

Issue: Second Administrative Review of Hearing Officer's Decision in Case No. 10303;  
Ruling Date: June 24, 2014; Ruling No. 2014-3901; Agency: Virginia Polytechnic  
Institute and State University; Outcome: Hearing Decision in Compliance.



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

**ADMINISTRATIVE REVIEW**

In the matter of the Virginia Polytechnic Institute and State University  
Ruling Number 2014-3901  
June 24, 2014

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management administratively review the hearing officer’s decision and remand decision in Case Number 10303. For the reasons set forth below, EDR has no basis to further interfere with the decision in this case.

FACTS

The hearing officer’s findings in his April 15, 2014 decision in Case Number 10303, as recounted in EDR’s first administrative review in this case (EDR Ruling Number 2014-3877), are hereby incorporated by reference. In EDR Ruling Number 2014-3877, the hearing officer was directed to provide further consideration and explanation of his findings of fact and determinations as to whether the grievant failed to attend a mandatory training event without justification and whether this conduct warranted a Group II Written Notice for failure to follow policy and/or instructions. The hearing officer subsequently issued a remand decision again concluding that the grievant had failed to comply with an instruction to attend the training event, that this failure was without justification, and that the conduct warranted a Group II Written Notice.<sup>1</sup> The grievant has now requested administrative review of the hearing officer’s decision on remand.

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>2</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>3</sup>

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<sup>1</sup> Reconsideration Decision of Hearing Officer, Case No. 10303-R (“Remand Decision”), at 2-5.

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

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

*Findings of Fact*

As the hearing officer clarified in his remand decision his basis for finding that the grievant had failed to comply with a supervisor's instruction without justification, the grievant's request for administrative review is now fairly read as challenging the hearing officer's findings of fact based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>4</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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 this instance, the hearing officer determined that the record evidence demonstrated that the grievant had received an instruction to attend a mandatory training event and failed to attend without justification.<sup>8</sup> While EDR may not necessarily agree with the conclusions reached by the hearing officer, nevertheless, weighing this evidence and rendering a factual finding is squarely within the hearing officer's authority and it is not within our purview to interfere with his consideration of the evidence in this regard. EDR's review of the factual findings in this case is therefore concluded.

*Newly-Discovered Evidence*

In his request for administrative review, the grievant attempts to present additional evidence regarding the basis and motivation for the disciplinary action, as well as evidence of allegedly inconsistent treatment. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."<sup>9</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

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<sup>4</sup> Va. Code § 2.2-3005.1(C).

<sup>5</sup> *Grievance Procedure Manual* § 5.9.

<sup>6</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>7</sup> *Grievance Procedure Manual* § 5.8.

<sup>8</sup> Remand Decision at 2-5.

<sup>9</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 the newly discovered evidence rule in state court adjudications); *see also* EDR Ruling No. 2007-1490 (explaining newly discovered evidence standard in context of grievance procedure).

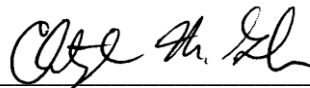
ended.<sup>10</sup> However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that

(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.<sup>11</sup>

In this instance, the grievant has provided no information to support a contention that the evidence presented in his request for administrative review should be considered newly discovered evidence under this standard. The grievant had the ability to obtain this evidence prior to hearing, and he had the ability to call all necessary witnesses at hearing and to elicit relevant testimony. Consequently, there is no basis to re-open or remand the hearing for consideration of this additional evidence.

#### 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>12</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>13</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>14</sup>



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<sup>10</sup> See *Boryan v. United States*, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

<sup>11</sup> *Id.* at 771 (quoting *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987)).

<sup>12</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>13</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>14</sup> *Id.*; see also *Va. Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).