Issue: Administrative Review of Hearing Officer's Decision in Case No. 10476; Ruling Date: April 23, 2015; Ruling No. 2015-4125; Agency: Department of Corrections; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2015-4125
April 23, 2015

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 remand decision in Case Number 10476. 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 December 18, 2014 decision in Case Number 10476, as recounted in EDR's first administrative review in this case (EDR Ruling Number 2015-4075), are hereby incorporated by reference.[1] In short, the grievant was issued two Written Notices on September 16, 2014: a Group II Written Notice for leaving work without permission and failure to follow instructions and/or policy[2] and a Group III Written Notice for falsification of records.[3] At the hearing, the parties agreed to present evidence relating only to the Group III Written Notice under the mistaken belief that there would be a separate hearing on the Group II Written Notice.[4] In the hearing decision, the hearing officer reduced the Group III Written Notice for falsification of records to a Group II Written Notice for failure to follow instructions and/or policy.[5]

On administrative review, EDR remanded the case to the hearing officer for a reconvened hearing on the grievant's challenge to the Group II Written Notice that was not addressed in the original hearing or decision.[6] The reconvened hearing was held on March 5, 2015, and the parties presented evidence relating to the Group II Written Notice.[7] The hearing officer issued a remand decision on March 11, 2015, that contained the following relevant findings of fact relating to the Group II Written Notice:[8]

> The Agency employed the Grievant as an academic instructor, and she had been employed there for four years as of the offense date. The Group II Written Notice charged the Grievant as follows:

[1] *See* Decision of Hearing Officer, Case No. 10476 ("Hearing Decision"), December 18, 2014.
[2] Agency Exhibit 1.
[3] Agency Exhibit 4A at 1.
[4] *See* EDR Ruling Number 2015-4075 at 1-4.
[5] Hearing Decision at 6.
[6] EDR Ruling Number 2015-4075 at 7-8.
[7] *See* Decision of Hearing Officer on Remand, Case No. 10476 ("Remand Decision"), March 11, 2015, at 1.
[8] *Id.* at 4-6 (citations omitted).

> [The Grievant], as documented on August 25 & 27, 2014, left the work site prior to the end of her scheduled shift assignment without notifying her supervisor or receiving the required prior approval. This clearly violates DOC Operating Procedure 110.1. This is not the first incident of this nature (refer to attachments and documentation below). Her actions have had an adverse impact on the educational process as classes scheduled on each of those days were cancelled; again, without the approval to do so.

As circumstances considered, the Written Notice provided:

> Documentation supports that [the Grievant] is clearly aware of the requirements of the procedures and processes; this is evidenced by the following: See attached list of dates and documentation.

A separate page added to the Written Notice identified eight enumerated documentation items, including emails and counseling memos.

The Agency's witnesses, the school superintendent, the human resources officer, and facility superintendent, testified consistently with the terms of the Written Notice, including the counseling of the Grievant, the Grievant's erroneous attendance documentation, and the importance of following procedure for the Agency. They testified to the email communications to the Grievant expressing the importance of her adherence to her established work schedule and the importance of prior notification of any changes and leave requests. For instance, on June 11, 2014, the Grievant's supervisor wrote an email to the Grievant that stated, among other things:

> I need to know in advance when the leave is going to be taken unless it is an emergency. Annual leave is approved in advance. Sick and family personal you contact your supervisor to let her know your status for the workday as well as the institution.
>
> The only whereabouts that I need to know about is when you are or are not at work. This is a requirement of exempt employees. When you submit your leave slip, you are expecting me to sign off on documentation that I know nothing about in some instances.

Another teacher, V.R., testified on the Grievant's behalf. V.R. testified that the principal's assistant requested that their leave be written on a paper calendar so that the leave could be logged with the staff leave at another location. The principal was present at the Grievant's facility only one day per week, as the principal supervised multiple facilities at different locations. V.R. testified that the principal gave the teachers, including the Grievant, her home and cell phone numbers so that she could always be reached for such notifications. V.R. had a standing medical authorization on file that addressed her regular needs to leave work unexpectedly to address the effects of severe migraine headaches. V.R. testified that she understood she was to notify her supervisor in advance if

> possible of any leave or changes in work hours. V.R. testified somewhat equivocally, but she confirmed that annual leave had to be arranged in advance, according to policy, and that the paper calendar did not excuse prior notification and approval for leave.
>
> The Grievant testified that the leave in question was related to medical appointments and she had no purposeful intention of not notifying her supervisor when her work schedule needed to change. The Grievant also testified that she understood that writing her leave on the paper calendar satisfied the requirement that she notify her supervisor and obtain approval for leave, and that nothing more was required. The Grievant admitted that the supervisor was only onsite one day per week, and the Grievant testified that her leave would often need to change from day to day because she had no control over her physician's appointment schedule. On August 25 and 27, 2014, the Grievant had written on the paper calendar a notation that she would be leaving at 2:00 p.m. When this notation was made is unclear. However, the undisputed records show that the Grievant instead left work on those days at about 1:00 p.m., and that she provided no notification to anyone in supervision. The Grievant testified that she did not cancel any classes on those dates because the classes were already cancelled because of test scoring or other reasons. The Grievant conceded on cross-examination that her supervisor had asked for text messages, email, or telephone messages for any leave requests or work schedule changes. The Grievant testified that she sometimes contacted her supervisor when leave changes occurred, but she could not state when.

In the remand decision, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant left work without permission and failed to follow policy, and upheld the Group II Written Notice.[9] The hearing officer further upheld the grievant's termination based on the grievant's accumulation of two Group II Written Notices (i.e., the Group II Written Notice from the original hearing decision and the Group II Written Notice addressed in the remand decision).[10] The grievant now appeals the remand 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."[11] 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 hearing officer correct the noncompliance.[12]

[9] *Id.* at 4-6.
[10] *Id.* at 10-11.
[11] Va. Code §§ 2.2-1202.1(2), (3), (5).
[12] *See Grievance Procedure Manual* § 6.4(3).

Admission of Exhibits

In her request for administrative review, the grievant asserts that the hearing officer failed to comply with the grievance procedure by admitting Agency Exhibits 13 and 14 into the hearing record even though the agency did not identify or disclose those exhibits to the grievant prior to the hearing.[13] By statute, hearing officers have the duty to receive probative evidence and to exclude evidence which is irrelevant, immaterial, insubstantial, privileged, or repetitive.[14] Importantly, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding,[15] and the technical rules of evidence do not apply.[16] When a grievant or agency seeks to introduce probative evidence at hearing, but has previously failed to identify the evidence in accordance with the hearing officer's prehearing orders, the hearing officer may continue the hearing to allow the opposing party time to respond. However, this remedy is required only when requested and when the opposing party would otherwise be materially prejudiced by the failure to identify an exhibit. In this case, the grievant did not request that the hearing officer continue the hearing.[17] Moreover, we find no material prejudice in admitting the evidence.

Agency Exhibits 13 and 14 consist of emails from June and July 2014 between the grievant and her supervisor that relate to the grievant's use of leave. When the agency identified the documents at the hearing, the hearing officer ordered a brief recess to allow the grievant and her advocate an opportunity to review the exhibits.[18] After reviewing the proposed exhibits, the grievant's advocate objected to the admission of the documents because they had not been presented by the agency in a timely manner.[19] The grievant's advocate argued, in effect, that the agency's failure to disclose the documents prior to the hearing was prejudicial because it impacted the grievant's ability to prepare a defense to the charge presented on the Written Notice.[20] The hearing officer determined that admitting the exhibits would not result in material prejudice and further noted that the grievant would be permitted to present evidence relating to the evidentiary weight that should be accorded to the documents.[21]

Although the grievant argues that she "was not given a reasonable opportunity to prepare for an explanation or provide evidence of misrepresentation of the context or content" of the emails, we cannot conclude that the grievant was harmed by their admission into the record. Agency Exhibits 13 and 14 contain evidence related to the agency's assertion that the grievant was required to notify her supervisor in advance of any use of annual leave. Having reviewed the agency's list of proposed exhibits and excluding Agency Exhibits 13 and 14, it is clear that the agency presented other documentary evidence before the hearing regarding its position that

[13] In her request for administrative review, the grievant states that the documents were entered into evidence as "exhibit 12." EDR's review of the hearing record and the grievant's claims in her request for review, however, show that the documents referred to by the grievant were actually admitted into the hearing record as Agency Exhibits 13 and 14, and we will refer to them as such in this ruling.
[14] Va. Code § 2.2-3005(C)(5).
[15] *Rules for Conducting Grievance Hearings* § IV(D).
[16] *Id.*
[17] *See* Hearing Recording at 4:52-22:38.
[18] *Id.* at 8:33-8:41.
[19] *Id.* at 8:52-9:12.
[20] *See id.* at 10:16-12:38.
[21] *Id.*

notice and approval were required prior to the use of annual leave.[22] Indeed, the Written Notice itself clearly states that the grievant was charged with failing to follow this directive.[23] We understand that the grievant may not have had advance notice that the specific emails contained in Agency Exhibits 13 and 14 would be presented at the hearing. EDR cannot, however, conclude that the grievant did not have notice of the agency's intent to show that the grievant had failed to follow the advance notification and approval for the use of the annual leave prior to the hearing.

While EDR in no way condones the agency's failure to disclose Agency Exhibits 13 and 14 in a timely manner,[24] we have also not identified anything in the record to suggest that the grievant's ability to prepare and present her case was negatively impacted because the hearing was not continued to allow her additional time to respond to Agency Exhibits 13 and 14. Therefore, under the particular circumstances of this case, we cannot find that the hearing officer erred either in admitting those exhibits into evidence or in not continuing the hearing to allow the grievant additional time to respond such that remand is warranted. Accordingly, we decline to disturb the remand decision on this basis.

Due Process

The grievant further argues that she was not afforded due process because the agency failed to provide her with an attachment to the Written Notice that contains additional information about the circumstances considered prior to the issuance of the Written Notice.[25] The grievant alleges that she did not receive a copy of the attachment until the parties exchanged exhibits several days prior to the hearing. As a result, the grievant claims that she was not given proper notice of the nature of the charge set forth on the Written Notice. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[26] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[27] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.

Prior to certain disciplinary actions, the United States Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[28] Importantly, the pre-disciplinary notice and

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[22] Agency Exhibit 10G at 1; Agency Exhibit 11; Agency Exhibit 12A at 4.
[23] Agency Exhibit 1 at 1.
[24] At the hearing, the agency's advocate explained that she did not have access to the documents presented as Agency Exhibits 13 and 14 until after the exchange of exhibits. *See* Hearing Recording at 5:16-6:17. EDR takes no position on whether the events that caused the delay in the agency's presentation of the exhibits at issue here would justify the late exchange of documents in other circumstances, but only that their admission into the hearing record did not cause material prejudice to the grievant in this case.
[25] *See* Agency Exhibit 1 at 2.
[26] *E.g.*, Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Huntley v. N.C. State Bd. Of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974).
[27] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[28] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). State policy requires that

opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[29]

On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[30] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[31]

In this case, it is evident that the grievant had ample notice of the charges against her as set forth on the Written Notice and in the agency's notice of intent to issue disciplinary action.[32] The attachment lists additional circumstances considered by the agency in its decision to issue the Written Notice.[33] It consists of a list of emails to or from the grievant about leave use procedures and counseling memos issued to the grievant relating to her use of leave.[34] The Written Notice explicitly states that the grievant was disciplined because she "left the work site prior to the end of her scheduled shift without notifying her supervisor or receiving the required prior approval."[35] The attachment, on the other hand, contains information to corroborate the statement in the Written Notice that "[t]his is not the first incident of this nature . . . ."[36] While this information is undoubtedly relevant to the offense charged on the Written Notice, we cannot conclude that the agency's failure to deliver the attachment when the Written Notice was issued prejudiced the grievant by, for example, limiting her ability to prepare a defense to the charge or present her case at the hearing. Furthermore, the documents referenced in the attachment appear to have all been either created by or delivered to the grievant, and thus should have been in her possession prior to, or at the time of, the issuance of the Written Notice, and a copy of the

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> [p]rior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations, employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60, *Standards of Conduct*, § E(1). Significantly, the Commonwealth's Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."

[29] *Loudermill*, 470 U.S. at 546.

[30] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[31] See Va. Code § 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

[32] *See* Agency Exhibit 1 at 1; Agency Exhibit 11.

[33] *See* Agency Exhibit 1 at 2.

[34] *Id.*

[35] *Id.* at 1.

[36] *Id.*

attachment itself was included in the agency's exhibit binder and provided to the grievant before the hearing. It cannot be said, therefore, that the grievant had no knowledge of the attachment or the documents that memorialize her prior communications with agency management about the use of leave before the hearing. Having reviewed the evidence in the record, we cannot conclude that the agency's failure to provide the grievant with the attachment to the Written Notice before the exchange of exhibits deprived her of pre-disciplinary due process as a question under the grievance procedure.

In addition, we further note that the grievant had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the opportunity to have counsel present. Accordingly, we believe, as do many courts, that the extensive post-disciplinary due process provided to the grievant cured any lack of pre-disciplinary due process. EDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[37] However, we are persuaded by the reasoning of the many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[38] Therefore, even assuming that the pre-disciplinary due process afforded to the grievant was somehow deficient, the full post-disciplinary due process described above cured any error. Accordingly, we find no due process violation under the grievance procedure.[39]

Hearing Officer's Findings of Fact

Fairly read, the grievant's request for administrative review appears to argue that the hearing officer's findings of fact, based on the weight and credibility that he accorded to evidence presented at the hearing, are not supported by the evidence. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[40] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[41] 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.[42] 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

[37] *See, e.g.*, Cotnoir v. University of Me. Sys., 35 F.3d 6, 12 (1st Cir. 1994) ("Where an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation.").
[38] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572 (and authorities cited therein).
[39] In the remand decision, the hearing officer addressed the grievant's arguments about the attachment as a matter of compliance with the grievance procedure, concluding that the grievant had waived her arguments about the attachment by failing to raise issue with the hearing officer after receiving the agency's exhibits. While this analysis might relate to a claim that the attachment should not have been admitted as evidence, we believe that the effect of the agency's failure to provide the attachment at the time the Written Notice was issued is better addressed as a matter of due process.
[40] Va. Code § 2.2-3005.1(C).
[41] *Grievance Procedure Manual* § 5.9.
[42] *Rules for Conducting Grievance Hearings* § VI(B).

circumstances.[43] 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 case, the hearing officer assessed the evidence and determined that the grievant had been previously counseled about the use of leave and received email communication "expressing the importance of her adherence to her established work schedule and the importance of prior notification of any changes and leave requests," that the "Grievant's testimony that she understood she only had to write her work schedule changes on the paper calendar [was] not credible," and that grievant's actions "exhibited a carelessness and indifference to her obligations of notification and approval for taking leave, supporting and justifying the Agency's Group II level offense . . . ."[44] In her request for administrative review, the grievant disputes the hearing officer's remand decision and argues that she followed the proper notice procedures for the use of leave.

There is evidence in the record to support the hearing officer's conclusion that the grievant engaged in the behavior charged on the Written Notice,[45] that the behavior constituted misconduct,[46] and that the agency's discipline was consistent with law and policy.[47] 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.[48] While the grievant may disagree, determinations of credibility as to disputed facts of this nature 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, we decline to disturb the remand decision on this basis.

Mitigation

The grievant also challenges the hearing officer's decision not to mitigate the agency's disciplinary action. She argues that she "had no understanding of how the agency would interpret or enforce the rule of prior approval . . . ." In effect, she claims that she did not have notice of the rule and/or the agency's interpretation of the rule relating to notification procedures for the use of leave.

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[43] *Grievance Procedure Manual* § 5.8.
[44] Remand Decision at 4-6.
[45] *See, e.g.*, Agency Exhibits 2, 8A, 8B; Grievant's Exhibit 2 at 8-9.
[46] *See* Agency Exhibits 12A at 4; Agency Exhibits 13, 14.
[47] *See* Agency Exhibit 12D; DHRM Policy 1.60, *Standards of Conduct*, Attachment A (stating that "[f]ailure to follow supervisor's instructions or comply with written policy" is misconduct that would typically warrant the issuance of a Group II Written Notice).
[48] *See, e.g.*, EDR Ruling No. 2012-3186.

By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[49] The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "a hearing officer is not a 'super-personnel officer'" and that "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[50] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[51]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on the issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[52] EDR will review a hearing officer's mitigation determination for abuse of discretion,[53] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In assessing mitigating factors pursuant to the *Rules*, the hearing officer may consider whether the employee "had notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with the rule."[54] The *Rules* further state that:

> [A]n employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee. Proper notice of the rule and/or its interpretation by the agency may also be found when the rule and/or interpretation have been communicated by word of mouth or by past practice. Notice may not be required when the misconduct is so severe, or is contrary to

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[49] Va. Code § 2.2-3005(C)(6).
[50] *Rules for Conducting Grievance Hearings* § VI(A).
[51] *Id.* § VI(B).
[52] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).
[53] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts." *Id.*
[54] *Rules for Conducting Grievance Hearings* § VI(B)(2).

> applicable professional standards, such that a reasonable employee should know that such behavior would not be acceptable.[55]

As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[56]

Here, the grievant alleges in her request for administrative review that her "supervisor implemented a calendar procedure to notify her of the time" when leave was taken, and that this process was used by the supervisor at other office locations. The grievant further claims that she was never given "a written policy with regard to requesting annual leave in advance." She argues that the evidence supports a conclusion that she did not have notice of the agency's policy that advance notice and approval were required for the use of annual leave, and that the hearing officer should have mitigated the disciplinary action for that reason.

Based on EDR's review of the hearing record, there is nothing to indicate that the hearing officer's decision not to mitigate on this basis was contrary to the evidence in the record or constitutes an abuse of discretion in this case. At the hearing, for example, Witness V.R. testified that she knew annual leave had to be requested and approved in advance and that the office calendars did not serve as a substitute for advance notification and approval requirements.[57] Moreover, the grievant's supervisor directed the grievant to provide advance notice of her use of annual leave before the misconduct at issue in this case occurred.[58] The agency also presented evidence to show that, in 2012, the grievant had received a copy of the agency policy that outlines the proper procedure for the use of annual leave and states that "[a] minimum of 48 hours [sic] advance notice" is required for the use of annual leave absent "extreme or mitigating circumstances."[59] Further, it is squarely within the hearing officer's discretion to determine the weight to be given to the testimony presented. In the remand decision, the hearing officer explicitly stated that the evidence presented by the agency demonstrated that "the Grievant's testimony that she understood she only had to write her work schedule changes on the paper calendar is not credible."[60]

While the grievant may disagree with the hearing officer's mitigation decision, EDR cannot conclude that the hearing officer's mitigation analysis was in any way unreasonable or contrary to the actual evidence in the record. Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer, and we cannot conclude that the hearing officer's decision not to mitigate constitutes an abuse of discretion in this case. Accordingly, EDR will not disturb the remand decision on this basis.

Newly Discovered Evidence

In her request for administrative review, the grievant offers additional evidence that was not presented at the hearing in support of her argument that the hearing officer should have mitigated the discipline. Specifically, the grievant appears to claim that the nature of her

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[55] *Id*. at § VI(B)(2) n.26.
[56] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).
[57] Hearing Recording at 3:06:22-3:06:33, 3:10:01-3:10:27.
[58] Agency Exhibit 13 at 1.
[59] Agency Exhibit 3 at 3; Agency Exhibit 12A at 4.
[60] Remand Decision at 5.

employment and job responsibilities, as well as her length of employment with the agency, support mitigation of the discipline. From EDR's review of the hearing record, it does not appear that the grievant presented witness testimony or documentary evidence to support these claims 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."[61] 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.[62] 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.[63]

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 present this evidence at the hearing, as well as the opportunity to call any necessary witnesses and to elicit relevant testimony from those witnesses to support her theories that the discipline should have been mitigated. Consequently, there is no basis to re-open or remand the hearing for consideration of additional evidence on the issue of mitigation, and we decline to disturb the remand decision on this basis.

APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's remand 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.[64] 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.[65] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[66]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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[61] *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).
[62] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[63] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[64] *Grievance Procedure Manual* § 7.2(d).
[65] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[66] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).