park Managers at the Park. The new Park Manager had a different style and there were a lot of problems with the transition. Some employees left, others adapted to the change. The Grievant and the Park Manager were in conflict continuously. They filed complaints about each other and were uncooperative with each other concerning numerous Park issues. The Grievant received criticism for his work but was always rated a contributor.

By letter, dated May 8, 2005, the Grievant requested a reevaluation of his position. Grievant noted a large number of duties which he was solely responsible for performing, infrequent pay increase and a comparison with other Parks.

By letter, dated September 5, 2006, Grievant received a response to his reevaluation request. The response suggested Grievant seek another position if he was displeased with his position at the Park.

Grievant remained in the Chief Ranger position for approximately eleven years until September 22, 2006 when the Agency unilaterally placed the Grievant in a newly created State Park Ranger position at the Park. The DCR labeled the action a lateral transfer and accomplished the personnel action by a letter from the Assistant State Parks Director. The letter stated the transfer was made because the new position better fit the Grievant's skills and abilities. Grievant filed an employee grievance objecting to the position transfer.

Grievant's prior position of Chief Ranger was filled by another person. When Grievant changed positions he was directed to vacate his on site housing. Additionally, the Grievant was directed to give his office with its equipment to the new Chief Ranger and designated to work from the maintenance shop. The Grievant was removed from the Park voice mail system and replaced by the Chief Ranger. The Grievant was given daily work assignments on a list with other Park staff. The Grievant's salary remained the same.

On June 7, 2007, the Grievant was issued a Group II Written Notice with a four day suspension by the Park Manager for violations of the credit card policy. The Notice alleged several violations of policy, that the Grievant had reported no activity on his card for the period ending January 15, 2007, that the Grievant failed to submit supporting documentation for the period ending February 15, 2007, that the Grievant failed to take training timely, and for the periods ending April 16, 2007 and May 16, 2007, the Grievant failed to submit supporting documentation at the time of submission of the monthly credit card report. The Grievant filed an employee grievance objecting to the disciplinary action.

On January 23, 2007, the Grievant submitted a memo stating he had no charges on his credit card for the period ending January 15, 2007. The Grievant's credit card statement for the period ending January 15, 2007 showed no debits and two credits. On May 9, 2007, the Grievant submitted a memo stating he had no charges on his credit card for the period ending February 15, 2007. Grievant never received a credit card statement for the period. The Grievant was on vacation from April 20, 2007 to May 2, 2007. The Grievant completed online credit card training on May 2, 2007. The Grievant was sent an email on March 26, 2007 informing him of the training and setting a deadline for completion of April 27, 2007. The Park Manager and the Chief Ranger never advised the Grievant of the training requirement. This was the first time the DCR had required online training. In past years the training was conducted in a classroom.

On June 29, 2007, the Grievant was issued a Group II Written Notice with termination of his employment. The Notice was issued for disregard of authority, failure to follow instructions, misuse of state property and insubordination. The Grievant filed an employee grievance

objecting to the disciplinary action.

The Park is home to native wildlife. Sometimes these animals become infected with rabies. Feral cats, at times, also inhabit the Park. Trapping has been used to remove diseased animals and feral cats from the Park. On April 9, 2006, the Park Manager issued a memo directing that all need for trapping be brought to his attention prior to traps being set. In April 2006 the Grievant ceased all trapping. In the Winter or early Spring of 2007, at a staff meeting, several staff members complained about the feral cat activity in the Park. A discussion was conducted on the issue. The Park Manager agreed that something would have to be done about the problem, however, the discussion concluded with the Park Manager not specifying any particular action.

On or about May 2, 2007, a trap was found behind a storage shed with racoon remains inside. The Park Manager states that the Grievant admitted setting the trap to both himself and the Chief Ranger. The Grievant states that the trap was stored behind the shed because the shed was full of the personal belongings of the Park Manager and that the trap was deactivated, unbaited and empty when placed behind the shed after previously being used to catch feral cats months earlier.

The Grievant's three grievances were consolidated for a single hearing by ruling of the Director of the Department of Employee Dispute Resolution.

APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management (hereafter DHRM) promulgated Standards of Conduct Policy number 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards of Conduct serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The DHRM also established policy number 1.40, Performance Planning and Evaluation, to establish a mechanism to communicate with employees on performance issues. DHRM policy 1.40 defines procedures for evaluation and performance plans. Performance demotion is covered in this policy and requires a series of procedures to correct employee performance prior to

demotion.

The DHRM established policy number 3.05, Compensation, to govern the administration of compensation and plan for employment positions. The policy contains a section which is titled "Reassignment Within The Pay Band." This section permits an Agency to move an employee from one position to a different position in the same "role" or "pay band."

The DCR has established policy number 139, Small Purchase Charge Card, to provide procedures for the use of Agency credit cards by employees. Employees with Agency credit cards are responsible for maintaining records of card use and reporting to the Division of Finance. Prior to issuance of a credit card all employees sign an agreement that they will comply with policy 139.

Was The Grievant Demoted in Violation of Policy?

The Agency contends that the Grievant was laterally transferred from his Chief Ranger position to a newly created State Park Ranger position pursuant to DHRM policy 3.05. DCR presented evidence that the two positions have the same classification of Natural Resource Specialist 2 and that the Grievant's salary was unaffected by the change to establish that the personnel action was, in fact, a lateral transfer and permitted as a unilateral directive under the authority of policy 3.05.

While these two factors support the DCR contention the overwhelming bulk of the evidence demonstrates that the Grievant was demoted and not laterally transferred. One need look no further than the titles of the positions for the first bit of evidence. Chief Ranger is a higher level position than State Park Ranger. A Chief Ranger is FLSA exempt showing the managerial nature of the position. A State Park Ranger is not FLSA exempt showing the subordinate nature of the position and inability to make executive decisions. The salary range, while overlapping in part, is higher for a Chief Ranger than a State Park Ranger. A Chief Ranger is essential on-site personnel and thus gets the benefit of housing provided. A State Park Ranger does not. In this case the new State Park Ranger position was a subordinate of the Chief Ranger and was subject to his directives and obligated to report to him. The Grievant lost his office, equipment and voice mail with the change.

The change of job duties as noted by DCR reflect a demotion of position. The Grievant was told by DCR he would have less responsibility and less discretionary authority in the new position. The Grievant moved from a position where he delegated responsibility to a position where he simply took directives from superiors. The intent to demote the Grievant is clear from his assigned duties. The Grievant went from a position where he had authority to make decisions about public safety, resource management and park maintenance to being directed to mow grass in a particular field on a particular day. Total loss of discretionary authority is a significant factor in this case demonstrating demotion.

The demotion is further illustrated by the circumstances of the personnel action. The Chief Ranger position was open, available and needing to be filled when the Grievant was moved to the newly created State Park Ranger position. The Agency choose to move the Grievant to a lower position and place a new person in his old position as his superior. This demonstrates a direct downward move in the chain of command in the Park. Ironically, the Grievant is placed in the very position he requested be created to support him in his duties as Chief Ranger. DCR, rather than create the State Park Ranger position and find someone to fill the job in support of the Grievant as Chief Ranger, moved him to that position and filled his

former job with a new person. By its actions, DCR clearly agreed the Park needed an additional Ranger as the Grievant had told it but took personnel action which is unmistakable as an act to demote the Grievant when it could have easily left him in his position and filled the new position.

Why the Agency took this action is well documented. DCR had received the Grievant's request for reevaluation of his position and perceived the Grievant as unhappy in his job. The Grievant had sole responsibility for law enforcement in the Park as he was the only law enforcement qualified Ranger in the Park after the new Park Manager was assigned to the Park. The Grievant had sole responsibility for the Park water treatment as he was the only Ranger certified to do these duties. The new Park Manager was not qualified in either area. The Grievant believed the Park should have a backup person to perform these duties when he was off duty or on vacation. The Grievant tried to bring this to the attention of DCR through the reevaluation process after the Park Manager had refused to address the issue. This was the wrong approach as it left DCR with a negative view of the Grievant's abilities and only added to the conflict between the Grievant and the Park Manager.

DCR took the Grievant's request as a statement that he could not perform his job adequately. Feeling that he was unable to do his job, DCR began to remove responsibilities from the Grievant, such as firearms training, which he had done above and beyond his regular job duties. At the same time the Grievant was receiving negative evaluations and complaints from the Park Manager about his performance.

The Park Manager gave the Grievant a rating of contributor on his performance evaluation but wrote in the text that his performance was not satisfactory. The Park Manager testified that he considered the relationship with the Grievant to be a normal employer/employee relationship. His credibility suffered greatly with this testimony as it was apparent that the conflict between the two men over how the Park should be run was extreme and anything but a normal employer/employee relationship. The Park Manager used his position as an employee evaluator to create a negative performance record for the Grievant.

The Grievant did not suddenly lose all the skills and ability he had learned and practiced for over twenty years with the Agency. The conflict between the Grievant and the Park Manager is at the root of the negative evaluations.

The decision to move the Grievant to the new State Park Ranger position was clearly related to the perceived performance problems of the Grievant. DCR states that the Park Manager and his superiors worked together to reach the decision to make the reassignment. The Park Manager raised the performance issue as a reason to place the Grievant in a position with less responsibility and less authority. Thus the Grievant was demoted for job performance issues and not laterally transferred.

Demotion for job performance issues is specifically covered in policy 1.40. The policy lays out in detail a procedure which has several steps which must be taken to address employee performance prior to demotion. DCR did not follow this procedure.

The procedure exists to provide the employee with notice that he is in danger of being demoted and an opportunity to correct his performance in specific areas to avoid demotion. The action of the Agency denied the Grievant these rights as provided by the DHRM policy. Therefore, the DCR demoted the Grievant in violation of policy.

<u>Did the Grievant fail to follow established written policy in regard to credit card use such as to</u>

warrant a Group II Written Notice with a four day suspension?

.

The first allegation is that for the billing period ending January 15, 2007, the Grievant submitted a notice stating he had no activity on the account when actually there were two credits made to the account which were not reported and thus violated the requirements of policy 139. The Park Manager considered credits the same as charges, testifying that credits were "negative charges."

Policy 139, F.5 provides that if a card holder has "no charges" for the month the employee may notify his supervisor and the Department of Finance in lieu of submitting a reconciled statement.

The Grievant's notice to the Park Manager and the Department of Finance states he had no charges for the month and thus would not be submitting a reconciled statement. The policy specifically grants authority to submit such a notice when there are no charges. The Grievant's notice is accurate, he had no charges and never reported there was no activity on the account. The Park Manager equating charges and credits is inappropriate. The two are not equivalents, they are opposites. Further, the Park Manager falsely states the Grievant reported no activity. The Grievant reported no charges as prescribed in policy 139, not no activity. There is no violation of policy in the first allegation.

The second allegation is that for the period ending February 15, 2007, the Grievant filed a no activity report which the Park Manager with no supporting documentation until contacted by DCR, Department of Finance. The Grievant submitted a notice to the Park Manager stating there were no charges for the month and thus he would not be submitting a reconciled statement. The Park Manager refused to sign the notice and did not forward it to the Department of Finance. The Park Manager demanded that the Grievant supply verification he had no charges. The Grievant received no statement that month and was thus unable to provide the verification demanded by the Park Manager. It is obvious that the Park Manager was blocking the Grievant's attempt to comply with the policy. Policy 139 F.6 requires that cardholders and their supervisors sign the reports. Thus by refusing to sign the Grievant's notice submitted in lieu of a reconciled statement the Park Manager effectively made it impossible for the Grievant to fully comply with the policy. The policy does not require the submission of verification when submitting notification of no charges for the month. The obvious intent of the policy is to streamline the process when a credit card is not used during a billing cycle. After the DCR, Department of Finance notified the Park Manager it had not received the records for the period the Park Manager signed the notice and it was submitted curing the problem. The employee can not be held responsible for the willful refusal of his supervisor to cooperate in compliance with policy. Additionally, it is not a violation of policy to fail to submit verification of a no charge notice. Thus there is no violation of policy in the second allegation.

The third allegation is that the Grievant failed to take annual training timely. A notice was sent on March 26, 2007 by email stating that online training had to be completed by April 27, 2007. The Grievant completed training on May 2, 2007, the day he returned from vacation and checked his email at the gift shop.

The email was the only notice given for this new training which had always been done in a classroom previously. The Park Manager and the Chief Ranger did not advise the Grievant of the training. The Park Manager stated that he did not notify the Grievant because the Grievant had a computer ID number and the notice only required him to notify employees that did not have computer ID numbers.

After the Grievant had been demoted he no longer had an office or a designated computer. He was assigned to work from the maintenance shop where he had no direct access to a computer. The Grievant was assigned daily tasks in the field and not directed to check his email. The Grievant checked his email sporadically, approximately once every two months. He was away on vacation during part of the one month training period. He decided to check his email upon his return and discovered the training notice and completed the program immediately. The Grievant maintains that he received no notice of the training until he returned from vacation after the training period had ended. The Grievant's position is supported by the time line and is credible given the circumstances of a first time procedure, short time line, no regular computer access, no supervisor giving him notice, on vacation during the period and immediate completion upon return.

The Agency can only demonstrate that an email was sent and someone said to someone else that the email had been opened. This is insufficient to show the Grievant had actual notice of the directive. This is particularly true in light of the fact that the Park Manager could have simply told the Grievant that he needed to take the training prior to his leaving on vacation. He choose not to, leaving it for the Grievant to discover the directive for himself, when he knew the Grievant was in the field daily and going on vacation.

To be in violation of the directive to take the online training the Grievant had to be aware of the instruction and knowingly violate it. The evidence is insufficient to prove the Grievant knew about the training directive until May 2, 2007, when he completed the program. The third allegation is found to be unsubstantiated.

The fourth and fifth allegations are the same issue for two time periods. The allegation is that the Grievant failed to submit receipts at the time he submitted his credit card use report for the billing periods ending April 16, 2007 and May 16, 2007. These allegations are not violations of policy 139. The policy requires submission of the statement, the statement cover sheet and a copy of the monthly log sheet under policy 139, F.5. Under Policy 139 F.6 the original supporting documentation is to be kept on file by the cardholder for three years. It is the cardholders responsibility to reconcile the statement pursuant to policy 139, section F, not his supervisor. Under policy 139, the Grievant is not obligated to turn over supporting receipts to his supervisor.

Allegations four and five are therefor found not to be violations of policy.

<u>Did the Grievant disregard authority, fail to follow a supervisor's instructions, misuse state property and be insubordinate such as to warrant the issuance of a Group II Written Notice with employment termination?</u>

On June 29, 2007, the Park Manager issued the Grievant a Group II Written Notice and terminated his employment. The Park Manager alleges that the Grievant had been directed to get approval prior to any trapping, by memo dated April 9, 2006, and that the Grievant violated this directive sometime prior to May 2, 2007, when a staff member found a dead racoon in a trap behind a shed. The Park Manager alleges that the Grievant misused state property by setting the trap and killing the racoon thus disregarding authority and being insubordinate.

The Agency carries the burden of showing its actions are justified. The Agency presented the testimony of the Park Manager, a copy of a memo dated April 9, 2006 and the response of the Grievant to the allegation. No direct evidence was presented showing when the trap was set or who set the trap. DCR identified the Grievant as the perpetrator through the

testimony of the Park Manager. The Park Manger stated that the Grievant admitted setting the trap to him and to the Chief Ranger.

The conflict between the Park Manager and the Grievant renders the Park Manager's testimony suspect. His statements reflect a desire to find the Grievant at fault and show a strong bias which clouds judgment. The Park Manager used the Grievant's statement that the trap was used to catch feral cats months earlier as the admission that the Grievant set the trap which killed the racoon sometime in April.

The Grievant's sole admission is that the trap was used sometime around February to early March, 2007, to catch feral cats. His response presented by the Agency and his current testimony are consistent on this issue. The Grievant maintains consistently that the trap was stored behind the shed during March and April, unbaited and not set to operate.

Glaringly absent from the Agency's evidence is any corroboration of the Park Manager's testimony. The Chief Ranger did not testify or submit and affidavit stating what was said to him even though testimony by telephone was allowed. The alleged admission to him is presented solely through the Park Manager who says the Chief Ranger told him the Grievant admitted setting the trap. Even if true, this does not clarify the timing. The Grievant admits the trap was set months earlier but it is the setting of the trap which caught the racoon that is at issue in regard to the allegation that the Grievant misused state property to destroy a natural resource he was sworn to protect.

While it may be purely coincidental, the timing of this allegation is also suspect. The allegation occurs at the height of the conflict between the Park Manager and the Grievant. At this point in their feud the Park Manager is looking for issues he can raise to use against the Grievant to create a disciplinary record. His judgment is skewed and this taints his testimony. It is also strange that this allegation arises on the very day the Grievant returns from vacation, when he is taking his online credit card training. If the Grievant had set the trap and the racoon remained in it long enough to die it is remarkable that it was not discovered sooner as the Grievant had been away since April 20, 2007 on vacation.

The Agency's evidence which tends to prove the Grievant set the trap which killed the racoon is simply the unsupported allegation of the Park Manager. The Park Manager's testimony is unreliable in regard to what was said to him by the Grievant and is thus insufficient to show the Grievant misused state property by killing a racoon by trapping it and leaving it in the trap until it died.

The statements of the Grievant do, however, indicate that he set traps to catch feral cats subsequent to the April 9, 2006 memo. The memo directs that prior to traps being set, the issue is to be brought to the attention of the Park Manager for approval. The Grievant ceased all trapping in April 2006 until early 2007. Prior to trapping the feral cats the issue was discussed in a staff meeting. The issue was thus brought to the attention of the Park Manager prior to any traps being set but the meeting ended without any approval being given by the Park Manager to set traps. The Grievant testified he understood the statement of the Park Manager at the meeting as authorization to deal with the feral cat problem by trapping. Communication between the two men was marginal at best and it is likely that both men interpreted the statements of the other in the way they wanted to rather than trying to understand what the other truly meant.

While the position of the Park Manager on dealing with the feral cats was indecisive and vague it is clear he did not give any specific direct authorization to the Grievant to trap the cats. Thus it is found that the Grievant did fail to follow the instructions of a supervisor, issued by memo on April 9, 2006 by the Park Manager, in violation of policy 1.60, Standards of Conduct.

Because the position of the supervisor stated at the staff meeting in 2007 was vague, indecisive and misunderstood by the Grievant, it is found that the failure to obey a supervisor's instruction was not made with any disregard for authority or insubordination. There was a feral cat problem in the Park and the Grievant took action to deal with it as he had done prior to the Park Manager being assigned to the Park.

DECISION

The Agency demoted the Grievant in violation of policy and is hereby ordered to reinstate the Grievant to a position of Chief Ranger retroactively as if he had never been demoted.

The Agency failed to established that the Grievant violated an established written policy in regard to the use of a DCR credit card. Therefore, it is hereby ordered that the Agency shall remove from the Grievant's personnel file the Group II Written Notice for a violation of policy number 139, Small Purchase Charge Card. The Agency is hereby ordered to pay the Grievant all lost wages and benefits as a result of the suspension made with the Group II Written Notice.

The Agency established that the Grievant failed to follow the instructions of a supervisor when in early 2007 the Grievant trapped feral cats in the Park without the specific permission of the Park Manager to set traps contrary to the memo he issued on April 9, 2006. This is a Group II offense. The Agency, however, failed to establish the level of discipline was justified. The level of discipline is unjustified because it was determined based on four allegations when only one was proven. Additional mitigation is also present because the unproven allegations are the most serious and include all the action which could be considered damaging to the Park. The Grievant's action to remove the feral cats by trapping was a procedure used successfully in the past and addressed a real problem his supervisor was indecisive about solving and was in compliance with the Park's mission and needed for public safety. Therefore, it is hereby ordered that the Agency shall place in the Grievant's personnel file a Group II Written Notice for a single violation of the Standards of Conduct, policy 1.60, failing to follow a supervisor's instructions by failing to get specific authority from the Park Manager prior to setting a trap. The Group II Written Notice shall not contain other allegations and will not include employment termination. The Agency is hereby ordered to reinstate the Grievant and pay all wages and benefits lost as a result of the employment termination.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

ADMINISTRATIVE REVIEW: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401.

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main Street, Suite 400, Richmond, VA 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a final hearing decision, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

JUDICIAL REVIEW OF FINAL HEARING DECISION: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contrary to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

_____

Frank G. Aschmann
Hearing Officer

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DIVISION OF HEARINGS
REQUEST FOR ADMINISTRATIVE REVIEW
DECISION OF HEARING OFFICER

In the matter of: Case Nos. 8635/8684/8685
Date of Decision: January 31, 2008

FACTS

On January 24, 2008, the Hearing Officer received, via email, an Agency request for administrative review of case numbers 8635/8684/8685 based upon new evidence discovered since the hearing. The Agency submits three previously unseen documents and a memorandum titled "Points for Appeal of Hearing Officer's Decision." The Agency's points for appeal argues the validity of the decision in case number 8635 and the validity of the decision in case number 8684. However, the Agency requests that the Hearing Officer only review allegations 3, 4 and 5 from case number 8684.

The first document is a copy of the email sent by the Department of Conservation and Recreation (hereafter DCR), Department of Finance requiring online credit card training. This document was created on March 26, 2007. The document was referred to in the hearing but never produced. At the hearing based upon witness testimony it was accepted that the document existed and directed DCR employees to take online training. This document was in the possession of DCR and retrieved from its records for this review.

The second document is a list which gives names of recipients, actions and dates & times. This document was referred to during the hearing when the Grievant's supervisor testified he had been told by another DCR, Department of Finance employee that the Grievant had opened the training notice email. The DCR, Department of Finance employee also testified and stated he did not know if the Grievant had opened the email. This document was in the possession of DCR. DCR argues that it could not be produced at the hearing because of the process for pulling archived records.

The third document is a copy of a page from the supervisor/reviewer online credit card training and is titled, "Responsibilities." The sheet is undated. This document was in the possession of DCR and produced for the purpose of this review.

No affidavits authenticating or explaining any of the documents have been submitted. The Agency has made no request to reopen the hearing for taking additional witness testimony evidence. The Agency submits argument in its points for appeal that the documents prove its case.

The Group II Written Notice generating grievance number 8684 was issued on June 7,

2007. Grievant timely filed his grievance. On August 14, 2007, grievance number 8684 was consolidated with the other grievances for hearing. By agreement and to accommodate the schedules of all parties a hearing was set for November 28, 2007. The hearing was continued at the request of DCR and held on December 17, 2007.

LAW AND OPINION

The law on newly discovered evidence in Virginia is well established and long standing. Odum v. Commonwealth, 225 Va. 123 (1983); Fulcher v. Whitlow, 208 Va. 34 (1967); Reiber v. Duncan, 206 Va. 657 (1965); Mundy v. Commonwealth, 11 Va.App. 461 (1990). There is a four part test which must be met to get reconsideration of a decision based upon newly discovered evidence.

1. The evidence must be discovered after the trial;
2. The evidence could not have been obtained prior to trial through the exercise reasonable diligence;
3. The evidence is not merely cumulative, corroborative or collateral;
4. The evidence is material and would produce opposite results on the merits of the case.

The Agency's evidence fails to meet this standard. The documents were all known to the Agency prior to the hearing in this matter. The first two documents were actually referred to during the hearing. All three documents were created by the Agency. While the third document is undated, to be at all relevant, had to be in existence prior to the time the grievance issues arose. This document is presumably from the training mandated in the Spring of 2007. The Agency clearly had knowledge and possession of all these documents well in advance of the hearing.

The documents could have been obtained prior to the hearing with reasonable diligence. Approximately, five months past between the origination of the grievance and the hearing. Even having to perform an archive retrieval, it stretches the bounds of credibility to believe the Agency was unable to obtain one of its own records in the time period available. Additionally, the Agency never requested a continuance to have time to retrieve documents even though the Agency was granted a continuance to secure witness testimony. The documents appear to be a response to the decision rather than evidence which could not have been produced at the hearing. This appears particularly true in the case of the third document which appears to have been readily available and was simply not submitted in the discretion of the Agency Presenter.

The third document also fails to meet the standard for materiality. The document is simply a page from training the Grievant would not have seen. It does not in any way change the written policy which the Grievant is charged with violating. The training actually appears to contradict the written policy and is contrary to the primary argument of the Agency at the hearing, that it was ultimately the cardholder's responsibility to manage his card, records and follow policy, not his supervisor's. Thus, this document further fails the test as being unlikely to produce opposite results.

The first document fails to add any evidence which would change the results as well.

The facts contained in the document were accepted through witness testimony and were considered. The document is therefor just cumulative.

The second document standing alone fails to address whether someone else could have opened the email or if there is any other explanation for the Grievant's testimony that he had not received notice of the training until he returned from vacation. If the newly submitted evidence merely impeaches a witness it is not a basis to grant relief. Powell v. Commonwealth, 133 Va. 741 (1922); Whittington v. Commonwealth, 5 Va.App. 212 (1987). Alone the second document is insufficient to obtain an opposite result.

"Every man is entitled to one fair trial, and no man is entitled to more. It is for these reasons that motions for new trials, because of after discovered evidence, are not looked upon with favor. If this were not true, then justice, sometimes none too swift, would be more leaden-footed than ever." Powell v. Commonwealth, 179 Va. 703 (1942). The Agency's evidence does not meet the required standards to be considered sufficient to grant any relief. The Hearing Officer affirms the previously issued decision in the matter of case number 8684.

ORDER

The Hearing Officer hereby dismisses the Agency's Request for Administrative Review.

The parties appeal rights have been fully detailed in the original decision.

_____

Frank G. Aschmann
Hearing Officer