EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Corrections
Ruling Number 2022-5369
March 9, 2022

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11745. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11745, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. She began working for the Agency on March 23, 2020. No evidence of prior active disciplinary action was introduced during the hearing.
>
> A condition of Grievant's employment was that she be able to work any shift and post.
>
> Grievant developed a pattern of failing to report to work as scheduled or reporting to work tardy. Grievant informed Agency managers that she had problems obtaining child care that resulted in her poor attendance. For approximately two weeks, facility shift commanders attempted to assist Grievant by allowing her to report to work late or leave early. Grievant's poor attendance continued. She exhausted her leave balances. Grievant met with the Chief of Security who asked Grievant if moving her to night shift would resolve her child care issues. Grievant said that working the night shift would resolve her child care problems but that she would not work the night shift.
>
> The Chief of Security assigned Grievant to the night shift effective June 22, 2021. Grievant was scheduled to work on June 26, 2021 for a shift lasting 11.5 hours. Grievant reported to work on June 26, 2021 and worked 5.7 hours. She left

[1] Decision of Hearing Officer, Case No. 11745 ("Hearing Decision"), February 18, 2022, at 2-3 (footnotes omitted).

the Facility without completing her entire shift. Grievant was scheduled to work 11.5 hour shifts on June 27, 2021, June 28, 2021, July 1, 2021, and July 2, 2021. She did not report to work on any of those days. Her last day of work was June 26, 2021.

On July 12, 2021, Grievant filed with the Third Party Administrator a claim for Short-term Disability. On September 15, 2021, the Third Party Administrator denied Grievant's claim.

Grievant presented the Agency with a note dated April 21, 2021 indicating she was seen in the doctor's office for illness. Grievant presented the Agency with a note dated May 21, 2021 from a medical doctor saying Grievant was under the doctor's care and that Grievant should keep her work hours the same day to day without extra hours being added. Grievant presented a note dated June 15, 2021 regarding treatment to her foot and indicating she could return to work on June 17, 2021. Grievant presented a note dated June 16, 2021 from a medical provider. The comments cannot be deciphered. Grievant presented a note dated June 22, 2021 from a nurse practitioner indicating Grievant could return to work on June 24, 2021 without restrictions. Grievant presented a note dated June 28, 2021 from an FNP-C indicating FMLA paperwork had been completed and that Grievant was to work day shift and not more than eight hours per day. She could return to work July 5, 2021. Grievant presented the Agency with a note dated July 6, 2021 from a nurse practitioner indicating Grievant was under the nurse practitioner's care and could return to work on July 14, 2021. Grievant presented the Agency with a note dated July 20, 2021 from that nurse practitioner indicating Grievant was under the nurse practitioner's care and could return to work on July 26, 2021. Grievant presented another note dated August 9, 2021 from that nurse practitioner indicating Grievant had an office visit on August 9, 2021.

On September 15, 2021, the agency issued to the grievant a Group III Written Notice with termination for being absent in excess of three days without authorization.[2] The grievant timely grieved the disciplinary action and a hearing was held on February 14, 2022.[3] In a decision dated February 18, 2022, the hearing officer found that "the Agency's decision to remove grievant must be upheld" because the grievant "failed to report to work" on June 27, June 28, July 1, and July 2, 2021 and "was not authorized to be absent" on those days.[4] The hearing officer further determined that there were no circumstances warranting mitigation of the agency's discipline.[5] The grievant now appeals the 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

[2] Agency Ex. at 2.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 3-4.
[5] *Id.* at 4.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).

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] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant contends that the hearing officer erred in upholding the Written Notice. She appears to argue that the agency's evidence was insufficient to support the charged misconduct "due to several discrepancies embellished in the information shared by employees" at her facility. As support for this position, the grievant lists "[f]alse [d]ocuments" and "[w]rongful termination" as grounds for her appeal. The grievant further alleges that the "[d]ecision was abruptly made without adequate documentation," explaining that she requested documents from the agency but did not receive them in advance of the hearing.

Documents Issues

The grievant's primary argument on administrative review appears to be that the agency failed to provide her with documents about matters related to the discipline and her grievance. At 5:33 p.m. on February 11, 2022, after the close of business on the last business day before the hearing, the grievant emailed to the hearing officer and the agency an undated document in which she requested the following information from the agency:

- "[C]opies of any alleged allegation that caused [her] termination . . . ."
- "[A] copy of the roster with [her] sign in and sign out signature with [her] initials."
- "[P]olicy for draft days, call ins, tardiness, and the due process policy."
- "[A]ny documentation for [Public Health Emergency Leave] that [she] utilized."[9]

At the same time, the grievant emailed a second document addressed to the hearing officer, explaining that she was "awaiting the information" from the agency and "may need to extend the date" of the hearing. At the hearing on February 14, 2022, the grievant did not request a continuance or raise any concerns about the agency's production of documents**.**

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."[10] 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.[11] 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.[12]

---

[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] It is unclear whether the grievant submitted this request to the agency before February 11, 2022 and, if so, to whom she directed the request at that time.
[10] Va. Code § 2.2-3003(E); *see Grievance Procedure Manual* § 8.2.
[11] *Rules for Conducting Grievance Hearings* § III(E).
[12] *Id.* § V(B).

The hearing officer addressed the grievant's request for documents in the decision, stating that she "presented exhibits suggesting she had requested documents from the Agency," though it was "unclear when she requested the documents."[13] The hearing officer further noted that the grievant "requested a continuance by email at 5:33 p.m. on Friday February 11, 2022 but did not orally request the continuance when the hearing began on February 14, 2022 at 9 a.m." and "[t]here was no basis to delay the hearing given Grievant's untimely submission and request."[14] 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 either before or during the hearing, apart from her February 11, 2022 emails describing the requested documents and the agency's alleged failure to disclose them.

Regardless of any procedural issues relating to the grievant's apparent request for documents, EDR has not reviewed anything to indicate that the agency's failure to produce the documents, if it actually occurred as described by the grievant, impacted the outcome of the case such that the grievant suffered any material prejudice. First, some of the documents described in the grievant's request – in particular, information about the allegation that led to her termination and agency policies addressing the charged misconduct – were presented in the agency's exhibits.[15] Second, it is unclear how the grievant's requests for rosters and information about Public Health Emergency Leave would have been relevant to contradict or disprove the allegation against her in this case: namely, that she was absent in excess of three workdays on June 27, 28, July 1, and July 2, 2021.[16] In the absence of evidence showing that the agency failed to comply with a directive from the hearing officer or that the grievant's ability to mount a defense to the charges against her was materially prejudiced because of the agency's alleged actions, EDR finds no error with respect to this issue and declines to disturb the decision on this basis.

Hearing Officer's Consideration of Evidence

In addition, the grievant appears to argue that her termination was "[w]rongful" because it was based on "[f]alse documents" and lacked "adequate documentation." EDR has reviewed the grievant's submission and, although she has not identified specific alleged errors in the decision, we find that the grievant's claims are best characterized as disputes with the hearing officer's factual conclusion that she was absent from work without approval on June 27, June 28, July 1, and July 2, 2021.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[17] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[18] 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

[13] Hearing Decision at 4.
[14] *Id.*
[15] *E.g.*, Agency Ex. at 1-8, 120-206. The grievant presumably received those documents from the agency in advance of the hearing as directed by the hearing officer. The grievant has not alleged otherwise.
[16] Agency Ex. at 2. The evidence that the grievant did not report to work after June 26, 2021 is undisputed. *E.g.*, Hearing Recording at 19:45-20:39 (lieutenant colonel's testimony).
[17] Va. Code § 2.2-3005.1(C).
[18] *Grievance Procedure Manual* § 5.9.

mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[19] 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.[20] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

The Group III Written Notice issued to the grievant stated that she "was assigned to night shift effective June 22, 2021" to address attendance issues related to childcare.[21] According to the Written Notice, the grievant allegedly said that "she was not going to work night shift" at the time and subsequently failed to report to work after June 26, 2021.[22] In the hearing decision, the hearing officer determined that the "Grievant was scheduled to work on June 27, 2021, June 28, 2021, July 1, 2021, and July 2, 2021," that "[s]he failed to report to work on those days," and that "[s]he was not authorized to be absent."[23] The hearing officer specifically addressed the grievant's medical documentation as follows:

> Grievant presented the Agency with evidence of doctor's notes showing she received medical treatment. Grievant did not present evidence showing she had available leave balances to use for any medically related absence. Grievant informed Agency managers that her absences related to problems finding child care rather than health related concerns. Grievant applied for short-term disability but her request was denied. Grievant did not present evidence showing she had a disability or was entitled to leave that would otherwise justify her absence on June 27, 2021, June 28, 2021, July 1, 2021, and July 2, 2021. The Hearing Officer concludes that Grievant's absences on those dates were not excused.[24]

As a result, the hearing officer upheld the agency's issuance of the Group III Written Notice with termination.[25]

Upon a review of the hearing record, it does not appear that there is sufficient evidence to support a conclusion that the agency's disciplinary action was unwarranted, as the grievant alleges. The grievant did not testify at the hearing and presented only two exhibits, both relating to her request for documents discussed above. Moreover, the grievant has not explained in her request for administrative review why she disputes the decision or how the decision allegedly does not comply with policy or the grievance procedure. In the absence of evidence in the record, argument

---

[19] *Rules for Conducting Grievance Hearings* § VI(B).
[20] *Grievance Procedure Manual* § 5.8.
[21] Agency Ex. at 2.
[22] *Id.*
[23] Hearing Decision at 3-4.
[24] *Id.* at 4. The hearing officer further addressed the grievant's claim that "the Agency retaliated against her for filing a prior grievance and complaining about how the Agency treated her." *Id.* The hearing officer rejected this argument, finding that "the Agency took disciplinary action against Grievant because she was absent in excess of three days." *Id.* None of the information presented in the grievant's request for administrative review addresses her claim of retaliation, and thus we will not discuss it further in this ruling.
[25] Hearing Decision at 5.

on appeal, or other information that might have supported the grievant's position that she was improperly terminated, we have no basis to conclude that the hearing officer's decision does not comply with policy or the grievance procedure.[26] Although the grievant may disagree with the decision, there is nothing to indicate that the hearing officer's consideration of the available record evidence regarding the grievant's misconduct was in any way unreasonable or not based on the actual evidence in the record. Accordingly, EDR declines to disturb the hearing decision on these grounds.

Newly Discovered Evidence

Finally, it appears the grievant is attempting to offer newly discovered evidence. Following the hearing, the grievant emailed the hearing officer explaining that she requested documents from the agency in advance of the hearing and did not receive a response. The grievant also appears to have sent multiple communications to the agency after the conclusion of the hearing, requesting the following:

- "Disciplinary notices"
- "Sign in and Sign out rosters from Jan[uary] 2021 thr[ough] Sept[ember] 2021"
- "28 day cycle sheets"
- "Call-in (record/documentation)"
- "Draft sign-in log"[27]

It appears the grievant may intend to submit these documents, if she receives them from the agency, for consideration by EDR and/or the hearing officer. In addition, the grievant has provided EDR with a number of emails, personal notes, pay stubs, and other documents, all of which are dated June 26, 2021 and earlier.

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[28] 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.[29] 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

[26] EDR notes that some exhibits in the record could raise questions as to whether this situation was handled in compliance with applicable law or whether the grievant was entitled to any leave benefit for the days she did not report to work. However, the grievant has not raised such issues on appeal to EDR. Further, the record is lacking evidence that could substantiate such claims. Thus, for example, this ruling does not address whether provisions of the Americans with Disabilities Act, the Family and Medical Leave Act, or other related laws would have applied to the circumstances giving rise to this case.

[27] In one of her communications to the agency, the grievant also requests again several of the documents she sought before hearing, specifically "a copy of the roster with [her] sign in and sign out signature with her initials" and policies addressing "draft days," "call-ins," "tardiness," and "the due process policy."

[28] *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).

[29] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

> 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.[30]

Having reviewed the information provided by the grievant, EDR finds that she has not provided evidence to support a contention that any of the documents she has provided to EDR after the hearing or is currently seeking from the agency should be considered newly discovered evidence under this standard. Some of the documents in question existed and appear to have been in the grievant's possession prior to the hearing, yet she did not offer them as exhibits. As discussed above, other documents she has identified were included in the agency's exhibits and admitted into the record at the hearing. As for the remaining documents that the grievant continues to seek from the agency, the grievant did not request an order from the hearing officer for production of the documents or otherwise raise the agency's failure to respond to her request for the hearing officer to address at the hearing. The grievant had the ability to offer all relevant evidence and call all necessary witnesses at the hearing, and it was her decision as to what evidence she should present. Although the grievant may now realize she could have provided additional evidence to support her arguments, this is not a basis on which EDR may remand the decision.

Moreover, even assuming that the grievant could satisfy all of the elements necessary to consider the evidence in question newly discovered under this standard, the grievant has not demonstrated how the information she has offered and/or requested would have an impact on the outcome of this case. Upon consideration of the grievant's submissions, EDR has reviewed nothing to suggest that the additional evidence offered and/or requested by grievant would have any impact on the hearing officer's findings. Accordingly, there is no basis for EDR to re-open or remand the hearing for consideration of this additional evidence.

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.[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

[30] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[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).