Issue: Administrative Review of Hearing Officer's Decision in Case No. 10727; Ruling Date: March 4, 2016; Ruling No. 2016-4305; Agency: Virginia Department of Transportation; 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 Virginia Department of Transportation
Ruling Number 2016-4305
March 4, 2016

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 10727. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant was employed as a Transportation Operator by the Virginia Department of Transportation ("agency").[1] On October 23, 2015, the grievant was issued a Group III Written Notice for "[v]iolence in the [w]orkplace."[2] The agency described the conduct supporting the Written Notice as:

> On August 27, 2015 in the [Area Headquarters], you were quoted saying that "I am the one that everyone should be worried about, on my last day I will come in here and shoot you, you and you" You used finger gestures to act like you were holding a gun and sticking your arm out like you were shooting each one of them. Employees have concerns about your behavior and your threats to harm them and others.
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> Employees have stated that you have called them names such as "worthless piece of s..t" or "fat a..s". It has been reported that you have made several remarks about sexual activity between two co-workers because they are working and traveling together. This last accusation occurred on September 4, 2015 where you asked a female employee "I thought xxxx would have already wiped the sweat off of your forehead". It is stated that you continue to refer to employees with inappropriate names and have created a disruptive and hostile work environment for employees while making them feel uncomfortable to report to work.
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> The investigation found that you were in violation of the above mentioned policies. The Workplace Violence policy "shall be subject to corrective action, up to and including termination" under DHRM Standards of Conduct policy 1.60.[3]

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[1] *See* Decision of Hearing Officer, Case No. 10727 ("Hearing Decision"), February 2, 2016, at 2; *see also* Agency Exhibit D at 1.
[2] Agency Exhibit B at 1.
[3] *Id.*

The grievant timely grieved the disciplinary action.[4] A hearing was subsequently held on December 18, 2015.[5] On February 2, 2016, the hearing officer issued a decision upholding the disciplinary action.[6] The grievant has now requested administrative review of the hearing officer's decision.[7]

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 . . . ."[8] 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.[9]

Inconsistency with Agency Policy

The grievant argues that the hearing officer's decision is inconsistent with state and agency policy. In particular, he appears to argue that the hearing officer erred in finding that the grievant's conduct constituted "workplace violence" or misconduct under policy; that the hearing officer erred in finding the grievant's conduct was properly characterized as a Group III offense; that agency policy (rather than DHRM policy) is controlling; and that the grievant was not afforded due process or the protections set forth in DHRM Policy 1.60, *Standards of Conduct*. The Director of DHRM has the sole authority to interpret all policies affecting state employees and to make a final determination on whether the hearing decision comports with policy.[10] The grievant has requested such a review. Accordingly, EDR will not address these claims further.

Issue and/or Claim Preclusion

The grievant asserts that the question of whether an assault occurred was barred from "relitigation" under the doctrines of *res judicata* or collateral estoppel, as that matter had already been litigated in a criminal proceeding. As the grievant notes, these doctrines preclude a second litigation of claims and issues where those matters have previously been adjudicated. "For *res judicata* purposes, four elements must concur: (1) identity of the remedies sought; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality of the persons for or against whom the claim is made."[11] Similarly, for collateral estoppel to apply, "the following requirements must be met: (1) the parties to the two proceedings must be the same, (2) the issue of fact sought to be litigated must have been actually litigated in the prior proceeding, (3) the issue of fact must have been essential to the prior judgment, and (4) the prior proceeding must

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[4] Agency Exhibit D; *see* Hearing Decision at 1.
[5] *See* Hearing Decision at 1.
[6] *Id.* at 1, 17.
[7] The grievant and his attorney each submitted requests for administrative review. Both requests are considered in this ruling.
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[11] Wright v. Castles, 232 Va. 218, 222, 349 S.E.2d 125, 128 (1986) (citation omitted).

have resulted in a valid, final judgment against the party against whom the doctrine is sought to be applied."[12]

"It is a well-settled rule in Virginia that a criminal judgment has no preclusive effect in a subsequent civil proceeding."[13] Further, in this case, the criminal proceeding against the grievant and the grievance hearing do not involve the same issues and/or claims, and as such, preclusion does not apply. Specifically, the criminal proceeding apparently addressed whether the grievant engaged in conduct violative of Sections 18.2-57 or 18.2-60.3 of the Code of Virginia, by in fact assaulting two people or by engaging in conduct that placed those people "in reasonable fear of death, criminal sexual assault, or bodily injury to that person or to the person's family or household member."[14] In contrast, the grievance hearing considered whether the grievant's conduct violated agency policy, which prohibits "[w]ords or actions that could be reasonably construed to constitute a threat, goal or intent to cause physical and/or psychological harm, destruction or punishment," whether or not the individual to whom the threat was directed feels in danger or afraid.[15] As there is no basis to find that the criminal proceeding precludes administrative action in this case, EDR will not disturb the hearing decision on this basis.

Hearing Officer's Consideration of the Evidence

The grievant also challenges the hearing officer's finding that the grievant's conduct constituted misconduct or a violation of policy. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[16] and to determine the grievance based "on the material issues and grounds in the record for those findings."[17] Further, in cases involving discipline, the hearing officer reviews the evidence *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.[18] 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.[19] 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.

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[12] Glasco v. Ballard, 249 Va. 61, 64, 452 S.E. 2d 854, 855 (1995) (citation omitted).
[13] United States v. Turner, 933 F.2d 240, 243 n.2 (4th Cir. 1991) (citing Selected Risks Ins. Co. v. Dean, 233 Va. 260, 263-64 (1987)); *see also*, *e.g.*, Smith v. New Dixie Lines, Inc., 201 Va. 466, 472, 111 S.E.2d 434, 438 (1959) ("In Virginia the general rule is that a judgment of conviction or acquittal in a criminal prosecution does not establish in a subsequent civil action the truth of the facts on which it was rendered, or constitute a bar to a subsequent civil action based on the offense of which the party stands convicted or acquitted. . . .").
[14] Grievant's Exhibit 1.
[15] *See* Agency Exhibit G, *Preventing Violence in the Workplace Safety Directive*, at 3; *see also* DHRM Policy 1.80, *Workplace Violence*.
[16] Va. Code § 2.2-3005.1(C).
[17] *Grievance Procedure Manual* § 5.9.
[18] *Rules for Conducting Grievance Hearings* § VI(B).
[19] *Grievance Procedure Manual* § 5.8.

In this case, much of the grievant's actual conduct—that is, what he actually said is not in dispute; rather, what is primarily disputed by the grievant is the hearing officer's conclusion that the grievant's conduct was reasonably construed as threatening or otherwise violating policy.[20] The grievant also appears to dispute the hearing officer's determinations regarding witness credibility and strength of testimony, although he characterizes these disputes in terms of a lack of evidence.[21] While the grievant may disagree with the hearing officer's decision, determinations of this type are precisely the sort of findings reserved solely to the hearing officer. Where the evidence conflicts or is subject to varying interpretations, such as this case, 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.[22] While the grievant may be correct that some evidence supports his view of the facts of the case, EDR cannot find that the hearing officer abused his discretion in reaching the factual conclusions made in deciding this case. Accordingly, we decline to disturb the decision. [23]

Alleged Bias of Hearing Officer

The grievant further appears to allege that the hearing officer was biased in favor of the agency. The *Rules for Conducting Grievance Hearings* ("*Rules*") provide that a hearing officer is responsible for:

> [v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[24]

The applicable standard regarding EDR's requirement of a voluntary disqualification when the hearing officer "cannot guarantee a fair and impartial hearing," is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.[25] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by

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[20] For example, the impact, if any, of the grievant's intent or his co-workers' interpretation of his comments on the appropriate level of disciplinary action could be viewed as a question of policy to be determined by DHRM, not a matter for EDR to determine..

[21] As an example, the grievant argues that the hearing officer's finding that the MO manager did not learn of the grievant's conduct until September 9, 2015 is incorrect, citing the testimony of a superintendent. However, the MO manager testified that he did not receive information about the grievant's conduct until September 9. Transcript at 9. The grievant also asserts that "there was no evidence at the hearing" that the grievant called others a "worthless piece of s..t" or "fat a.s." The hearing officer did not make any finding that the grievant used the "worthless piece" phrase, however. In regard to the term "fat a.s.," the hearing officer notes that a handwritten witness statement introduced by the agency into evidence states that the grievant used that term "countless times." *See* Hearing Decision at 9; Agency Exhibit F at 26

[22] *See*, *e.g.*, Agency Exhibit F; Transcript at 8-19, 36-39, 69-72.

[23] As previously noted, to the extent the grievant argues that the hearing officer erred in finding that the grievant's conduct violated policy, this determination is within the sole purview of DHRM Director or her designee.

[24] *Rules for Conducting Grievance Hearings* § II. See also EDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if "a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself."

[25] While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.

whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[26] EDR finds the Court of Appeals' standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.[27] The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.[28]

In this particular case, there is no such evidence. Although the grievant asserts that the hearing officer was selected by the agency, the hearing officer was in fact selected by EDR under its Hearings Program Administration Policy. The grievant also asserts that the agency was allowed to make a written closing argument and was given an extension of time in which to do so. However, as the hearing decision documents, both parties were given time after the hearing to submit written closing arguments and neither grievant nor his counsel appear to have objected to a two-day extension granted to the agency.[29] Finally, with respect to the grievant's concern that the hearing officer apparently found the testimony of an agency witness to be credible, the mere fact that a hearing officer's findings align more favorably with one party than another will rarely, if ever, standing alone constitute sufficient evidence of bias. This is not the extraordinary case where bias can be inferred from a hearing officer's findings of fact. Therefore, EDR finds no reason to disturb the hearing officer's decision for this reason.[30]

Due Process

The grievant argues that the hearing officer erred by upholding the disciplinary action on the ground that the agency had failed to provide him with adequate pre-disciplinary due process. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[31] is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[32] However, the grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of compliance with the grievance procedure's *Rules*.[33]

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

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[26] Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); *see* Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.").
[27] *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.
[28] *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.
[29] Hearing Decision at 1.
[30] The grievant also argues that an agency witness "knew" that the decision was being issued two weeks before its actual issuance. The grievant has presented no evidence, other than his own statement, to corroborate this assertion; and even if the assertion is assumed to be true, that a witness knew that a decision was going to be issued does not establish hearing officer bias.
[31] *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).
[32] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[33] To the extent the grievant argues that the agency's actions were not in compliance with DHRM Policy 1.60, *Standards of Conduct*, this claim must be addressed by the DHRM Director, as explained previously.

to the charges, appropriate to the nature of the case.[34] Importantly, the pre-disciplinary notice and 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 her 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."[35]

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 an opportunity for the presence of counsel.[36] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[37]

Section VI(B) of the *Rules* provides that in every instance, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."[38] In this case, EDR finds that the grievant did have adequate notice of the charge against him and that the charge was sufficiently set forth on the Written Notice. 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.[39] 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.[40] 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

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[34] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985). State policy requires:

Prior 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."

[35] *Loudermill*, 470 U.S. at 545-46.

[36] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983).

[37] See Virginia Code Section 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; s*ee also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

[38] *Rules for Conducting Grievance Hearings* § VI(B) (citing O'Keefe v. U.S. Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002) (holding that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.")).

[39] *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.").

[40] *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).

violation under the grievance procedure. As such, the hearing decision will not be disturbed on this basis.

Failure to Mitigate

The grievant also challenges the hearing officer's decision not to mitigate the Written Notice. Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or in aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[41] The *Rules* provide that "a hearing officer is not a 'super-personnel officer'" therefore, "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."[42] 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.[43]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above.

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 that 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.[44] EDR will review a hearing officer's mitigation determination for abuse of discretion,[45] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

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[41] Va. Code § 2.2-3005(C)(6).
[42] *Rules for Conducting Grievance Hearings* § VI(A).
[43] *Id.* § VI(B)(1).
[44] The Merit Systems Protection Board's approach to mitigation, while not binding on this Office, 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).
[45] "'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.*

In this instance, the hearing officer considered the grievant's potentially mitigating evidence and found that mitigation was not warranted.[46] To the extent that the grievant argues that his length of service with otherwise satisfactory performance should have been considered as a mitigating factor, we find this argument unpersuasive. While it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[47] The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. In this case, neither the grievant's length of service nor his otherwise satisfactory work performance are so extraordinary as to justify mitigation of the agency's disciplinary action. Further, in regard to the grievant's claim that he has been singled out or disciplined in a manner inconsistent with how similarly-situated employees have been treated, the grievant has not presented sufficient evidence to show that other employees engaged in similar conduct and were treated differently to mandate mitigation in this case.[48]

Based upon EDR's review of the record, there is nothing to indicate that the hearing officer's mitigation determination in this instance was in any way unreasonable or not based on the actual evidence in the record. As such, EDR will not disturb the hearing officer's decision on this basis.

Newly-Discovered Evidence

In conjunction with his request for administrative review, the grievant has submitted an email from a safety officer at the agency regarding alleged conduct by another employee. The grievant argues that the hearing record should be reopened to allow for this admission of this "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."[49] 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.[50] 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

[46] Hearing Decision at 15-16.
[47] *See*, *e.g.*, EDR Ruling No. 2013-3394; EDR Ruling No. 2010-2363; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[48] The grievant also argues that the agency's alleged failure to provide due process should also be a mitigating factor. The matter of due process has previously been addressed in this ruling.
[49] *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).
[50] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

> (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.[51]

In this case, the grievant asserts that in another case involving the agency, an employee "made a direct threat to a supervisor and coworkers" but was allowed to retain employment. EDR has no record of a case involving the individual named by the grievant. A decision in a case involving the agency and an individual with a similar name was issued on August 26, 2015, but the hearing decision in that case does not appear to involve conduct comparable to that in which the grievant apparently engaged. For the purposes of this ruling, EDR will assume that the August 26, 2015 decision is the one to which the grievant intended to refer.

The grievant has not shown that he exercised due diligence to discover this alleged new evidence prior to hearing, particularly as the August 26 decision was issued almost 4 months prior to the grievant's hearing. However, even if EDR were to assume, for the sake of argument, that this information has only been recently discovered by the grievant despite his own due diligence, the grievant has not met his burden of showing that the evidence is material or that it would likely produce a different outcome. In particular, the grievant has not shown that the conduct with which the other employee was charged was sufficiently similar to that with which the grievant was charged. Moreover, from the evidence the grievant provided, the grievant in the August 26, 2015 decision was employed in a different residency under different supervision, and therefore was not similarly situated.[52] Accordingly, there is no basis to re-open or remand the hearing for consideration of additional evidence on this issue.

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.[53] 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.[54] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[55]

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Director
Office of Employment Dispute Resolution

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[51] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[52] *See generally* EDR Ruling No. 2015-4157.
[53] *Grievance Procedure Manual* § 7.2(d). To the extent this ruling does not explicitly address any issue raised by the grievant in his request for administrative review, EDR has thoroughly reviewed the record and has determined that the issue is not material, in that it has no impact on the result in this case, or that the issue has previously been adjudicated in another grievance.
[54] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[55] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).