Issue: Administrative Review of Hearing Officer's Remand Decision on Case No. 10378; Ruling Date: May 14, 2015; Ruling No. 2015-4129; Agency: Department of Alcoholic Beverage Control; 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 Alcoholic Beverage Control
Ruling Number 2015-4129
May 14, 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 remand decision in Case Number 10378. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10378, as found by the hearing officer, are set forth in EDR Ruling No. 2015-4083 and will not be repeated here. As directed by Ruling No. 2015-4083, on March 21, 2015, the hearing officer issued a remand decision which again upheld the disciplinary action against the grievant.[1] 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."[2] 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.[3]

Newly-Discovered Evidence

In his request for administrative review, the grievant argues that the hearing record should be reopened to allow for the admission of "newly discovered evidence." Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[4] Newly discovered evidence is evidence that

[1] *See* Remand Decision of Hearing Officer, Case No. 10378 ("Remand Decision"), March 21, 2015, at 1, 18.
[2] Va. Code §§ 2.2-1202.1(2), (3), (5).
[3] *See Grievance Procedure Manual* § 6.4(3).
[4] *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).

was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[5] 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.[6]

In this case, the grievant argues that General Order 502 should be introduced as newly discovered evidence. That document, which became effective on July 1, 2014, after the incident for which the grievant was disciplined, allegedly replaced another agency policy, OM-03, cited by the hearing officer in his decision. The grievant asserts that he only recently discovered the existence of General Order 502 and made due diligence to obtain the document prior to hearing, but that the agency improperly withheld the document during the course of discovery and wrongfully represented at hearing that OM-03 remained in effect. The grievant further argues that because the hearing officer relied on OM-03 in upholding the disciplinary action, admission of General Order 502 would likely change the outcome of the case.

To be considered on appeal, whether in general, on mitigation, or as to an issue of possible perjury,[7] General Order 502 must meet the elements of newly discovered evidence. However, even if EDR were to assume, for the sake of argument, that the document has only been recently discovered by the grievant despite his own due diligence, EDR does not agree that reopening the hearing to admit General Order 502 would result in a different outcome by the hearing officer. First, the parties do not dispute that OM-03, not General Order 502, was the policy in effect at the time of the grievant's conduct. Thus, General Order 502 has no direct impact on the hearing officer's finding of misconduct. Further, while some portions of General Order 502 differ from those of OM-03, neither document specifically authorizes the actions for which the grievant was disciplined, such as a search of the premises involving opening a closed desk and cabinet drawers.[8] Lastly, with respect to the grievant's claims of mitigation, the

---

[5] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[6] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[7] Although the grievant additionally claims that an agency director committed perjury by testifying that agency policy OM-03 was still in effect, presumably at the time of hearing, the grievant has not substantiated that such testimony would meet the definition of perjury such that a remand would be warranted. *See, e.g.,* Scott v. Commonwealth, 14 Va. App. 294, 297, 416 S.E.2d 47, 49 (1992) (noting that the definition of perjury includes a "willful" assertion that is "material" to the issue or point of inquiry). For example, even assuming that the agency director's statements regarding OM-03 were not accurate, the grievant has not shown that the director made those statements intentionally and knowingly with the intent to mislead, rather than out of confusion or a simple failure of memory. Indeed, the agency director's brief testimony on this point could have been referring to the fact that OM-03 was the policy still in effect at the time the grievant was disciplined, which was indisputably the case. Further, for the reasons discussed below, the grievant has not shown that General Order 502 would have a material impact on this case, and therefore any detrimental result on the grievant is at best speculative.
[8] *See* Decision of Hearing Officer, Case No. 10378 ("Hearing Decision"), December 28, 2014, at 3-4.

hearing officer already had before him evidence regarding the grievant's alleged lack of notice that his conduct was prohibited. Therefore, even if General Order 502 can be read to suggest that the agency has not consistently taken the position that the grievant's conduct was prohibited, General Order 502 would merely be cumulative evidence. For all these reasons, there is no ground on which EDR can conclude that the admission of General Order 502 would likely change the outcome of this case.[9] Accordingly, there is no basis to re-open or remand the hearing for consideration of additional evidence on this issue.

Alleged Agency Conduct

The grievant also asserts that the agency improperly withheld General Order 502 during the course of discovery. First, EDR's review indicates that both sides bear at least some responsibility for General Order 502 not being timely raised before the hearing officer. Additionally, even if we were to assume for the sake of argument that the agency acted inappropriately, the remedy appropriate would be to allow for the admission of the document into evidence. However, as explained above, the inclusion of General Order 502 in the record would not have been likely to produce a different outcome. Consequently, the grievant did not suffer any material harm from the non-disclosure, to the extent it even was inconsistent with the grievance procedure, such that any further remand or other relief is warranted to address the matter under the grievance procedure.

Mitigation

The grievant also asserts that the hearing officer erred in failing to mitigate the disciplinary action. Specifically, he argues that the hearing officer failed to consider and/or failed to apply the correct standard to certain of his arguments regarding mitigation. We disagree. Although the hearing officer may have defined or addressed the grievant's arguments in ways he finds objectionable, there is no basis to conclude that the hearing officer's interpretation constituted an abuse of discretion. Further, while the evidence in this case could be subject to more than one interpretation, a review of the Remand Decision does not support a conclusion that the hearing officer abused his discretion in concluding that the grievant had failed to meet his burden of demonstrating that mitigation was warranted. Although reasonable minds may disagree with the conclusion reached by the hearing officer, 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 in this case is, therefore, concluded.

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

[9] *Id*. at 15-18. As explained in EDR Ruling No. 2015-4083, "[t]o the extent the grievant's argument seeks a determination of whether the hearing officer erred in determining as a matter of law that consent or a warrant was required under the Fourth Amendment and that no valid consent was obtained, these claims are best addressed by the Circuit Court, rather than EDR."

decision becomes a final hearing decision once all timely requests for administrative review have been decided.[10] 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.[11] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[12]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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