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## ADMINISTRATIVE REVIEW

In the matter of the Department of Motor Vehicles
Ruling Number 2022-5391
May 13, 2022

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11763. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

## FACTS

The relevant facts in Case Number 11763, as found by the hearing officer, are as follows:[1]

> During the time relevant to this proceeding (the "Period"), the Grievant was employed by the [Department of Motor Vehicles (the "agency")] as a Senior Special Agent in the Law Enforcement Division of DMV.
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> The Grievant was employed by DMV as a law enforcement officer for over 10 years. As a sworn law enforcement officer at DMV, Grievant had the authority to carry and discharge a weapon, arrest citizens and take away their liberties, drive a state cruiser, and testify under oath in court.
>
> As a law enforcement officer, the Grievant was charged with maintaining public trust and public safety. The Grievant was required to consistently use good judgment in enforcing laws and regulations; and to ensure that actions taken were appropriate for the circumstances.
>
> According to the Grievant's job description, he "**MUST** be able to render credible testimony in a court of law as well as any other forum required by job responsibilities."

[1] Decision of Hearing Officer, Case No. 11763 ("Hearing Decision"), March 11, 2022, at 4-10 (citations and paragraph enumeration omitted).

His job requires that he, "Appears for court hearings or administrative proceedings" and that his "[t]estimony is truthful and unbiased; is delivered in an articulate and understandable manner."

In short, as a law enforcement officer, the Grievant was expected to exhibit exemplary judgment, conduct and ethics and to ensure that all applicable laws, Agency policies, guidelines, practices and rules were followed.

The Grievant's Employee Work Profile (EWP) stresses that the Grievant was required to be skilled at proper use and application of equipment commonly used in law enforcement to include firearms, less lethal force devices, and "safe operation of a motor vehicle under a variety of conditions including emergencies."

The Agency can and did consider the "unique impact that a particular offense has on the agency." The "unique" impact in this case concerned the Grievant's role as a member of law enforcement, where law enforcement, particularly in the current environment, must operate with the highest level of integrity and public trust, and because of *Brady v. Maryland*.

The compelling, uncontroverted testimony of the Assistant Commissioner and the HR Analyst Sr., as reinforced by the "Guide" to the Virginia Association of Chiefs of Police and the Commonwealth's Attorneys, is that Brady v. Maryland requires that "Officer integrity underlies every criminal investigation and prosecution. It is a critical component to every case." The Guide adds, "If there is an issue with an officer's integrity, it must be addressed and possibly disclosed under *Brady v. Maryland* and related cases."

The consequences of failure to disclose are significant, as explained by the Guide: "Failure to disclose material issues can have serious consequences, such as wrongful convictions, the reversal of otherwise valid convictions, the exclusion of evidence, court sanctions, civil liability, and the accompanying embarrassment and distrust for all involved."

The Guide includes "[p]otential Brady [i]ssues" requiring a discussion about Brady with the prosecutor such as (a) intentional false or materially inaccurate statements or reports; (b) sustained findings of misconduct after an internal investigation related to untruthfulness or dishonesty; and (c) sustained findings of misconduct, on or off-duty, related to dishonesty.

This concern is not theoretical or academic. The Agency provided examples of situations where the Agency has received Brady requests, including for the Former Special Agent in Charge ("SAC") and the Assistant Special Agent in Charge ("ASAC"), relating to evidence of "impeachment" information.

The Grievant understood and agreed pursuant to his EWP that DMV would monitor his driving record.

The Grievant received significant training concerning his position and the Grievant also had significant experience as a law enforcement officer with the Federal Government prior to joining to DMV.

**WRITTEN NOTICE 1:**

On March 4, 2020, the Grievant took two sedatives at one time at 8:15 am, after arriving at the medical facility where he had a MRI.

The Grievant's doctor prescribed the medication for the Grievant to "Take 1 Tablet By Mouth Twice Daily."

Contrary to the doctor's prescription, the Grievant took it upon himself to take two tablets by mouth once daily.

The same prescription instructs to "use this drug as ordered by your doctor." It advises to "get medical help right away if you feel very sleepy or dizzy." It further advises, "Avoid driving and doing other tasks or actions that call for you to be alert until you see how this drug affects you."

While the Grievant may have thought he was familiar with the drug because he had taken it previously, his own prescription cautions that as people get older, the side effects could change. His prescription states, "If you are 65 or older, use this drug with care. You could have more side effects." It states "very bad dizziness or passing out" as possible side effects of the medication. It advises the user, "Call your doctor or get medical help if any of these side effects or any other side effects bother you or do not go away: Feeling dizzy, sleepy, tired, or weak." Of course, doubling the prescribed dose exacerbated the problem.

Grievant chose to return home following the procedure after taking double the prescribed dose of the medication, to get into his state cruiser, and drive 1.25 hours to work until approximately 4:30 pm. He then recklessly got into his state cruiser to drive the approximately 1.25 hours home. Not surprisingly, the Grievant's journey was interrupted when he recklessly drove his vehicle across the median line, hitting an innocent citizen.

Previously, Grievant experienced claustrophobia when undergoing MRI procedures. Grievant's medical evidence provides, "If you have a fear of enclosed spaces (claustrophobia), you might be given a drug to help you feel sleepy and less anxious."

Grievant took the medication to "help him feel sleepy and less anxious", namely, to sedate him. According to his own medical evidence, Grievant could resume his usual activities immediately following the MRI, only "[i]f you haven't been sedated."

Grievant told officers responding to the accident, "I was driving on my way home on Brooks Gap Road. I don't remember making the left on Hopkins Gap Road (Route 612). I don't remember driving southbound or the accident. My first memory of the crash was driving in a corn field and my cruiser stopped." Grievant admitted "at 8:45 AM he was given Lorazepam prior to having an MRI and he believes that Lorazepam is what caused him to blackout."

Grievant admitted that "in the afternoon, when he started working, he had limited recall of events until the next day at about 2:00 pm with some outstanding memories. He stated he remembered being at the office in Waynesboro but doesn't remember leaving, he remembered the bang of the crash that 'it woke him up.'" Grievant didn't remember talking to the other driver, although the agency produced a recording of that conversation.

Grievant admitted to the ASAC, "Having taken medication, I know when you don't feel right. I could feel the signs and I knew I should not be driving the cruiser – but I did anyways." Grievant also admitted to the ASAC, "I knew better."

**WRITTEN NOTICE 2:**

On August 3, 2021, a citizen called 911 to report her concern that the Grievant was conducting an unsupervised burn at a property he owned.

The 911 operator spoke to the Assistant Fire Marshall (the "Fire Marshall"), to convey the concern. The Fire Marshall recalled that he personally issued the subject burn permit to the Grievant.

The applicable Fire Prevention Code requires a person with a burn permit to stay close to a smoldering fire and if he wants to leave it, to extinguish it.

Ultimately, the Fire Marshall spoke to the Grievant and reminded the Grievant of this obligation. The Fire Marshall was acting in his official capacity pursuant to his official duty to protect the public when he spoke to the Grievant. The Fire Marshall reasonably expected the Grievant to be forthright and honest in his communications.

However, at a time when the Grievant was miles away at the Ruritan Club, the Grievant misrepresented to the Fire Marshall that he was at home, in his kitchen, looking out his window at the fire. The Fire Marshall relied on the [Grievant's] misrepresentations and closed out the matter.

**WRITTEN NOTICE 3:**

On March 3, 2020, while the ASAC and the SAC were having lunch, the SAC spoke on the phone to the Grievant and specifically instructed him not to drive his state cruiser to the MRI appointment and not to return to work on March 4, 2020, because of the medication he would be taking for his MRI.

Following instructions is critical in any employment scenario, but particularly so in a law enforcement paramilitary organization. It is also clearly articulated in the Rules of Conduct for law enforcement.

The Grievant did not follow the SAC's instructions resulting in the crash.

The SAC noted the orders and course of events within days of the incident.

The agency issued to the grievant three Written Notices on September 30, 2021, with termination based on his accumulation of disciplinary action:

- A Group III Written Notice ("Written Notice 1") charging the grievant with allegedly "driving a vehicle issued and owned by the Commonwealth of Virginia" and "caus[ing] a collision with another vehicle" after taking medication that he knew had caused him to be incapacitated;[2]
- A Group III Written Notice ("Written Notice 2") charging the grievant with lying to a Fire Marshall that he was "at [his] home supervising a burn" pursuant to a burn permit when he was actually "in a meeting with other witnesses, not at [his] home" observing the burn;[3]
- A Group II Written Notice ("Written Notice 3") charging the grievant with failing to follow the SAC's order not to drive his state vehicle or report to work after a medical procedure on March 4, 2020, "which resulted in a serious motor vehicle accident."[4]

The grievant timely grieved these disciplinary actions, and a hearing was held on February 23, 2022.[5] In a decision dated March 11, 2022, the hearing officer upheld the agency's discipline, concluding that the agency had proven the cited offenses and that no mitigating circumstances existed to reduce the disciplinary action.[6]

The grievant now appeals the hearing decision to EDR.

[2] Agency Ex. 2.
[3] Agency Ex. 3.
[4] Agency Ex. 4.
[5] Hearing Decision at 1.
[6] *Id.* at 12-20.

## DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure."[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 a party; the sole remedy is that the hearing officer correct the noncompliance.[8] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[9] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant argues that the hearing officer erred in his consideration of the evidence, noting that the decision "did not make any finding of a lack of credibility for the Grievant or his witnesses" and that "the evidence presented by Grievant was not considered in the factual findings of the Hearing Officer."[10] The grievant further contends that the hearing officer "manufactured facts which were not presented as evidence," "did not allow witnesses to be cross-examined," "prejudicially calculated time against the Grievant in the hearing," and "displayed overt bias in his questions and in his decisions."[11]

*Hearing Officer's Consideration of Evidence*

The grievant alleges numerous errors in the hearing officer's factual findings and consideration of the evidence relating to each of the three Written Notices. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[12] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[13] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[14] Thus, in disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[15] As long as the hearing officer's findings are based on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

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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 § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[10] Request for Administrative Review at 1.
[11] *Id.*
[12] Va. Code § 2.2-3005.1(C).
[13] *Grievance Procedure Manual* § 5.9.
[14] *Rules for Conducting Grievance Hearings* § VI(B).
[15] *Grievance Procedure Manual* § 5.8.

Written Notice 1

Written Notice 1 charged the grievant as follows:

> On March, 3, 2020, you notified your supervisor that you were having a medical procedure on the morning of March 4, 2020.
>
> Later that evening, while driving a vehicle issued and owned by the Commonwealth of Virginia, you were seen by another officer as swerving in the road.
>
> Shortly thereafter, you caused a collision with another vehicle.
>
> You told the investigating police officer that you were given medication prior to having an MRI and you believed that the medication is what caused you to black out.
>
> . . . [T]his notice is based on your statements to [the ASAC], on March 6, 2020, stating that, based on a previous accident, stating that you took medication fol[l]owing that accident.
>
> [The ASAC] documented that you stated to him that you know when you don't feel right and that you could feel the signs and knew you should not be driving the cruiser, "but I did anyways," and afterwards you began crying. You then told [the ASAC] that you knew better, and asked for counseling.[16]

The agency went on to describe the grievant's conduct as violating various DHRM and agency policies because it constituted a failure to operate his state-owned vehicle in a manner to avoid injury to other persons or damage to property, amounted to recklessly damaging state property, and violated safety rules where there was a threat of bodily harm.[17]

The hearing officer assessed the misconduct charged in Written Notice 1 as follows:

> . . . [T]he Rules of Conduct for DMV Law Enforcement Officers requires of Grievant, "While on duty, employees shall remain alert and awake, unencumbered by alcoholic beverages, *prescription drugs*, illegal narcotics, or conflicts arising from off-duty employment."
>
> The policy further requires, "Employees using any prescribed drug or narcotic or any patent medicines that could possibly induce impairment of their performance shall notify their supervisor."

[16] Agency Ex. 2.
[17] *Id.*

> The policy further provides, "Employees shall operate Department vehicles and other equipment in such a manner as to avoid injury to persons or damage to property."[18]

Based on this analysis and his factual findings regarding the events described in the Written Notice, the hearing officer upheld the agency's discipline as warranted and appropriate.[19]

The grievant asserts that the hearing officer failed to consider the grievant's testimony about his call with the ASAC on March 6, 2020, which differs from what he alleges is the ASAC's "factually incorrect" account.[20] The grievant also contends that the ASAC's interviews with management and his testimony at the hearing were inconsistent and did not establish that the grievant knew he should not have driven his state vehicle before he began driving.[21] In addition, the grievant claims he took his medication as prescribed and directed, experienced no side effects before the accident, and was familiar with the effects of the medication from his previous experience with it.[22] The grievant further disputes the hearing officer's characterization of the medication as a "sedative" that was intended to "help him feel sleepy."[23] Finally, the grievant argues that his recollection of and testimony about his conduct immediately after the accident were consistent.[24]

We find record evidence in direct support of each of the hearing officer's findings regarding Written Notice 1. At the hearing, the ASAC testified at length about his conversation with the grievant on March 6, 2020 in a manner consistent with the Written Notice and the hearing officer's findings of fact.[25] Although the grievant argues that there were inconsistencies in the ASAC's account of that conversation over time, it appears that the ASAC's recollection of the key details related to the charged misconduct – such as the grievant's admission that he "could feel the signs" and knew he should not have been driving but did anyway – were consistent across the ASAC's accounts of the conversation throughout the agency's investigation of the incident.[26] The grievant's testimony at the hearing contradicted the ASAC's testimony in several material respects; namely,

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[18] Hearing Decision at 11 (citations omitted).
[19] *Id.* at 12, 14.
[20] Request for Administrative Review at 8.
[21] *Id.* at 8-9.
[22] *Id.* at 13-14.
[23] *Id.* at 14-15.
[24] *Id.* at 15. The grievant also appears to claim that the hearing officer violated Section 19.2-392.2 of the Code of Virginia by describing the grievant's conduct as "reckless." That section of the Code addresses expungements of police and court records. The grievant's evidence indicates that a criminal charge of reckless driving related to the accident was expunged, and the grievant therefore argues that the hearing officer's reference to the grievant's conduct as reckless was thus in error. *Id.* at 14; *See* Grievant's Ex. 13. The hearing officer described the grievant as "recklessly" driving his state vehicle prior to the accident. Hearing Decision at 7. Nothing in the decision or record evidence suggests that this description of the grievant's conduct is a reference to the expunged criminal charge. The Written Notice alleged the grievant had "recklessly damaged state property" and the hearing officer's description of the grievant's conduct as reckless is consistent with that charge. Agency Ex. 2. As a result, we find no error as to this issue.
[25] *See* Hearing Recording, at Track 3, 1:17:33-1:34:10 (ASAC's testimony).
[26] *See id.*; Agency Ex. 14 (ASAC's notes documenting the conversation on March 6, 2020); Agency Ex. 19, at 3-4, 7 (investigator's report); Grievant's Ex. 16, at 14-23 (transcript of interview with ASAC).

the grievant explained he told the ASAC he did not know that he did not feel right and did not know the signs of feeling impaired by the medication, essentially amounting to a denial that he knew he should not have been driving.[27] The grievant also testified that he told the ASAC about a former colleague who had an accident and took medication, and thus was not referring to himself as having experience with the effects of medication.[28] These details appear to be the aspects of the ASAC's testimony that the grievant points to as "factually incorrect" on administrative review.

Even if the ASAC may have misunderstood or misinterpreted the grievant's description of a past accident, the hearing officer made no factual findings about this portion of the conversation. The hearing officer instead made findings consistent with the ASAC's testimony that the grievant admitted to knowing he should not have driven based on his past experience taking medication – experience that is confirmed by the grievant's testimony that he had taken medication before MRI procedures for many years and that he further acknowledges in his request for administrative review.[29] In addition to the ASAC's account of his conversation with the grievant on March 6, 2020, there is also evidence in the record to support the hearing officer's conclusion that the grievant violated agency policy as charged in Written Notice 1, such as his admission to the agency's investigator that he had "limited recall" of events both before and after the accident and his statement to police at the scene of the accident that he did not remember either the events before the accident or the accident itself.[30]

Ultimately, it would seem that whether the ASAC's description of the past accident discussed during the March 6, 2020 phone call was consistent with the grievant's actual experience has no bearing on whether the grievant told the ASAC he knew he should not have been driving on March 4, 2020, apart from its potential relevance to an assessment of the ASAC's credibility. Similarly, although the grievant refers to the hearing officer's description of a recording from the scene of the accident as inconsistent with the content of the recording, alleging that the recording supports his position that he was not impaired, we perceive no error on any material fact relevant to the grievant's condition before or at the time of the accident. Having considered the evidence in the record and the grievant's claim on administrative review, we find every indication that the hearing officer, presented with conflicting testimony about the grievant's conversation with the ASAC and the grievant's impairment when the accident occurred, made findings of fact in accordance with the testimony he found most credible – as hearing officers routinely do.

Regarding the grievant's medication, the evidence is undisputed that his prescription stated to "[t]ake 1 tablet by mouth twice daily,"[31] but that he took two tablets prior to the MRI procedure on March 4, 2020 because this was how he had taken medication under these circumstances in the past.[32] Though the grievant may not have read the prescription or understood that the dosage was

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[27] Hearing Recording at Track 5, 24:11-30:16 (grievant's testimony)
[28] *See id.*
[29] *Id.* at 7:01-8:18 (grievant's testimony); Request for Administrative Review at 13-14; *see* Agency Ex. 19, at 12 (investigator's report).
[30] Agency Ex. 12, at 4-5 (accident report); Agency Ex. 19, at 12 (investigator's report).
[31] Agency Ex. 20.
[32] *E.g.*, Hearing Recording at Track 5, 10:55-11:26 (grievant's testimony).

different from his previous prescriptions,[33] there is clearly evidence to indicate that he did not take the medication as prescribed. As for the hearing officer's characterization of the medication as a "sedative" intended to "make [the grievant] feel sleepy," the hearing officer made that determination based on one of the grievant's own exhibits describing an MRI procedure and the medication one may be prescribed.[34] It therefore cannot be said that the hearing officer's characterization of the grievant's medication as a sedative lacks support in the record. Notably, however, the agency's Written Notice did not describe the medication in question as a sedative, and thus the nature or characterization of the medication would not seem to be an issue material to the outcome of the case.[35] Whether the medication is described as a sedative or not, the hearing officer found that the grievant did not take the medication as prescribed, which led the grievant to violate agency policy as charged in Written Notice 1. These conclusions are consistent with the evidence in the record as discussed above.

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. In this case, there is nothing in the hearing recording or the hearing decision to indicate that the hearing officer abused his discretion in assessing the relative persuasive weight of the evidence presented by the parties as to the misconduct charged in Written Notice 1. Because 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 on the issues raised in the grievant's request for administrative review.

Written Notice 2

Written Notice 2 charged the grievant as follows:

> A citizen alerted [the SAC] that you told the Fire Marshal[] that you were at your home supervising a burn when in fact you were witnessed at another meeting.
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> . . . On August 3, 2021 at [7:49 p.m.] you received a call from the fire department asking if your fire was under control. You assured the fire department that it was under control and that you were at "the house" and said, "I have an eyeball on it." This statement was false, and you were not at the house and instead were at a meeting witnessed by others.
>
> [The Fire Marshal] also called you and explained that he received a report that the fire was unsupervised. You told the Fire Marshal[] you were burning but that you were watching the fire from inside your house (looking out the window) and it was fine. Based on your representation, the Fire Marshal[] cleared the call

[33] *See id.* at 1:12:58-1:14:18 (grievant's testimony).
[34] Grievant's Ex. 23, at 5; *see* Hearing Recording at Track 5, 7:01-8:18 (grievant's testimony).
[35] *See* Agency Ex. 2. For example, it is unclear how removing references to the medication as a sedative from the decision would affect the outcome of the case since the hearing officer's conclusion that the grievant engaged in the misconduct charged on Written Notice 1 did not depend on a conclusion that the medication was a sedative.

> fourteen minutes later at 7:57 pm after the conversation with you. The Fire Marshal[] said he had no reason to doubt the information that he received from you and the only concern regarding the fire was that it was unsupervised.
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> . . . Based on witness accounts, at this exact time you were seen in a meeting with other witnesses, not at your home. You were observed talking loudly on the phone and then racing out of the meeting.
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> . . . It is clear from the facts that you lied to the Fire Marshal[] and told him you were home when indeed you were not observing the burn.[36]

Written Notice 2 charged the grievant with violating the agency's core values, explaining that "public trust and integrity" were "paramount" to his position as a law enforcement officer, especially in light of his need to "testify in court without [his] testimony being tainted."[37]

The hearing officer found that the "lack of candor as exhibited here by Grievant, which undermined his position, the Agency core values and severely impacts the Agency's activities, is appropriately classified by management as a Group III offense."[38] In support of this conclusion, the hearing officer referred to the agency's policy that law enforcement officers must "remain unsullied in their life and avoid acts of moral turpitude and maintain good moral character."[39]

On administrative review, the grievant contends that the evidence in the record was insufficient to support a conclusion that the grievant lied to the Fire Marshal, pointing to the failure of one witness who provided information during the agency's investigation to testify at the hearing and the lack of direct testimony that the grievant lied to the Fire Marshal.[40] The grievant further asserts that the hearing officer "ignored" issues with the "timing of several phone calls" and did not consider "three witnesses and two affidavits" the grievant presented at the hearing indicating that he was at home during the relevant time period.[41]

At the hearing, the agency presented evidence from its investigator about their review of the incident regarding the Fire Marshal. The investigator spoke with a non-employee eyewitness who stated that the grievant was at the meeting at 7:00 p.m. until he left upon receiving a phone call.[42] The investigator testified that they found the eyewitness credible.[43] Another non-employee testified at the hearing that they spoke with the eyewitness during the meeting about the fire at the grievant's home, and the eyewitness confirmed that the grievant was at the meeting until approximately 8:00 p.m.[44] Although the eyewitness in question did not testify at the hearing, the accounts of the eyewitness's knowledge from the investigator and the non-employee appear

[36] Agency Ex. 3.
[37] *Id.*
[38] Hearing Decision at 12.
[39] *Id.* at 14.
[40] Request for Administrative Review at 3-4.
[41] *Id.* at 15-16.
[42] Hearing Recording at Track 4, 46:55-56:20 (investigator's testimony); Agency Ex. 22 at 3-4.
[43] Hearing Recording at Track 4, 55:54-56:05 (investigator's testimony).
[44] *Id.* at Track 3, 47:15-52:00 (non-employee's testimony).

consistent with one another and with the charge on the Written Notice. Moreover, and despite any credibility concerns with the failure of the eyewitness to testify, the SAC was also at the meeting and testified about his observation of the grievant.[45] The SAC testified that the grievant arrived at the meeting around 7:00 p.m., and that the grievant quickly left the meeting at approximately 8:00 p.m. after receiving a phone call.[46] The Fire Marshal, meanwhile, testified that he spoke with the grievant about the fire and the grievant said he could see the fire from his kitchen.[47]

In his testimony, the grievant stated that he received two calls about the fire: the first from a 911 operator at 7:49 p.m. and the second from the Fire Marshal at 7:54 p.m.[48] The grievant presented evidence from his wife and daughter that he was at home when he spoke to the 911 operator and then immediately left to go to the meeting.[49] The grievant admitted that he arrived at the meeting immediately before the Fire Marshal called him.[50] The grievant denies making the affirmative statements attributed to him by the Fire Marshal's testimony, explaining that he implied to the Fire Marshal that he was not at home during their conversation.[51] Notably, the hearing officer made no factual findings about when the grievant arrived at the meeting or his location before his conversation with the Fire Marshal. The hearing officer instead found that, while the grievant was at the meeting, he "misrepresented to the Fire Marshal[] that he was at home, in his kitchen, looking out his window at the fire."[52] There is evidence in the record to support this conclusion, based on both the Fire Marshal's and the grievant's own testimony as to his location during the conversation.

The hearing officer could have discussed any credibility determinations between conflicting testimony about the incident with the Fire Marshal in greater detail, but we find no error in his assessment of the evidence in the record or his conclusion that the agency's evidence was sufficient to support the charges against the grievant in Written Notice 2. As a general matter, the grievance procedure does not require that a hearing officer specifically discuss every argument or fact presented by a party; thus, a hearing decision's mere silence as to specific arguments, testimony, and/or other evidence does not necessarily constitute a basis for remand.[53] EDR cannot find that there is evidence the hearing officer failed to consider on any disputed issue of material fact. Moreover, conclusions as to the credibility of witnesses are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment

[45] *Id.* at Track 2, 1:02:46-1:07:48 (SAC's testimony).
[46] *See id.*
[47] *Id.* at Track 4, 15:21-20:50 (Fire Marshal's testimony).
[48] *Id.* at Track 5, 42:25-47:40 (grievant's testimony); *see* Grievant's Exhibit 31 (grievant's phone records).
[49] Hearing Recording, Track 3, at 55:43-1:06:40 (testimony of grievant's wife and daughter); Grievant's Exs. 28, 29 (affidavits of grievant's wife and daughter). According to the grievant's evidence, the meeting took place at a location approximately five minutes from his home. Grievant's Ex. 27.
[50] Hearing Recording, Track 5, at 45:21-46:15 (grievant's testimony).
[51] *Id.*
[52] Hearing Decision at 9.
[53] *See, e.g.*, EDR Ruling No. 2020-5075; EDR Ruling No. 2020-5073.

for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[54]

Written Notice 3

Written Notice 3 charged the grievant as follows:

> You failed to follow [the SAC's] order given to you on March 3, 2020, which resulted in a serious motor vehicle accident on March 4, 2020 while driving a state vehicle. On March 3, 2020, upon learning from [the ASAC] you were having a medical procedure the following day, [the SAC] spoke to you and ordered you not to drive your state vehicle on March 4, 2020 following your procedure and told you to take the day off. You failed to follow his order, and worked on March 4, 2020 following the procedure, and drove your state issued vehicle which resulted in a motor vehicle accident involving your state issued cruiser.
>
> . . . .
>
> Your failure to follow [the SAC's] orders had a serious impact on agency operations in that you caused a collision that could have resulted in death to you and/or another person. Had you followed his order, this would not have occurred.[55]

The hearing officer found that the agency's evidence was sufficient to support the issuance of a Group II Written Notice for failure to follow instructions under these circumstances.[56]

On administrative review, the grievant contends that the hearing officer failed to properly consider or address an issue with the agency's production of phone records relating to Written Notice 3, which he argues demonstrate no phone call between the SAC and the grievant took place on March 3, 2020.[57] The grievant argues that "all documentary evidence of phone records and cross-examination of Agency witnesses contradicted the claims that the March 3, 2020 phone call took place," and that the agency's only evidence about the call consisted of "inconsistent" witness testimony.[58] Prior to the hearing, the grievant requested documents from the agency relating to the phone call that took place on March 3, 2020.[59] The agency provided the SAC's and ASAC's state phone records but did not produce the grievant's state phone records.[60] The grievant argues that the SAC's and ASAC's state phone records confirmed neither of them spoke with the grievant during the time when the call allegedly took place on March 3, 2020, and that the hearing officer failed to consider this in making his decision. Moreover, the grievant takes issue with the hearing officer's discussion of the agency's production of documents, stating that the hearing officer

[54] *See*, *e.g.*, EDR Ruling No. 2020-4976.
[55] Agency Ex. 4.
[56] *See* Hearing Decision at 12, 15.
[57] Request for Administrative Review at 5-7.
[58] *Id.* at 5.
[59] *See id.* at 5-6.
[60] *See id.* at 6.

"summarily dismissed" the agency's failure to produce documents as a procedural matter instead of a substantive factual issue.[61] The grievant maintains that the agency's production of documents (or lack thereof) constitutes "definitive and exculpatory evidence" that the March 3, 2020 call did not occur.[62]

Before turning to the evidence in the record regarding Written Notice 3, we must first address the agency's production of documents in response to the grievant's request. The grievance statutes provide that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be made available, upon request from a party to the grievance, by the opposing party."[63] Pursuant to the *Rules for Conducting Grievance Hearings*, a hearing officer may "issue an order for . . . the production of documents" upon request by a party.[64] In cases where a party fails to produce relevant documents, a hearing officer has the authority to draw an adverse inference against that party if it is warranted by the circumstances.[65]

The hearing officer addressed the grievant's request for documents in the decision, noting that "these records were not requested from the hearing officer" and explaining that, "[i]f they had been, the hearing officer could have issued an order for documents and sent it to counsel for the Agency . . . ."[66] EDR's review of the hearing record confirms that the hearing officer's description of events appears to be correct: there is nothing to show that the grievant requested an order from the hearing officer for the documents in question and, in any event, the hearing officer did not issue an order for the production of any documents. Moreover, it does not appear the grievant brought the matter to the hearing officer's attention before the hearing, raising the matter for the first time at the hearing when questioning the agency's witnesses about their phone records.[67]

More significantly, we also find no error in the hearing officer's consideration of the evidence relating to Written Notice 3. Witness testimony at the hearing indicated that the grievant spoke with the ASAC while the ASAC and the SAC were having lunch on March 3, 2020.[68] The SAC testified that he took the ASAC's phone and directed the grievant not to drive his state vehicle to his medical procedure on the following day or report to work after the procedure.[69] The ASAC testified that he could not remember whether he spoke with the grievant on his state or personal phone but confirmed he overheard the call.[70] Although the grievant claims that the state phone records of the SAC and the ASAC definitively prove that no such call occurred, the hearing officer was entitled to evaluate all of the evidence offered by the parties and make factual determinations based on what he found to be credible. Two witnesses (the SAC and the ASAC) who were present confirmed that the call took place. Moreover, evidence in the record suggests that the call may

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[61] *Id.*
[62] *Id.* at 7.
[63] Va. Code § 2.2-3003(E); *see Grievance Procedure Manual* § 8.2.
[64] *Rules for Conducting Grievance Hearings* § III(E).
[65] *Id.* § V(B).
[66] Hearing Decision at 18.
[67] *See*, *e.g.*, Hearing Recording at Track 3, 18:55-32:37 (SAC's testimony).
[68] *Id.* at Track 2, 32:27-39:00 (SAC's testimony) and Track 3, 1:09:00-1:14:10 (ASAC's testimony).
[69] *Id.* at Track 2, 32:27-39:00 (SAC's testimony).
[70] *Id.* at Track 3, 1:08:42-1:15:17, 2:00:25-2:00:47 (ASAC's testimony); *see id.* at Track 2, 1:18:03-1:22:55 (SAC's testimony).

have occurred on a different phone (*i.e.* the ASAC's personal phone) than the ones for which the grievant received records.

The grievant maintains that the lack of phone records confirming what phone was used for the call and the precise time at which the call took place requires a conclusion that the call never occurred. However, as with the evidence relating to Written Notices 1 and 2, the hearing officer had the authority to weigh the evidence about the details of the March 3, 2020 phone call based on his assessment of the evidence he considered most credible – including phone records, witness testimony, and any other relevant documents. The record before EDR indicates that the hearing officer's findings about this matter are based upon evidence in the record and the material issues of the case. Accordingly, we find no error in the hearing officer's consideration of the evidence regarding the misconduct charged in Written Notice 3.

In summary, EDR has thoroughly reviewed the hearing record and the grievant's request for administrative review and concludes that most of the alleged errors in the hearing officer's assessment of the evidence relating to Written Notices 1, 2, and 3 were either not material or are simply factual findings on which the grievant disagrees with the hearing officer's conclusions or impact of the findings. As a result, EDR cannot find that remanding the case to the hearing officer for reconsideration on the specific factual issues alleged by the grievant would have an effect on the ultimate outcome of this case. Furthermore, the hearing officer clearly assessed the evidence presented by the parties and found that the agency had met its burden of showing that the grievant had engaged in the conduct described in the Written Notices, that his behavior constituted misconduct, and that the discipline imposed was consistent with law and policy. EDR's review of the hearing record indicates that there is evidence to support those findings. Accordingly, we decline to disturb the decision on any of the grounds discussed above.

*Length of Hearing and Questioning of Witnesses*

The grievant asserts that the hearing officer "wrongly subtracted significant time" from the grievant's presentation of his case, which prevented the SAC, a "key witness," from being adequately cross-examined and otherwise prejudiced his ability to present his case at the hearing.[71] The grievant argues that his alleged inability to fully cross-examine the SAC "amounted to a fundamental denial of due process" and is inconsistent with the grievance procedure.[72]

The *Rules for Conducting Grievance Hearings* (the "*Rules*") do not expressly require the hearing officer to grant a party a particular amount of time to present evidence. Generally, hearings can be concluded in a day or less but there is no requirement that a hearing last an entire day.[73] However, a hearing should last as long as necessary for the parties to have an opportunity to fully and fairly present their evidence.[74] In this case, the hearing officer sent a scheduling order to the parties in advance of the hearing that clearly stated they would each have four hours to present their respective cases. The scheduling order specifically stated that each party's time would include

[71] Request for Administrative Review at 9.
[72] *Id.*
[73] *Rules for Conducting Grievance Hearings* § III(B).
[74] *See id.*

"direct examination, cross-examination, [and] rebuttal testimony," in addition to 30 minutes for opening and closing arguments.[75] The hearing in this matter appears to have lasted over eight hours.[76]

The grievant contends that he should have had at least one hour of the allotted four hours to present his evidence, including additional cross-examination of the SAC, following the conclusion of the agency's case-in-chief.[77] The grievant claims that the hearing officer failed to prevent "spurious objections" from the agency's counsel and to calculate the grievant's use of time properly, and that agency witnesses "avoided answering clear questions," all of which interfered with his ability to present his case within his allotted four hours.[78] The grievant has presented many alleged examples of misuse of time and mistakes in the hearing officer's timekeeping in support of his position that he did not receive a full four hours to present his case as described in the scheduling order.[79] The grievant also claims that the hearing officer only allowed him 15 minutes to present his evidence and that, upon contacting the SAC to resume cross-examination, the SAC was "not in a position to review documents and answer questions" and thus could not testify.[80]

It would be inappropriate for a hearing officer to enforce an arbitrary limitation of time without regard to the particular circumstances of a given case, but it is not an abuse of discretion for a hearing officer to make an assessment of the time reasonably needed for a hearing and to require the parties to adhere to that time limit absent a showing that additional time is needed for a full and fair presentation of the evidence. Here, it is evident from our review of the hearing recording that the hearing officer granted the grievant latitude to present evidence beyond the four-hour limitation described in the scheduling order. There appears to be no discussion in the hearing record about the remaining time available to the grievant before he began his presentation of evidence, so we are unable to verify what the hearing officer may have said to the parties regarding the alleged 15 minutes the grievant had available. Nevertheless, and regardless of his remaining time at the start of his presentation of evidence, the grievant testified under direct and redirect examination for approximately one hour.[81] This appears to represent an extension of the grievant's available time and, notably, aligns with the amount of time the grievant claims he should have been given to present his case (*i.e.* at least one hour).

Further, based on a review of the record, it does not appear that the hearing officer prevented the grievant from testifying further or otherwise cut off his testimony. The record reflects that the grievant was permitted to answer all questions asked by his counsel on direct

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[75] Although the grievant contends that the hearing officer counted the parties' opening arguments, procedural discussions, and breaks between witness testimony against their respective four-hour allotments, *see* Request for Administrative Review at 10, our review of the hearing record does not clearly indicate this was the case such that we have a basis to conclude either party was prejudiced. The grievant also claims that he was unaware his cross-examination of the agency's witnesses counted against his own four hours before the hearing, *see id.*, but the scheduling clearly stated as such. As a result, we find no error as to these matters.
[76] *See* Hearing Decision at 19.
[77] Request for Administrative Review at 10.
[78] *Id.* at 10-11.
[79] Request for Administrative Review at Exs. C, E.
[80] *Id.* at 10.
[81] *See* Hearing Recording at Track 5, 5:52-49:25, 1:32:57-1:46:25 (grievant's testimony).

examination. The grievant's counsel did not request any further time at that point in the hearing or indicate that he was prevented from presenting any evidence through the grievant's testimony at the hearing. In light of the latitude the hearing officer allowed the grievant to present his case despite any time limitations described in the scheduling order, we find no error in his exercise of discretion with regard to managing the length of the hearing or any other timekeeping matters.

Regarding the SAC's testimony, the agency indicated at the hearing that the SAC had retired from his position with the agency.[82] As a result, the agency lacked the authority to compel him to testify, though it appears that he nonetheless testified at the agency's request. However, the SAC indicated during his testimony that he needed to leave the hearing by a particular time and would be unavailable afterwards.[83] The grievant's counsel initially indicated that he expected to have concluded his cross-examination of the SAC by that time.[84] The grievant's counsel then cross-examined the SAC for approximately 45 minutes, until the SAC stated that he needed to leave. The grievant does not appear to have objected to the SAC's departure at that point, though the hearing officer did note that the SAC could be called back to testify remotely later if needed.[85] When the grievant later contacted the SAC to resume cross-examination, the SAC was traveling and appears to have been unable to review documents or testify privately.[86] The grievant's counsel therefore elected not to further cross-examine the SAC.[87] On administrative review, the grievant alleges that this inability to further cross-examine the SAC under these circumstances amounted to a denial of due process.

Prior to certain disciplinary actions, the United States Constitution generally provides, for individuals with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[88] In this context, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine adverse witnesses in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[89] The grievance statutes

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[82] *See* Hearing Recording at Track 2, 29:17-29:38 (SAC's testimony).
[83] *Id.* at Track 2, 1:23:10-1:23:34 and Track 3, 42:11-43:00 (SAC's testimony).
[84] *Id.* at Track 2, 1:23:10-1:23:34.
[85] *Id.* at Track 3, 24:49-26:30.
[86] *Id.* at Track 5, 1:18-5:51.
[87] *Id.*
[88] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). State policy requires that

> [p]rior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60, *Standards of Conduct*, § E(1). Significantly, the Commonwealth's Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."
[89] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses

and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[90]

In this case, the grievant, represented by counsel, participated in a hearing before an impartial decision-maker, where he had the opportunity to present evidence relevant to the agency's accusations against him and to question all witnesses called. As a matter of the grievance procedure, EDR perceives no procedural impairment based on the grievant's inability to cross-examine the SAC at greater length. It is evident the grievant had ample opportunity to question the SAC, as demonstrated by his approximately 45 minutes of cross-examination following the SAC's direct examination by the agency. The SAC, as a former agency employee, was under no obligation to appear at the hearing and clearly notified the parties of the limitations to his availability during his testimony. Moreover, the grievant has not identified on administrative review any matters about which the SAC would have testified if he had been cross-examined further, nor did he proffer at the hearing any evidence that would have been addressed by the SAC in additional cross-examination at that time.

Accordingly, having considered the totality of the circumstances in this case, including the length of the hearing (over eight hours) and the grievant's opportunity to present his own evidence and cross-examine the agency's witnesses (including the SAC) for more than four hours, we find no basis to conclude that the grievant suffered any material prejudice or was otherwise unable to present his case in a manner that amounts to a due process violation as a matter of the grievance procedure. Because it appears that the grievant participated in a full and fair hearing with the opportunity to question the adverse witnesses presented by the agency to carry its burden of proof, EDR will not disturb the hearing decision on these grounds.

*Hearing Officer Bias*

The grievant contends that the hearing officer displayed bias against him in several respects. First, the grievant asserts that hearing officer improperly held against the grievant his choice to "tak[e] advantage of his rights . . . and disput[e] the factual claims by the Agency."[91] The grievant also alleges that the hearing officer "repeatedly made assertions" that certain documents presented at the hearing were "incomplete," which "prevented witnesses from giving pertinent answers to direct questions about" the documents and otherwise improperly "disput[ed] the evidence" about the documents "in the presence of the Grievant and the Agency."[92] The grievant also appears to generally allege bias in the hearing officer's conduct at the hearing, consideration of the evidence, and reasoning in the decision.

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and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[90] See Virginia Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

[91] Request for Administrative Review at 5.

[92] *Id.* at 6.

The *Rules* provide that a hearing officer is responsible for avoiding the appearance of bias and:

> [v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[93]

The applicable standard regarding EDR's requirements of a voluntary disqualification is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.[94] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[95] EDR finds the Court of Appeals' standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.[96] The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.[97]

In the decision, the hearing officer found that "the Grievant's actions, recklessness, failure to accept any measure of accountability in this case and to recognize responsibility for his shortcomings has essentially undermined his position, and DMV's core values, and the trust and confidence that DMV has a right to expect from every employee, especially those who are in law enforcement positions."[98] The grievant disagrees with this characterization of his conduct, arguing that the hearing officer improperly viewed his decision to challenge the agency's allegations through the grievance procedure as proof that he engaged in misconduct. Viewed in context, the statement to which the grievant objects follows the hearing officer's conclusion that the agency had presented sufficient evidence to support the Written Notices and a recitation of the agency's core values and expectations for employees.[99] Indeed, of particular importance in this case was the agency's determination that the grievant's truthfulness, a quality necessary for employees in law enforcement positions, could no longer be relied upon based on the charge in Written Notice 2.[100] Having determined that the grievant had engaged in the charged misconduct, the hearing officer appears to have been merely noting that the agency properly found the grievant's behavior was a violation of agency policy that undermined "his position" at the agency, not his position in the case

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[93] *Rules for Conducting Grievance Hearings* § II. See also EDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if "a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself."

[94] While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.

[95] Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); *see* Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.").

[96] *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.

[97] *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

[98] Hearing Decision at 13.

[99] *See id.* at 12-13.

[100] *See id.* at 4-6 (describing the agency's expectation of truthfulness and integrity in its law enforcement employees and the consequences to the agency when these expectations are not met).

or his choice to pursue a grievance. EDR has found no evidence, either in the hearing record or in the decision, to support a conclusion that the hearing officer considered the grievant's use of the grievance procedure as a factor supporting the agency's discipline.

The *Rules* provide that "the hearing officer may question the witnesses."[101] The *Rules* caution, however, that the "tone of the inquiry, the construct of the question, or the frequency of questioning one party's witnesses can create an impression of bias, so care should be taken to avoid appearing as an advocate for either side."[102] In addition, the grievance statutes provide that the hearing officer has the authority to "[d]ispose of procedural requests" and "exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttals, or cross-examinations."[103] This includes addressing the parties' objections to evidence presented at the hearing.

EDR has conducted a thorough review of the hearing record and decision, finding no basis to conclude that the hearing officer's conduct at the hearing demonstrated bias against the grievant that warrants remanding the case. The hearing officer's questions of the witnesses were relevant to the matters at issue and appear to have been reasonably intended to clarify the witnesses' personal knowledge of the events that led to the issuance of the discipline. It further appears both parties had an opportunity to question the witnesses further about any matters raised by the hearing officer. Although the grievant disagrees with the hearing officer's questioning of witnesses, as well as his commentary and procedural rulings on other matters, these matters were within his authority and discretion under the grievance procedure.

In conclusion, EDR has identified nothing in the hearing officer's conduct at the hearing or reasoning in the decision that was inconsistent with the *Rules*, showed bias in favor of the agency, or was otherwise in error on any material matter. Accordingly, the grievant's request for relief with respect to these issues is denied.

*Newly Discovered Evidence*

In addition, the grievant alleges that "all of [his] case" should be considered newly discovered evidence because "all of [his] evidence was ignored" in the hearing decision.[104] As support for this position, the grievant states that "NO FACTS from the Grievant's presentation of evidence exist in the [d]ecision" and there was no "finding of lack of credibility in the Grievant, his witnesses, [or] the witness affidavits" to explain "why Grievant's witnesses and evidence was ignored."[105] On administrative review, the grievant appears to contend that the case should be remanded to the hearing officer for consideration of the entirety of his evidence presented at the hearing.

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[101] *Rules for Conducting Grievance Hearings* § IV(C).
[102] *Id.*
[103] Va. Code §§ 2.2-3005(C)(2), (5).
[104] Request for Administrative Review at 12.
[105] *Id.* (emphasis in original).

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[106] 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.[107] 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.[108]

Having reviewed the grievant's arguments, EDR finds that he has not provided evidence to support a position that his evidence presented at the hearing should be considered newly discovered evidence under this standard. Indeed, the grievant seems to advance this argument as a means of requesting reconsideration of the evidence that was already admitted into the record at the hearing. To the extent the grievant disagrees with the hearing officer's assessment of the evidence or factual findings on any material issue in this case, EDR declines to disturb the decision for the reasons discussed more fully above. There is no basis for EDR to re-open or remand the hearing for consideration of the evidence that the grievant presented at the hearing.

*Civility in the Grievance Process*

Finally, the grievant argues that the agency's counsel was "extremely rude" during the hearing, noting that the she "badgered witnesses" and "raised spurious objections during cross examination of agency witnesses."[109] For example, the grievant describes an incident during the grievant's testimony when the agency's counsel said to the grievant's counsel, "Why are you looking at me? Look at him," before going on to describe the grievant's counsel as "creepy."[110] In response to the grievant's request for administrative review, the agency's counsel argues that the grievant's counsel "stared and glared" at her at one point while questioning the grievant, which she describes as "sexist and misogynistic."

The grievance procedure requires all parties and advocates to "treat all participants in the grievance process in a civil and courteous manner and with respect at all times and in all communications. Parties and advocates shall not engage in conduct that offends the dignity and

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[106] *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).
[107] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[108] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[109] Request for Administrative Review at 11.
[110] *Id.* at 12; *see* Hearing Recording at Track 5, 1:33:24-1:34:23.

decorum of grievance proceedings . . . ."[111] EDR has reviewed the hearing record in consideration of the grievant's claims regarding the conduct of the agency's counsel. The audio recording available does not demonstrate any nonverbal behavior and it is thus impossible to verify all aspects of what occurred during the hearing. There is no indication in the grievance record that the grievant raised an objection to the hearing officer about any behavior that may have been noncompliant with the civility provisions of the grievance procedure and that the behavior was not addressed at the hearing. For example, with regard to the agency's counsel's assertion that the grievant's counsel "glared" at her and the grievant's objection to her conduct at the time, the hearing officer appears to have reasonably addressed this matter and continued with the proceeding in an appropriate manner.

EDR finds no indication that the conduct of the agency's counsel affected the outcome of the hearing decision or that the hearing officer failed to comply with the grievance procedure in a manner that resulted in material prejudice to the grievant. EDR strongly encourages all parties to grievance proceedings, as well as their advocates, to advance their positions consistent with the requirements of civility and respect for all participants. To the extent that any participant fails to meet this standard, objections should be raised to the hearing officer during the hearing. EDR may address a hearing officer's handling of such objections on any such issue as a matter of compliance with the grievance procedure. Where, as here, there is no indication that the hearing officer conducted the hearing in a manner that was noncompliant with the grievance procedure, there is no basis for EDR to disturb the decision on these grounds.[112]

## CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[113] 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.[114] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[115]

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[111] *Grievance Procedure Manual* § 1.9.
[112] To the extent this ruling does not address any specific issue raised in the grievant's request for administrative review, EDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision is inconsistent with the grievance procedure or state policy such that remand is warranted.
[113] *Grievance Procedure Manual* § 7.2(d).
[114] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[115] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).