Issue: Administrative Review of Hearing Officer's Decision in Case No. 10965; Ruling Date: May 10, 2017; Ruling No. 2017-4537; Agency: University of Virginia Medical Center; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the University of Virginia Medical Center
Ruling Number 2017-4537
May 10, 2017

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 10965. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10965, as found by the hearing officer, are as follows:[1]

> The University of Virginia Medical Center employed Grievant as a Patient Care Technician. She began working for the Agency in 2015. No evidence of prior active disciplinary action was introduced during the hearing.
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> Grievant worked in a Unit with patients recovering from surgery. The Agency adopted a system to prioritize tasks on the unit. Level 1 tasks were the highest priority. These tasks include assisting patients needing to use the restroom. Level 2 tasks were medium priority tasks such as assisting a patient with walking. Level 3 tasks were the lowest priority. These tasks included getting ice for patients.
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> Assisting a patient who needed to use the restroom usually required two employees – a nurse and a patient care assistant.
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> When patients needed assistance, they were to call the Unit Coordinator who then sent a text to a nurse and patient care assistant advising them of the services needed at a particular room where the patient was located. The patient care assistant was to reply to the text to advise if he or she could respond to the request. A nurse could also send a text to a patient care assistant seeking assistance.
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> On December 7, 2016, Unit Coordinator sent Grievant a text message asking that she assist with a patient needing bathroom assistance, a Level 1 request. Grievant responded "N" to indicate she could not respond to the call. A

[1] Decision of Hearing Officer, Case No. 10965 ("Hearing Decision"), April 11, 2017, at 2-3 (citations omitted).

> Nurse went to speak with Grievant to ask why she could not respond to the Level 1 text. Grievant said she was doing a blood sugar test for another patient. The Nurse recognized that a blood sugar test was not a Level 1 task and Grievant should have responded to the patient's room to provide bathroom assistance. The Nurse reminded Grievant that bathroom assistance take priority over blood sugar tests.
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> Later in the day, the Nurse sent Grievant a text asking for assistance. Grievant received the text but did not reply. The Nurse requested assistance from another patient care technician because Grievant did not reply. The Nurse asked the Assistant Nurse Manager to speak with Grievant about her failure to respond. He indicated he would speak with Grievant if she repeated her behavior one more time.
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> Patient A required assistance and the Nurse sent Grievant a third text message asking for bathroom assistance, Level 1. Grievant did not reply. The Nurse obtained assistance from another employee. After finishing assisting Patient A, the Nurse located Grievant in the break room and observed Grievant eating and speaking on her personal cell phone. The Nurse spoke again with the Assistant Nurse Manager.
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> The Assistant Nurse Manager located Grievant in the break room and sat down to speak with her. The Assistant Nurse Manager calmly addressed his concerns about Grievant's failure to respond to text messages. Grievant became annoyed and abruptly walked away from the Assistant Nurse Manager. As she passed the nursing station, Grievant tossed her badge on the counter and said, "I'm done." Grievant left the Unit without providing "hand off" information regarding her patients to other nursing employees. Grievant's work duties were reassigned to other staff which caused delays.

On January 4, 2017, the grievant was issued a Step 4 Performance Improvement Counseling Form with removal.[2] The grievant timely grieved the disciplinary action[3] and a hearing was held on April 10, 2017.[4] Though properly notified of the hearing date, the grievant did not appear at the hearing.[5] In a decision dated April 11, 2017, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant had engaged in the charged misconduct and upheld the issuance of the Step 4 Performance Improvement Counseling Form with removal.[6] The grievant now appeals 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

[2] *See* Agency Exhibit 1 at 3-4. The form was subsequently revised and reissued on or about March 27, 2017. *Id* at 1-2; Hearing Decision at 1.
[3] Agency Exhibit 2.
[4] *See* Hearing Decision at 1.
[5] *Id.*
[6] *See id.* at 1, 3-4.

matters related to . . . procedural compliance with the grievance procedure."[7] 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 either party; the sole remedy is that the hearing officer correct the noncompliance.[8]

Hearing Officer's Consideration of Evidence

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[10] 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.[11] 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.[12] 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, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

The grievant asserts that the hearing officer erred in his consideration of the evidence in this case. The record evidence available to the hearing officer was severely limited, however, by the grievant's failure to attend her grievance hearing. The grievant received adequate notice of the hearing date and time,[13] and she has offered no explanation sufficient to excuse her absence. After review, EDR finds that there is sufficient evidence in the record to support the hearing officer's conclusion that the grievant engaged in the charged misconduct.[14] Moreover, EDR has reviewed nothing in the hearing record to indicate that the hearing officer erred in his assessment of the agency's witnesses or exhibits. As such, the hearing decision will not be disturbed on this basis.

Newly-Discovered Evidence

In her request for administrative review, the grievant seeks to present or have considered evidence regarding her claims that she did not engage in the charged misconduct and was treated in an inappropriate manner. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[15]

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[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code § 2.2-3005.1(C).
[10] *Grievance Procedure Manual* § 5.9.
[11] *Rules for Conducting Grievance Hearings* § VI(B).
[12] *Grievance Procedure Manual* § 5.8.
[13] *See* Hearing Decision at 1.
[14] *See, e.g.*, Agency Exhibits 1-3.
[15] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[16] However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[17]

In this case, the grievant has provided no information to support a contention that this evidence should be considered "newly discovered" under this standard. The grievant has presented nothing to indicate that she was unable to obtain this evidence prior to the hearing or to excuse her failure to attend the hearing. While the grievant may regret her failure to present this evidence during the hearing, this is not a basis on which EDR may remand the decision. Accordingly, there is no basis to re-open or remand the hearing for consideration of additional evidence on this issue.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, we decline to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[18] Within thirty 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.[19] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[20]

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[16] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[17] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[18] *Grievance Procedure Manual* § 7.2(d).
[19] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[20] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).