Issue: Administrative Review of Hearing Officer's Decision in Case No. 10800, 10801; Ruling Date: July 12, 2016; Ruling No. 2016-4378, 2017-4388; Agency: Department of Corrections; 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 Department of Corrections
Ruling Numbers 2016-4378, 2017-4388
July 12, 2016

Both the grievant and the Department of Corrections (the "agency") have 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 10800/10801. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10800/10801, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employs Grievant as a Casework Counselor at one of its Facilities. She has been employed by the Agency for approximately 29 years. Grievant received the Agency's annual Security Awareness Training. No evidence of prior active disciplinary action was introduced during the hearing.
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> Grievant received assistance from Inmate S. He had better computer skills than many other inmates at the Facility. He tutored other inmates at the Facility. Inmate S resided in a dorm with other inmates. Other inmates could see items in Inmate S's possession.
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> Several laptops were located in the computer lab at the Facility. Inmates would go to the lab and use the computers as part of their studies. Laptops were supposed to remain in the lab when not used for activities in that room.
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> Grievant learned of construction that would take place in the area of the computer lab and she knew that Inmate S would not be able to go to the computer lab, obtain a laptop, and assist Grievant. Grievant could have taken a laptop from the computer lab and kept it in her office with a locked door and then allowed Inmate S to use the computer. Instead, Grievant authorized Inmate S to take a laptop from the lab and keep it with him in the dorm. Grievant did not have the authority to permit Inmate S to keep the laptop in the dorm. On the following day, Inmate S brought the laptop to Grievant's office. Grievant and Inmate S downloaded information about a project into a portable hard drive. Grievant

[1] Decision of Hearing Officer, Case No. 10800/10801 ("Hearing Decision"), June 14, 2016, at 2-3 (citation omitted).

connected the portable hard drive to her computer and printed information contained on the portable hard drive.

Two inmates used laptops to create a database to help Grievant perform her work duties. The database information included offenders' names, offender discharge dates, offenders needing birth certificates, offenders needing social security numbers. It is unclear who "populated" the database. Grievant claimed that the inmates created a template and but were not involved in updating the information in that database. Without additional evidence, the Hearing Officer cannot substantiate the Agency's allegation that Grievant permitted the inmates to access personal information about inmates and then enter that information into the database.

On September 29, 2015, the Agency received an Offender Request Form submitted by an anonymous inmate. The inmate claimed that Grievant had violated security policies including allowing Offender S take a laptop into the dorms. The inmate also claimed Grievant was permitting inmates to use the internet from her office.

As a result of the Offender Request Form, the Agency began an investigation. On September 29, 2015, the Major spoke with Grievant regarding the Offender Request Form. On the interview, major wrote:

> I spoke with [Grievant] in my office and she did confirm that [Inmate F] and [Inmate S] did create a database for her. The database consists of offender discharge dates, offenders who still need a birth certificate, offenders who still need Social Security cards, offenders who were born outside of the United States, and offenders who have no case plan. She also confirmed that [Inmate S] did take the laptop to his bed area at night to work on projects for her. [Grievant] denied ever allowing the offenders to use the Internet in her office.

As part of the Agency's investigation, it examined Grievant's internet use. Grievant used her DOC email address to send emails to her husband and son. She also received emails from them. She received emails from private organizations and public utilities. For example, she received bill payment reminders from a retail business. Grievant received an email about biometric screening for DOC employees. Grievant forwarded the email to her personal email address from her DOC email address. Grievant received an email from a DOC employee at another facility regarding whether Grievant wanted to purchase Girl Scout candy and nuts from that employee's daughter. Grievant deleted the email without replying. Grievant did not report to the Agency that she had received the email.

On January 5, 2016, the grievant was issued a Group I Written Notice for unsatisfactory performance related to computer and internet use and a Group II Written Notice for failure to

follow instructions and/or policy related to use of technology by offenders.[2] The grievant timely grieved the disciplinary actions[3] and a hearing was held on June 9, 2016. In a decision dated June 14, 2106, the hearing officer determined that the grievant's computer and internet usage did not constitute unsatisfactory performance and rescinded the Group I Written Notice.[4] The hearing officer further concluded that the grievant failed to follow agency policy regarding the use of technology by offenders and upheld the issuance of the Group II Written Notice.[5] The grievant and the agency now appeal 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 matters related to . . . procedural compliance with the grievance procedure."[6] 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.[7]

Agency's Claims Regarding Inconsistency with State and/or Agency Policy

The agency asserts in its request for administrative review that the hearing officer's decision is inconsistent with state and/or agency policy. Specifically, the agency asserts that the hearing officer erroneously "conflated Internet usage with use of [the agency]'s [] email system" in assessing the evidence relating to the issuance of the Group I Written Notice. The agency appears to acknowledge that Operating Procedure 310.2, *Information Technology Security* ("OP 310.2"), permits incidental personal use of the Internet, but argues that there is no such incidental personal use provision regarding its email system. As a result, the agency claims that any personal use of its email system "is absolutely prohibited" and, thus, that the hearing officer erred 1) in finding the "Grievant's personal use was incidental and not contrary to policy"[8] and 2) rescinding the Group I Written Notice. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[9] The agency has requested such a review. Accordingly, the agency's policy claims will not be discussed in this ruling.

Agency's Claim Regarding Hearing Officer's Findings of Fact

Fairly read, the agency's request for administrative review disputes the hearing officer's determination that the grievant's email use was personal and incidental, and thus argues that his decision to rescind the Group I Written Notice was not supported by the evidence in the record. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10]

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[2] Agency Exhibits 1, 2.
[3] Agency Exhibit 3.
[4] Hearing Decision at 4-6, 7.
[5] *Id.* at 6-7.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Hearing Decision at 4.
[9] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[10] Va. Code § 2.2-3005.1(C).

and to determine the grievance based "on the material issues and the grounds in the record for those findings."[11] 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.[12] 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.[13] 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.

In the hearing decision, the hearing officer assessed the evidence and concluded that the "Grievant had personal use of her computer and the Internet because she sent emails not relating to Agency operations using her computer to access the Internet."[14] Regarding the grievant's personal use of her email, the hearing officer determined that

> "[o]ver a six-month period, Grievant sent between 40 and 50 emails using the Agency's computer and Internet access. On those days that she sent emails, Grievant typically averaged one email per day. Grievant's behavior did not interfere with the performance of her duties or affect the Agency's responsibilities. The Agency has not presented evidence showing Grievant's Internet use was contrary to policy.[15]

There is evidence in the record to support these findings regarding the extent of the grievant's email use.[16]

With regard to the agency's policies regarding email use, the evidence in the record shows that OP 310.2 requires employees to use its "email system and all email accounts . . . for appropriate business purposes."[17] OP 310.2 defines "appropriate use" as including job-related functions that are "directly related to the mission, goal and business of the" agency, and prohibits the use of "[p]ersonal, non-work related or inappropriate comments, graphics, quotes, links, or other non-business related items . . . in official communications using email . . . ."[18] EDR has identified no additional witness testimony or evidence in the record to explain the application of these policy provisions, such as, for example, whether they would operate to disallow any incidental personal email use.[19] At the hearing, the agency's Information Security Officer

[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B).
[13] *Grievance Procedure Manual* § 5.8.
[14] Hearing Decision at 4.
[15] *Id.*
[16] *See, e.g.*, Agency Exhibit 13; Hearing Recording at 3:42:16-3:45:04 (testimony of grievant).
[17] Agency Exhibit 5 at 16.
[18] *Id.*
[19] Such a conclusion could arguably be inconsistent with DHRM Policy 1.75, *Use of Electronic Communications and Social Media*, which states that "incidental and occasional personal use of the Commonwealth's electronic communications tool including the Internet is permitted," so long as it does not interfere with any employee's work performance or the operation of the Commonwealth's computer systems. Grievant's Exhibit 2 at 1.

testified that the grievant violated the provision of OP 310.2 that prohibits "[u]tilizing a DOC issued laptop device . . . as one's own personally owned device for personal business," but did not identify any specific policy provision that would absolutely prohibit employees from sending or receiving any personal email, regardless of whether such email use was incidental.[20]

Having reviewed the hearing record, EDR cannot find that the hearing officer disregarded any evidence regarding the agency's policies or the grievant's use of her email account in reaching his decision in this case. It appears instead that the hearing officer reasonably considered how these different policy provisions should be read in conjunction with one another and found that the use of agency-owned computers "for personal business" is prohibited, but that incidental personal use is acceptable. Indeed, the hearing officer clearly assessed the facts and determined that

> Grievant's usage of her DOC email address for personal use was limited. If Grievant had treated the DOC email address as if she owned the email address herself, she would have demonstrated frequent and extensive usage of that DOC email address. Sending and receiving a few emails using the DOC email address is not sufficient to show that the email address was used as if "personally owned."[21]

EDR cannot conclude that this result is inconsistent with the evidence in the record or was otherwise improper as a matter of the grievance procedure.[22] Indeed, it appears that the hearing officer has reasonably construed the relevant policy provisions and has reached an understandable conclusion based on an application of those provisions to his factual findings of the grievant's conduct, all of which was an appropriate exercise of authority under the grievance procedure.

Further, determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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 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.[23] Because the hearing officer's findings are based upon evidence in the record and address the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer, and we decline to disturb the hearing decision on this basis.

Timeliness of Grievant's Request for Administrative Review

The *Grievance Procedure Manual* provides that "[r]equests for administrative review must be in writing and ***received by*** the reviewer within 15 calendar days of the date of the original hearing decision. ***Received by*** means delivered to, not merely postmarked or placed in

[20] Hearing Recording at 2:01:52-2:04:30 (testimony of Information Security Officer); *see* Agency Exhibit 5 at 11.
[21] Hearing Decision at 5.
[22] Whether the hearing officer's decision is consistent with state and/or agency policy regarding incidental personal use of the Internet and/or electronic communications is a matter of policy that is not subject to review by EDR and must be addressed, if at all, by the DHRM Director.
[23] *See, e.g.*, EDR Ruling No. 2012-3186.

the hands of a delivery service."[24] In this case, the grievant's request for administrative review was received by EDR on July 1, 2016, seventeen calendar days after the date of the original hearing decision. Ordinarily, such a request would be untimely. However, the grievant mailed her request for administrative review by certified mail, and tracking information from the postal service indicates that a delivery attempt was made on June 29, the fifteenth calendar day, but that it could not be delivered on that date because the business (i.e., EDR) was closed. This is incorrect; EDR's offices were open on June 29, just as on any other normal business day. Regardless of the reason, the fault for the delay in EDR's receipt of the grievant's request for administrative review in this case cannot be attributed to the grievant. Had the postal service delivered the grievant's request on June 29, as initially attempted, it would have been timely. Accordingly, under the particular circumstances of this case, EDR will consider the grievant's request for administrative review to have been timely initiated.

Grievant's Claim Regarding Newly-Discovered Evidence

In her request for administrative review, the grievant argues that one of her witnesses "produced and offered documents" about one of the agency's educational programs to support her argument that the issuance of the Group II Written Notice was not warranted. The grievant states that she "possessed no knowledge of the documents" prior to the hearing, claims that would have "provided a better defense against the allegations" in the Written Notice had they been admitted into the hearing record, and requests that these documents be considered as newly-discovered evidence. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[25] 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.[26] 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.[27]

Even assuming that the grievant could satisfy all of the other elements necessary to support a contention that the documents in questions should be considered newly discovered evidence under this standard, the grievant has not presented any information to demonstrate that the documents would have any impact on the outcome of this case. While it is apparent that the grievant disagrees with the hearing officer's decision, there is evidence in the record to show that "[o]ffenders shall only be permitted to use IT resources to perform approved job assignments" or

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[24] *Grievance Procedure Manual* § 7.2.
[25] *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).
[26] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[27] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

other authorized tasks,[28] that the "Grievant permitted Inmate S to take a laptop into his dorm,"[29] and that "Inmate S was not performing an approve[d] job assignment or other permitted duties while he kept the laptop in the dorm."[30] The grievant had the ability to obtain evidence about the educational program prior to the hearing, as well as the ability to question the witness about that program and elicit relevant testimony. EDR has reviewed nothing to suggest that additional evidence about the educational program would have any impact on the hearing officer's findings regarding the application of the agency's policies restricting the use of computers by offenders. 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, EDR declines 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.[31] 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.[32] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[33]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[28] Agency Exhibit 6 at 2.
[29] Hearing Decision at 7; *see, e.g.,* Agency Exhibits 9, 10.
[30] Hearing Decision at 7; *see, e.g.,* Hearing Recording at 22:44-23:05 (testimony of Major), 1:15:04-1:16:02 (testimony of Superintendent); Agency Exhibits 8, 9.
[31] *Grievance Procedure Manual* § 7.2(d).
[32] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[33] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).