

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10271; Ruling  
Date: March 27, 2014; Ruling No. 2014-3840; Agency: Department of Corrections;  
Outcome: Hearing Decision Affirmed.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resources Management**  
**Office of Employment Dispute Resolution**

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Corrections  
Ruling Number 2013-3840  
March 27, 2014

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 10271. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

On December 20, 2013, the grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.<sup>1</sup> The grievant timely filed a grievance challenging the disciplinary action.<sup>2</sup> On February 27, 2014, following a hearing, the hearing officer issued a decision upholding the disciplinary action.<sup>3</sup> The grievant has now requested an administrative review of the hearing officer’s decision by 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.”<sup>4</sup> 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 action be correctly taken.<sup>5</sup>

In this case, the grievant seeks administrative review for the purpose of introducing new evidence. Specifically, the grievant seeks to introduce information from an agency database which shows he subsequently corrected the information he was charged with falsifying, as well as database printouts which allegedly show that additional administrative staff members were aware of misconduct by a co-worker.<sup>6</sup>

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<sup>1</sup> Decision of Hearing Officer, Case No. 10271 (“Hearing Decision”), February 27, 2014, at 1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 1, 5.

<sup>4</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>5</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>6</sup> The grievant asserts that the documentation regarding the knowledge of other administrative staff contradicts the hearing officer’s findings. However, the hearing officer’s finding was not that other administrative staff did not have knowledge, but rather that facility managers lacked knowledge. See Hearing Decision at 5.

Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are “newly discovered evidence.”<sup>7</sup> 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.<sup>8</sup> The party claiming evidence was “newly discovered” must show that

(1) the evidence was newly discovered since the judgment was entered; (2) due diligence...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.<sup>9</sup>

Here, the grievant has provided no information to support a contention that the additional records should be considered newly discovered evidence under this standard. Although it appears that the documentation provided by the grievant was in existence prior to the hearing, the grievant has not presented any evidence that he exercised due diligence to discover the evidence prior to the hearing or that he was in any way unable to timely obtain this evidence. Further, there is no indication that this additional evidence would likely produce a new outcome if considered. Consequently, there is no basis to reopen or remand the hearing for consideration of this additional evidence.

#### CONCLUSION AND APPEAL RIGHTS

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.<sup>10</sup> 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.<sup>11</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>12</sup>



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<sup>7</sup> 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 “newly discovered evidence” rule in state court adjudications); *see also, e.g.*, EDR Ruling No. 2007-1490 (explaining “newly discovered evidence” standard in context of grievance procedure).

<sup>8</sup> *See Boryan v. United States*, 884 F.2d 767, 771 (4<sup>th</sup> Cir. 1989).

<sup>9</sup> *Id.* (quoting *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11<sup>th</sup> Cir. 1987)).

<sup>10</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>11</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>12</sup> *Id.*; *see also Va. Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).