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***Department Of Human Resource Management***

***Office of Employment Dispute Resolution***

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## ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2019-4884
May 3, 2019

The Department of Corrections ("the agency") has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM")[1] administratively review the hearing officer's decision in Case Number 11307. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

## FACTS

The relevant facts in Case Number 11307, as found by the hearing officer, are as follows:[2]

> The Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. He began working for the Agency in 2015. No evidence of prior active disciplinary action was introduced during the hearing.
>
> Facility Managers authorized a search of employees and members of the public entering the Facility on November 8, 2018. The Agency used a trained drug detection dog to smell people entering the Facility. The dog would "alert" if someone entered the Facility with the odor of illegal drugs, a "narcotic odor".
>
> On November 8, [2018] at approximately 5:35 p.m., the dog alerted as Grievant walked into the Facility. The K9 Officer informed the Lieutenant of the dog's reaction to Grievant. Facility managers assumed Grievant had contraband on him and initiated the Agency's strip search procedures.
>
> The Lieutenant gave Grievant a form entitled "Consent for Strip or Body Cavity Search." This form read, in part:

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

[2] Decision of Hearing Officer, Case No. 11307 ("Hearing Decision"), Feb. 28, 2019, at 2-5 (citations omitted).

> In accordance with the Department of Corrections Operating Procedure 445.1, Employee, Visitor, and Offender Searches, there is reasonable belief that you or your minor children are attempting to transport contraband into this facility. Before you will be allowed to enter this facility, you must submit to the search described below:
>
> In order for the person indicated above to enter this facility they must submit to:
>
> Strip Search a person and clothing by trained corrections staff of the same gender.
>
> The search must be approved by the Facility Unit Head or Administrative Duty Officer and will be conducted in privacy.
>
> You may question the adequacy of the reasonable belief claimed for the search by filing a petition with the Facility Unit Head. If you are dissatisfied with the response of the Facility Unit Head, you may appeal to the Regional Director.
>
> If you refuse this request, you will not be allowed to enter the facility. You will be subject to the following sanctions in addition to possible law violations:
> Employees will be subject to disciplinary action in accordance with Operating Procedure 135.1, Standards of Conduct. ***
>
> If you submit to this search and no contraband is found, you will be allowed to enter the facility. ***
>
> I understand that I may leave the facility without submitting to the search indicated above. If I leave without submitting to the search, I will be subject to the sanctions listed above.
>
> I hereby consent to the search of my person….
>
> [Grievant's signature, name, and date]
>
> I hereby grant approval for the search to be conducted on this person. If the search is negative, the individual is approved to enter the facility as otherwise eligible.
>
> [Facility Unit Head signature, name, and date]

Grievant was strip-searched in private by two male corrections employees in accordance with Agency policy. No contraband was found on Grievant.

The Lieutenant decided to search Grievant's vehicle which was parked in the Facility's parking lot. The Lieutenant told Grievant to hand his keys to Officer P. The K9 Officer, drug detection dog, Officer P and the Lieutenant went to Grievant's vehicle. The drug detection dog did not alert on Grievant's vehicle. Nevertheless, the Agency employees decided to search the inside of Grievant's vehicle. Grievant was presented with a form entitled Consent to Search Vehicle. The form provided:

> I, the undersigned, do hereby grant my complete and voluntary permission for Virginia Department of Corrections staff and/or law enforcement officers to conduct a complex and thorough search of the vehicle described as follows: [Information describing Grievant's vehicle].
>
> I affirm that I have control and dominion over the property to be searched and therefore the legal authority to grant this consensual search.
>
> I understand that my refusal to permit this search may be justification for being barred from the unit.
>
> I understand that if I am an employee of the Commonwealth of Virginia, my refusal to permit this search may result in disciplinary action in accordance with the Commonwealth's Employee Standards of Conduct.
>
> [Grievant's signature, name and date]
> [Lieutenant's signature and date]
> [Witness signature and date]

Agency employees unlocked Grievant's vehicle and searched inside. No illegal drugs were found inside the vehicle. Officer P located Grievant's personal cell phone in the arm rest of the driver's side door. The cell phone had an Android operating system and contained personal information such as his call history and text messages and history. Officer P opened the phone and asked Grievant if the phone worked. Officer P turned on the phone began scrolling through Grievant's text messages. Officer P did not ask Grievant's permission to view the contents of Grievant's phone.

Facility inmates were permitted to make telephone calls to people outside of the Facility. The Facility recorded the number called and the conversations between the inmate and the person called. The Inmate was incarcerated at the Facility. He sometimes called Ms. H who was his "Girlfriend". On October 26, 2018, the Inmate called Ms. H and told her something to the effect that she should call a telephone number and say, "I got the money and stuff from your uncle Robert." The Inmate told Ms. H to call a telephone number which ended in 321. That telephone number was Grievant's cell phone number.

Officer P was responsible for monitoring telephone calls between inmates and callers outside the Facility. He knew Ms. H's telephone number because the Inmate had called her several times. Officer P noticed that one of the phone numbers appearing on Grievant's phone was Ms. H's telephone number.

The Lieutenant asked Grievant about the telephone number identified by Officer P. Grievant told the Lieutenant he did not know who the number belonged to but it may have belonged to a woman named "Pee Wee."

The Lieutenant used her cell phone to take pictures of Grievant's cell phone call and text history. She did not have Grievant's permission to take pictures of his phone. Grievant's cell phone showed one text message on October 26, 2018, one text message on October 27, 2018, three text messages on October 28, 2018, one text message on October 29, 2018, fifteen text messages on November 1, 2018, one telephone call lasting 28 seconds on November 1, 2018, and one text message on November 6, 2018. Grievant had deleted all of these text messages but the text history remained.

Grievant was asked to write a statement about the incident. He wrote:

> I received phone calls and text messages from the number so I called and text it back to figure out who was calling me. Once I found out it was a different female each time I kept texting to figure out who was playing on my phone.

The Agency conducted an investigation. The Investigator met with Grievant. She showed Grievant the photos of the text messages and the phone number identified as Ms. H's phone number. Grievant said he was trying to figure out who the person was who was contacting him. When the Investigator asked Grievant what all the text messages were back and forth, Grievant said "I have no idea." Grievant said it was probably one of his friends or cousin texting him. When asked why an offender would be giving someone Grievant's phone number to contact Grievant, Grievant said he had no idea. The Investigator asked Grievant if he deleted all of his text messages. Grievant said it "depends what it is" and said he keeps important texts. When asked if he knew Ms. H, Grievant said no. When asked who was sending him text messages from the phone number identified as Ms. H's phone, Grievant said, "I have no idea." Grievant told the Investigator he worked in all the buildings at the Facility but denied knowing the Inmate. Grievant said he gets "plenty of calls from random numbers." When asked why he did not block the number, Grievant said that the number might be of someone he knew who was "f—king with me."

On or about November 26, 2018, the grievant was issued a Group III Written Notice with termination for fraternizing with an offender.[3] The grievant timely grieved the disciplinary action and a hearing was held on February 14, 2019.[4] In a decision dated February 28, 2019 the hearing

[3] *See id.* at 1.
[4] *See id.*

officer concluded that the agency's search of the grievant's phone was a violation of his right of privacy, and as a result "the Agency issue[d] disciplinary action for an improper purpose . . . ."[5] He further determined that the agency's evidence—including the information obtained from the grievant's phone—was insufficient to demonstrate that the grievant fraternized with the Inmate.[6] As a result, the hearing officer rescinded the Group III Written Notice with termination, ordered the grievant reinstated to his former position or an equivalent position, and directed the agency to provide the grievant with back pay, less any interim earnings.[7] The agency 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 matters related to . . . procedural compliance with the grievance procedure."[8] 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.[9] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[10] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

*Hearing Officer's Consideration of Evidence*

In its request for administrative review, the agency contends that the hearing officer's decision is inconsistent with the evidence in the record. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[11] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[12] 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.[13] 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.[14] 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.

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[5] *Id.* at 5-6.
[6] *Id.* at 6-7.
[7] *Id.* at 7.
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[11] Va. Code § 2.2-3005.1(C).
[12] *Grievance Procedure Manual* § 5.9.
[13] *Rules for Conducting Grievance Hearings* § VI(B).
[14] *Grievance Procedure Manual* § 5.8.

Agency's search of the grievant's personal cell phone

First, the agency argues that, based on applicable Fourth Amendment law, its search of the grievant's personal cell phone was permissible under the circumstances. As a question of constitutional law, this issue necessarily implicates legal concepts appropriately raised with the circuit court and ultimately resolved by judicial review.[15] However, because the question at issue here is intertwined with the hearing officer's findings of fact and assessment of the evidence, EDR will address this question as a matter of the grievance procedure. In the hearing decision, the hearing officer discussed the agency's search of the grievant's phone as follows:

> Grievant's cell phone was not contraband. He was free to keep his cell phone in his vehicle in the Agency's parking lot. The information contained on Grievant's phone obviously did not give an odor of narcotics. Examining the information contained in Grievant's phone was not a logical extension of a search arising from a dog alerting to the odor of narcotics. The Agency did not have a policy authorizing it to examine the contents of Grievant's cell phone.
>
> The Agency violated Grievant's right of privacy when it reviewed the contents of his cell phone. By issuing disciplinary action in violation of Grievant's right of privacy, the Agency issue disciplinary action for an improper purpose thereby requiring the reversal of that disciplinary action.
>
> The Agency alleged that Grievant consented to the search of his cell phone. The Hearing Officer finds as fact that Grievant did not consent to a search of his cell phone. Grievant did not provide written consent to the Agency. Grievant denied giving verbal consent to the Lieutenant and his testimony was credible. When Grievant questioned the Lieutenant about her authority to search the information on his cell phone, the Lieutenant told Grievant she was authorized to do so by the search form used to justify searching Grievant's vehicle. Nothing in the consent to search Grievant's vehicle authorized Agency employees to turn on Grievant's personal cell phone and scroll through the contents of that phone.[16]

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[17] As applied to the states through the Fourteenth Amendment, the Fourth Amendment further limits "[s]earches and seizures by government employers or supervisors of the private property of their employees . . . ."[18] In other words, "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer."[19] In *O'Connor v. Ortega*, the Supreme Court established a two-step test for determining whether a public-sector employer's workplace search violates an employee's Fourth Amendment rights: (1) the employee must demonstrate that he had "an expectation of privacy that society is prepared to consider reasonable"[20] in the area to be searched, and (2) the employee

[15] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[16] Hearing Decision at 6.
[17] U.S. Const. amend. IV.
[18] O'Connor v. Ortega, 480 U.S. 709, 715 (1987).
[19] *Id.* at 717.
[20] *Id.* at 715.

must show that the government employer violated his expectation of privacy by conducting an unreasonable search.[21]

In *O'Connor*, the Court held that, in the public-sector workplace context, "[w]hether an employee has a reasonable expectation of privacy" in the area or item to be searched "must be addressed on a case-by-case basis."[22] Here, the evidence in the record supports the hearing officer's conclusion that the grievant had a reasonable expectation of privacy in his personal cell phone.[23] For example, there is no dispute that the phone was the grievant's personal property, and the agency does not appear to have presented evidence or argued that it was permitted by policy and/or law to search the phone simply because it was located on the agency's property.[24] Finally, the hearing officer made a factual determination that the grievant did not give the agency consent to search his cell phone, and there is evidence in the record to support this finding.[25]

Turning to the second part of the test, the Court in *O'Connor* further stated the reasonableness of an employer's search "depends on the context within which [the] search takes place,"[26] and that "both the inception and the scope of the intrusion must be reasonable."[27] In support of its position, the agency contends that its search of the grievant's phone was justified at its inception because "the suspicion of Grievant was initially satisfied by the drug dog alerting on him at the front entry," and that the search of his phone was reasonably related to its objective of "looking for evidence linking Grievant to drugs being brought into the prison."

In this case, the hearing officer assessed the evidence and found that "[e]xamining the information contained in Grievant's phone was not a logical extension of a search arising from a dog alerting to the odor of narcotics."[28] EDR agrees with the hearing officer's finding on this issue. When the drug detection dog alerted on the grievant, it created a reasonable suspicion that justified a search with the purpose of determining whether the grievant possessed, or had been in proximity to, illegal drugs. In this situation, a search of the grievant's person and of his vehicle were reasonable to determine whether the grievant had engaged in the work-related misconduct of bringing drugs into the Facility (on his person) or onto the agency's property (in his vehicle). The reasonable suspicion created by the drug detection dog's alert did not, however, extend to

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[21] *See id.* at 715-19.
[22] *Id.* at 718.
[23] *See* Hibbert v. Schmitz, No. 3:16-cv-3028, 2017 U.S. Dist. LEXIS 1152, at *14-17 (C.D. Ill. Jan. 5, 2017) (holding that, due to the capability of modern smart phones "to store important information, including personal passwords, banking and finance information, and medical and health care information," they contain "a cornucopia of personal information" and, thus, "society recognizes the reasonableness of the expectation of privacy in one's cell phone"); *see also* Riley v. California, 573 U.S 373, 393 (2014) (noting, in the context of a search incident to arrest, that "[m]odern cell phones . . . implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse").
[24] The hearing officer noted that "[w]hen Grievant questioned the Lieutenant about her authority to search the information on his cell phone, the Lieutenant told Grievant she was authorized to do so by the search form used to justify searching Grievant's vehicle." Hearing Decision at 6. The hearing officer determined, however, that "[n]othing in the consent to search Grievant's vehicle authorized Agency employees to turn on Grievant's personal cell phone and scroll through the contents of that phone," *id.*, and that conclusion is supported by the evidence in the record. Agency Exhibit 5 at 70; *see* Hearing Officer Exhibit 1 at 5.
[25] Hearing Decision at 6; Hearing Recording at 3:06:41-3:09:29, 3:30:00-3:30:30 (testimony of grievant).
[26] *O'Connor*, 480 U.S. at 719 (quoting New Jersey v. T. L. O., 469 U.S. 325, 337 (1985)) (internal quotation marks omitted).
[27] *Id.* at 726.
[28] Hearing Decision at 6.

the grievant's cell phone. As the hearing officer noted, "[t]he information contained on Grievant's phone obviously did not give an odor of narcotics."[29] As such, EDR has no basis to conclude that the hearing officer incorrectly determined that "[t]he Agency violated Grievant's right of privacy when it reviewed the contents of his cell phone" in the manner that occurred here.[30]

In addition, the agency asserts on appeal that "if the [agency] has reasonable suspicion to believe that evidence off Grievant's misconduct can be found on his personal cell phone then a search of the cell phone is permissible." EDR is not aware of authority that permits a search of an employee's personal cell phone in this regard. Searching through an employee's personal cell phone is more intrusive than the searches at issue in *O'Connor* and similar cases, which address an employer's search of an employee's office, for example. If there is such precedent, it is has yet to be identified in this matter. Although this is ultimately a question for legal review, in the absence of authority on this issue, EDR cannot determine that the hearing officer's determinations are in error under the grievance procedure.

Accordingly, and as a matter of the grievance procedure, EDR finds that the hearing officer's conclusions relating to the agency's search of the grievant's personal cell phone are consistent with the evidence in the record. EDR has reviewed nothing in this case that indicates the hearing officer erred under the grievance procedure by finding that the agency's search was impermissible. Under these circumstances, when a hearing officer finds that an agency has violated an employee's constitutionally-protected right(s), he or she may appropriately determine that the agency "issue[d] disciplinary action for an improper purpose"[31] and reduce or remove the discipline. As a result, EDR will not disturb the decision on this basis. To the extent the agency is seeking a determination as to whether the hearing officer erred as a matter of law in deciding that its search of the grievant's personal cell phone was inconsistent with the Fourth Amendment, this claim is best addressed by the circuit court in which the grievance arose rather than EDR.[32] This ruling does not address, with finality, the legal merits of the hearing officer's findings on this issue.

Evidence regarding fraternization

In addition, the agency asserts that the hearing officer erred in determining that, even if he were to consider the evidence obtained from the grievant's personal cell phone in violation of his right to privacy, such evidence was insufficient to justify a Group III Written Notice for fraternization. The hearing officer stated the following with regard to this issue:

> The Agency contended that Grievant fraternized with the Inmate by communicating with Ms. H as an agent or proxy for the Inmate. To meet this burden of proof, the Agency had to show that Grievant knew he was communicating with someone who was a proxy or agent of the Inmate. The Agency has not done so.

[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *See* Va. Code § 2.2-3006(B).

> The only evidence before the Hearing Officer is that Grievant sent text messages to someone who he did not know. He communicated with two different women one of whom was named Pee Wee. He continued to communicate with the person because he thought the person was someone he knew who was "f—king with him." The Agency has not established that Grievant knew his text messages were to Ms. H and that Ms. H was associated with the Inmate.[33]

In support of its position, the agency contends that Ms. H received the grievant's phone number from two inmates at the facility and contacted him on those inmates' behalf. However, the agency has overlooked the hearing officer's conclusion that, regardless of the actions of Ms. H or offenders, the evidence did not establish that the grievant knew or should have known that he was communicating with someone who was acting as an agent of the offenders. The hearing officer essentially found that, in the absence of such evidence, the agency's issuance of a Group III Written Notice for fraternization was not justified.

EDR has thoroughly reviewed the hearing record and finds that there is evidence to support the hearing officer's conclusion that the issuance of disciplinary action for the misconduct charged on the Written Notice was not warranted by the evidence presented in this case. In particular, there is no evidence to demonstrate that the grievant knew Ms. H or either of the offenders who gave his phone number to Ms. H. Indeed, the Investigator and the Lieutenant both testified that they had no information to suggest the grievant knew either of the two offenders who gave his phone number to Ms. H, and that, other than the phone calls recorded at the Facility, there was no evidence showing the grievant was connected to the offenders.[34] The Warden also acknowledged that the only thing connecting the grievant to the offenders was the offenders' sharing of his phone number with Ms. H.[35] While the Investigator believed the grievant was "vague" and "evasive" when questioned about his communications with Ms. H's phone number,[36] the grievant denied knowing Ms. H and the offenders, and said that he did not know who was contacting him from Ms. H's number.[37] Moreover, the evidence obtained from the grievant's cell phone established that the grievant sent or received twenty-two text messages and one phone call from Ms. H's number, but does not include any content or other information about those communications to indicate that his statements to the Investigator were false.[38]

In cases involving discipline, the burden is on the agency to show that the grievant engaged in the behavior charged on the Written Notice, that the behavior constituted misconduct, and that the discipline was consistent with law and policy.[39] Furthermore, 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 for that of the hearing officer where the

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[33] Hearing Decision at 6-7.
[34] Hearing Recording at 48:56-49:09, 55:43-56:02 (testimony of Lieutenant), 2:10:01-2:10:37 (testimony of Investigator).
[35] *Id.* at 2:28:32-2:30:05 (testimony of Warden).
[36] *Id.* at 1:35:55-1:37:42 (testimony of Investigator).
[37] *See* Agency Exhibit 5 at 46-47, 50-51, 53, 56.
[38] *Id.* at 71-75.
[39] *Rules for Conducting Grievance Hearings* § VI(B)(1).

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.[40]

In summary, there is nothing to indicate that the hearing officer's consideration of the charge set forth on the Written Notice was in any way unreasonable or not based on the actual evidence in the record. Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. Because the hearing officer's findings in this case 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. Accordingly, EDR declines to disturb the decision on this basis.

*Newly Discovered Evidence*

Finally, the agency has requested that EDR remand the case to the hearing officer for consideration of newly discovered evidence that is not part of the hearing record. This alleged newly discovered evidence consists of records from the grievant's cell phone service provider, which the agency argues indicate that the grievant had additional communication with Ms. H beyond the evidence it presented at the hearing. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[41] 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.[42] 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.[43]

In this case, the information provided by the agency arguably satisfies several of these elements. At the hearing, for example, the Investigator testified that she had requested records from the grievant's cell phone service provider, but had not received a response.[44] The agency therefore appears to have exercised due diligence to retrieve the records, but did not receive them until after the hearing due to circumstances beyond its control. Even assuming, however, that the agency could satisfy all of the other elements necessary to support a contention that the service provider's records should be considered newly discovered evidence under this standard, EDR

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[40] *See*, *e.g.*, EDR Ruling No. 2014-3884.
[41] *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).
[42] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[43] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[44] Hearing Recording at 1:29:33-1:29:42, 2:11:29-2:11:59 (testimony of Investigator).

finds that the agency has not demonstrated that the records would have an impact on the outcome of the case. In effect, the newly discovered evidence offered by the agency shows that the grievant's contacts with Ms. H's phone number were more extensive than what it discovered during its investigation prior to the issuance of the Written Notice. The evidence in the hearing record demonstrates that the grievant sent or received twenty-two text messages and one phone call,[45] while the service provider's records establish that the grievant exchanged thirty-five text messages and eight phone calls with Ms. H's phone number. The service provider's records do not, however, include the content of any of the text messages or phone calls.

As discussed above, the hearing officer considered the evidence presented by the parties at the hearing and found that "[t]he only evidence before the Hearing Officer [was] that Grievant sent text messages to someone who he did not know," and that "[t]he Agency ha[d] not established that Grievant knew his text messages were to Ms. H and that Ms. H was associated with the Inmate."[46] The hearing officer therefore found that evidence merely demonstrating the grievant had contact with Ms. H's phone number, without the content of the communications and/or other additional context to establish that the grievant knew he was communicating with Ms. H and that Ms. H was associated with the Inmate, was insufficient to support the charge of fraternization. The service provider's records contains no additional information about the nature of the grievant's communications with Ms. H's phone number, but only show that more contacts occurred than the agency was aware of at the time of the hearing and at the time the Written Notice was issued. The hearing officer has already determined that this type of evidence would not support the issuance of the Written Notice under the circumstances present in this case. Accordingly, and based on the hearing officer's assessment of the evidence presented at the hearing, EDR finds that remanding the case to the hearing officer would not have an impact on the hearing officer's findings or the outcome of the case. As a result, there is no basis for EDR to re-open or remand the hearing for consideration of the cell phone provider records offered by the agency.

## 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.[47] 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.[48] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[49]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[45] Agency Exhibit 5 at 71-75.
[46] Hearing Decision at 7.
[47] *Grievance Procedure Manual* § 7.2(d).
[48] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[49] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).