Issue: Administrative Review of Hearing Officer's Decision in Case No. 10484; Ruling Date: January 23, 2015; Ruling No. 2015-4084; Agency: Department of Corrections; Outcome: No Relief – Agency Upheld.

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 2015-4084
January 23, 2015

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 10484. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10484, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employed Grievant as a Casework Counselor at one of its facilities. She worked in an office that was located inside a housing unit.
>
> Agency staff conduct searches of housing units to look for contraband. This is referred to as a "shakedown." Contraband is not permitted inside the institution.
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> On August 25, 2014, Grievant's office was searched. An envelope was found inside of the drawer of Grievant's desk, but the envelope was not opened. Grievant observed the search and knew that the envelope had been found in her desk drawer.
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> On August 26, 2014, the Lieutenant decided to shakedown the counselor's office. He asked Grievant whose office it was and Grievant responded that it was her office. The Lieutenant conducted the shakedown of the counselor's office while Grievant watched. The Lieutenant found a manila envelope inside the drawer of Grievant's desk. The envelope was wrapped in tape. The Lieutenant asked Grievant who owned the envelope. Grievant said it was not hers and she had never seen it before. Inside the envelope were 39 cigarettes wrapped in plastic and several pages of photocopies of pornography. These items were contraband and not permitted in the Facility. A note from an offender to Grievant was also found in the envelope. The offender asked Grievant to call members of his mother and sister because they had some tracking numbers for him. Offenders typically

[1] Decision of Hearing Officer, Case No. 10484 ("Hearing Decision"), December 29, 2014, at 2-3.

> used tracking numbers to transfer money from one inmate to another to avoid detection by Agency employee[s].
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> On September 2, 2014, a confidential source informed Agency employees that Grievant was hiding the contraband in her desk for Inmate M.
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> The Intelligence Officer at the Facility watched the Rapid Eye video of Grievant's office from the time the envelope was found in Grievant's desk on August 25, 2014 until the envelope was found again on August 26, 2014. During that time, no one other than Grievant entered her office.

On September 12, 2014, the grievant was issued a Group III Written Notice with termination for fraternization with an offender.[2] In the hearing decision, the hearing officer assessed the evidence as to whether the grievant had fraternized with an offender in violation of agency policy, finding in the affirmative, and upheld the agency's issuance of a Group III Written Notice with removal.[3] The grievant 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."[4] 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.[5]

Inconsistency with Agency Policy

The grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[6] The grievant has requested such a review and DHRM has issued its response. Accordingly, the grievant's policy claims will not be discussed in this review.

Hearing Officer's Findings of Fact

In her request for administrative review, the grievant further argues that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence in the record. Specifically, the grievant claims that the evidence in the record does not support the hearing officer's determination that she "was in possession of cigarettes and photoc[o]pies of pages of pornography"[7] because the items were "accessible to any who entered [her] office." The

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

grievant further argues that video surveillance reviewed by the agency "only covered a time period of less than 24 hours" between August 25, when the envelope was initially found in her desk drawer, and August 26, when the contraband was discovered in the envelope. In effect, the grievant appears to assert that the evidence presented by the agency was insufficient to demonstrate that she brought the items into the facility.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[9] 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.[10] 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.[11] 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.

At the hearing, the agency presented evidence to show that the grievant had not reported previous instances of other employees using her office[12] and that video surveillance footage from August 25-26 indicated that no other employees had entered her office during that time.[13] The hearing's officer conclusion that the grievant "was in possession of" the items and that "[h]er actions showed an association with an offender to enable prohibited behavior"[14] is based on evidence in the record.[15] While there is also some evidence in the hearing record to support the grievant's assertion that she did not bring the items into the facility,[16] weighing the evidence and rendering factual findings is squarely within the hearing officer's authority. 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.[17] While the grievant may disagree with the hearing officer's decision and his assessment of the evidence presented at the hearing, determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. There is nothing to indicate that the hearing officer's consideration of the evidence was in any way unreasonable or not based on the actual evidence in the record. 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.

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[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.
[12] *E.g.*, Hearing Recording at 1:12:59- 1:13:10 (testimony of Witness H), 1:32:18-1:32:44 (testimony of Witness M).
[13] *Id.* at 52:28-53:45 (testimony of Witness L).
[14] Hearing Decision at 4.
[15] *See*, *e.g.*, Agency Exhibit 2 at 5-8.
[16] *See* Agency Exhibit 1 at 3-8.
[17] *See, e.g.,* EDR Ruling No. 2012-3186.

The grievant further asserts that she "stated that [she] had no idea how the envelope came to be in an unsecured desk drawer in [her] office" at the hearing, and appears to claim that the hearing officer did not consider this information. In the hearing decision, the hearing officer stated that "Grievant did not testify during the hearing and, thus, the credibility of her assertion could not be measured."[18] While it appears the grievant did indeed deny that she had brought the items into the facility in her opening and closing arguments,[19] she did not testify at the hearing.[20] The grievance procedure provides that "[t]he responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances"[21] and that the hearing decision must be based on the evidence in the hearing record.[22] Opening and closing statements are not considered to be evidence by the hearing officer in making a decision, as they are not testimony given under oath. While it was the grievant's choice whether or not to testify at the hearing, the hearing officer was required to base his decision on the evidence in the record. The hearing decision merely notes that the grievant did not testify to support her argument that she did not know how the envelope came to be in her office and, based on EDR's review of the hearing recording, it appears that this statement is accurate.

Newly-Discovered Evidence

In her request for administrative review, the grievant attempts to present additional evidence regarding her conduct on August 25, the alleged presence of other employees in her office on August 26, and previous reports of "unauthorized people being allowed in counselors [sic] assigned work spaces . . . ." Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[23] 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.[24] 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.[25]

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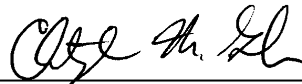
[18] Hearing Decision at 4.
[19] Hearing Recording at 2:20-2:25, 1:44:46-1:44:58.
[20] *See id.* at 1:40:35-1:41:05.
[21] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[22] *Grievance Procedure Manual* § 5.9; *see Rules for Conducting Grievance Hearings* § V(C).
[23] *Cf.* Mundy v. Commonwealth, 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).
[24] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[25] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

In this case, the grievant has provided no information to support a contention that the evidence presented in her request for administrative review should be considered newly discovered evidence under this standard. The grievant had the ability to obtain this evidence prior to the hearing, as well as the ability to call all necessary witnesses at the hearing and to elicit relevant testimony from those witnesses. Consequently, 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, we decline 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.[26] 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.[27] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[28]



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[26] *Grievance Procedure Manual* § 7.2(d).
[27] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[28] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).