Issue: Administrative Review of Hearing Officer's Decision in Case No. 11085; Ruling Date: March 12, 2018; Ruling No. 2018-4686; Agency: Department of Alcoholic Beverage Control; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Alcoholic Beverage Control
Ruling Number 2018-4686
March 12, 2018

The grievant has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 11085. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11085, as found by the hearing officer, are as follows:[1]

> The Virginia Department of Alcoholic Beverage Control employed Grievant as a Special Agent in Charge in of one of its regions. He had been employed by the Agency for approximately 27 years. No evidence of prior active disciplinary action was introduced during the hearing.
>
> The purpose of Grievant's position was:
>
> This position is assigned to the Bureau of Law Enforcement Operations and is responsible for executing the Agency's law enforcement mission in one of eight large geographic regions of the Commonwealth. The Regional Special Agents in Charge (SAC) supervise administrative staff and subordinate supervisors, plan, direct and administer assigned personnel, budget, office facilities and field operations. SACs have broad discretionary power to ensure the efficient and effective use of assigned resources and accordingly set regional goals and objectives, prioritize work and deploy resources in order to meet established Agency and Bureau goals and objectives. SACs serve as the Agency and Bureau liaison with federal, state and local officials and command level personnel with other law enforcement agencies and collaborate with such officials and other Bureau SACs when investigations cross regional boundaries or require sharing resources.

[1] Decision of Hearing Officer, Case No. 11085 ("Hearing Decision"), February 12, 2018, at 2-8 (citations omitted).

Grievant supervised the ASAC who was responsible for the direct supervision of the agents and all investigations conducted by the region. Mr. W and Mr. B were Special Agents reporting to the ASAC. Grievant reported to the Deputy Chief Field Ops.

The Agency's law enforcement employees were involved in several high profile arrests that generated controversy and negative publicity for the Agency. Agency special agents are vested with police powers pursuant to Virginia Code § 4.1-105. The Governor and Agency managers concluded its law enforcement employees should receive additional training.

The Governor issued Executive Order 40 on March 24, 2015 regarding Improving ABC Law Enforcement. The Executive Order provided:

> The ABC Board shall require the immediate retraining of all ABC special agents in the areas of use of force, cultural diversity, effective interaction with youth, and community policing, to be completed no later than September 1, 2015.

Grievant received training on June 1, 2015 and June 2, 2015 addressing several work related topics including "Upholding Constitutional Rights of Citizens." The training was intended to enable Grievant to be able to:

> Define "search" and "seizure" as each term pertains to government actions regulated by the Fourth Amendment. ***
>
> Define and properly conceptualize probable cause and reasonable suspicion.

The Lodge was a private club accessible only to members and invited guests. It is not readily accessible to the public. In 2016, the Lodge was warned by Agency employees not to engage in illegal gambling.

Mr. B worked as a Special Agent with the Agency. He began working for the Agency in 2013. He was a member of the Lodge and had an identification card allowing his entry into the Lodge. His identification card did not show his picture.

On January 19, 2017, Mr. B received tip from a Former Special Agent that the Lodge was conducting an illegal football pool for the upcoming Super Bowl. The Former Special Agent knew that the Lodge had been issued a warning the previous year for illegal football gambling.

Mr. W worked as a Special Agent with the Agency.

On January 24, 2017, Grievant spoke with the ASAC and Mr. W regarding a possible Super Bowl gambling case involving the Lodge. The ASAC and Mr. W discussed whether to use Mr. B's identification card to enter the

Lodge. Grievant approved their plan of having Mr. W enter the Lodge using Mr. B's identification card.

On January 27, 2017, Mr. W and Agent T made an "Internal Observation" at the Lodge. They approached the door of the Lodge and were "buzzed in". They entered the Lodge and sat at the bar. A Female Bartender approached them and looked at Mr. W's identification card which showed Mr. B's name. Mr. W was asked to "sign in" his guest. Mr. W wrote in a book that his guest was Mr. J. The Female Bartender asked the two men if they wanted a drink. Both men ordered beers. Mr. W paid $3.50 for the beers and left $1.50 as a tip. As they consume their beers, Mr. W noticed a flyer behind the bar referring to Super Bowl 51. Mr. W asked the Female Bartender what event the Lodge "had going" for the Super Bowl. She replied that they had a Super Bowl Board that was legal this year. She said that for $30, he could enter a Super Bowl Party where he could get a square on the board and be in the running for a payout of $500 for a quarter, $400 for a number, and $25 for a North,South, East or West on the board. She also said that the event would include draft beer, shrimp, wings, and meatball sandwiches.

The Female Bartender brought a board with 100 squares for Mr. W to see. She told Mr. W that when he paid his entry fee he did not get to pick his number on the board but instead got a chip from a bag and once Mr. W open the chip, a number would be revealed and it corresponded with the numbered squares on the board. She said that would be his numbered square. The game board squares that were covered up would be revealed at the party in random order. Mr. W paid $30 to the Female Bartender and she allowed him to pick one of the cardboard chips from a baggie. Mr. W opened the chip and it showed the number 83. Mr. W then wrote Mr. B's first name and last initial on the square numbered 83. The Female Bartender put the $30 with other money that appeared to be kept separate. The Female Bartender told Mr. W to come by the Lodge two hours before the football game.

Mr. W and Agent T left the Lodge. As they were leaving, Mr. W noticed the flyer which advertised a "LEGAL" Super Bowl Board.

Mr. W met with Mr. B after the observation and told Mr. B what he had learned. Mr. W gave the chip to Mr. B.

On January 31, 2017, Mr. B met with Grievant and the ASAC to discuss the game. Mr. B said he thought the game was legal. Grievant asked "why" and Mr. B said because there was a serial number on the chip. Grievant looked at the chip and noticed that it read that it was legal in California. Grievant explained that they were not in California and the three elements (chance, prize, and consideration) necessary for illegal gambling exited. Grievant and the ASAC concluded that the game was illegal.

Mr. B did not believe there would be any criminal charges brought against the Lodge even if the game was illegal. He informed Grievant he did not want to seize the money if the game turned out to be illegal. Mr. B did not see the point of

seizing the money. Grievant instructed Mr. B to seize the money as well because it was evidence for the case. Mr. B said he would seize the money since Grievant was telling him to do so.

Grievant did not obtain or instruct Mr. B to obtain a search warrant. Grievant did not speak with or instruct Mr. B to speak with the Agency's Internal Legal Counsel regarding the legal requirements to search the Lodge. Grievant did not instruct Mr. B to use the Agency's Consent to Search form.

On February 1, 2017, Mr. B went to the Lodge to discuss the Super Bowl football pool being conducted inside the premises. Mr. B met with Mr. D who was the ABC manager and bartender. The Lodge was not yet open for business and Mr. D was preparing the location to open for business. Mr. B noticed a flyer advertising the football board as "LEGAL" and listed the payouts as $500 per quarter, $400 to the winner and $25 each for "North, South, East and West." Mr. B explained the reason for his visit and asked to see the football pool in question. Mr. D showed Mr. B the Super Bowl game board with squares which was located in plain view behind the bar. Mr. B asked where were the chips for purchase. Mr. D went into a backroom and returned with a plastic bag with chips that had not been sold.

Mr. D explained that he would call the Acting Administrator, Mr. H, to notify him of Mr. B's visit. Mr. B photographed the flyer hanging in plain view.

Mr. B called Grievant to provide an update. Mr. B told Grievant he was not sure whether the game was legal or illegal. Grievant told Mr. B he would "get the name" of someone "at gaming" to call Mr. B.

Approximately 20 minutes later, Mr. H came to the Lodge along with Ms. T, Acting Secretary for the Lodge. Mr. B showed them his credentials and explained why he was at the Lodge. Ms. T was familiar with the game in question and had invoices upstairs. Mr. B and Ms. T went upstairs in the Lodge. The "upstairs" had a "banquet facility" with an office in the back. Ms. T went into the office and then provided Mr. B with two copies of invoices for the purchase of the "GameDay" boards. The boards were purchased from the Distributor in another state. Mr. B called an employee with the Distributor and asked her about the boards. This employee called an employee of the Manufacturer of the boards who said the game boards were legal to sell and use in Virginia.

Grievant called Mr. B and provided him with the name of Mr. M, a compliance manager with the Virginia Department of Agriculture and Consumer Services. Grievant said Mr. M was busy but would call Mr. B in 30 minutes. Grievant reminded Mr. B that if the game was illegal, Mr. B was to seize the money. Mr. B remained convinced that even if the game was illegal, the Lodge would not be prosecuted criminally. The matter would be handled administratively, according to Mr. B.

After waiting approximately 45 minutes, Mr. B decided to call Mr. M. Mr. B contacted Mr. M who asked Mr. B to send him pictures of the game board along with the associated chips. Mr. B complied with Mr. M's request. Mr. M told Mr. B that the game was illegal for two reasons:

1. The game was intended to be a $1/square and the Lodge was altering the entry fee to $30 per square. (The intended rules were stamped on the back of the "GameDay" board).
2. The game was intended to have a pre-determined winner but the Lodge was using the game score of the Super Bowl to determine the winner.

Mr. B told Mr. H and Ms. T that the game was illegal for the two reasons described by Mr. M. Mr. B told them there would be two administrative charges but no criminal charges. He told them that, "I would like to seize the game and proceeds as evidence."

They all walked downstairs. Mr. B stood at a table while Mr. H and Ms. T brought him envelopes.

Mr. H and Ms. T complied with Mr. B's statement and "volunteered the money acquired from the game along with the game board, remaining unused chips, and three unopened "GameDay" boards", according to Mr. B. Ms. T organized the money and she and Mr. B counted it for a total of $1,636.

Mr. B seized the following:

1. $1,636
2. Nine Sure tip game boards with envelopes (Winners won a spot or two depending upon sure tip board used).
3. One GameDay chip purchased by Mr. W on January 27, 2017.
4. The remaining GameDay chips sealed in a zip lock bag.
5. Two invoices from the Distributor for GameDay board purchases.
6. One GameDay board that had been opened and used.
7. Three GameDay Boards that were unopened.

All of the evidence was labeled, sealed, photographed, and entered into a temporary storage locker.

On February 7, 2017, Mr. B spoke with the local Assistant Commonwealth's Attorney regarding whether criminal charges should be made against the Lodge. The Assistant Commonwealth's Attorney told Mr. B he would not pursue criminal charges against the Lodge because the Lodge was not an ongoing gambling enterprise and the monetary value attached to the case was not substantial.

The Agency conducted an investigation. The Investigator spoke with Mr. H. Mr. H stated regarding Mr. B that:

> I think the words that he used when he got off the phone was that he had been asked to confiscate the – the games as well as all cash that was made from the board. ***
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> The board that we were playing was behind the bar as well as most of the cash. Some of the cash, we had been (inaudible). It's called a (inaudible) board to help sell spaces on there and that money was located in – back in the cash bag from the previous night that were in the safe in the back of the social quarters and some of it we had upstairs in the safe in the office.
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> I told him I'd give him anything and everything that he needed. You know, I wanted to cooperate in any way that I could. ***
>
> Required, told do, ordered, requested from his – I from his – I don't know if he had supervisor or – or who, but that's what he needed to do that day.

The Investigator spoke with Ms. T. Ms. T stated regarding Mr. B that:

> And after talking with them that, you know, he would need to see everything that was associated with the games and he did let us know that he was going to have to confiscate the board and the items that went with it and the cash that went with it. ***
>
> The way he put it basically he didn't have a choice. He – this was what he needed to do was to confiscate it all. ***
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> No. No. There wasn't – no. Well, I don't – no, we weren't given a choice about it, although he did – he wasn't really thrilled about taking the money.

Grievant filed a grievance to challenge the Agency's action. Grievant wrote on the Grievance Form A:

> [Mr. B] advised that he did not think the Commonwealth Attorney would prosecute the case because he had declined prosecution the year prior on a similar case at this [Lodge]. Since this was a repeat offense at the [Lodge], I explained that I thought that it was reasonable to assume that the Commonwealth Attorney would prosecute a case this time especially since we had actively participated in the "game" unlike the previous year. *** [Mr. B] and I went to [the ASAC's] office were I asked [the ASAC] if he agreed that we should seize any possible evidence, if it was determined the game was illegal, for the criminal case. [The

> ASAC] agreed that if the evidence could be legally seized it should be seized for the criminal case.

On July 24, 2017, the grievant was issued a Group III Written Notice with removal for ordering the seizure of money and other evidence without a search warrant or written consent, in violation of the Fourth Amendment to the United States Constitution.[2] The grievant timely grieved the disciplinary action and a hearing was held on October 10, 2017.[3] In a decision dated February 12, 2018, the hearing officer found that the agency had presented sufficient evidence to show that the grievant failed to follow agency policy regarding licensee inspections, and that his actions had a unique impact on the agency's operations that justified elevation of the discipline to a Group III offense.[4] Accordingly, the hearing officer upheld the issuance of the Group III Written Notice and the grievant's termination.[5] The grievant now appeals the hearing decision to EEDR.

DISCUSSION

By statute, EEDR 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 . . . ."[6] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[7]

Newly Discovered Evidence

In his request for administrative review, the grievant requests an opportunity to present additional evidence in the form of witness testimony by Mr. B. According to the grievant, Mr. B declined to testify at the hearing on the advice of his legal counsel. The grievant asserts that Mr. B's testimony would "directly contradict[]" some of the hearing officer's findings and conclusions. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[8] 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.[9] 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

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[2] *Id.* at 1.
[3] *Id.*
[4] *Id.* at 8-13.
[5] *Id.* at 14.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] *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).
[9] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

> 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.[10]

In this case, the grievant has not provided sufficient information to support a contention that testimony from Mr. B should be considered newly discovered evidence under this standard. The grievant alleges that he spoke with Mr. B on two occasions after the hearing took place and discovered Mr. B was in possession of newly discovered evidence at those times. However, it appears that the evidence in question essentially consists of Mr. B's testimony regarding conversations that allegedly occurred between the grievant and Mr. B before the Written Notice was issued. The grievant was aware of this evidence before the hearing because he participated in the conversations. Furthermore, that the grievant spoke with Mr. B about those conversations after the hearing does not convert the content of the conversations themselves, which took place before the hearing, into newly discovered evidence.

In addition, it is not clear that Mr. B's testimony would be anything more than cumulative evidence. In his request for administrative review, the grievant contends that the agency "argue[d] that things [he] testified to were false or did not occur simply because only [Mr. B] could corroborate [his] testimony." The grievant has not presented anything that would indicate the hearing officer determined his testimony was not credible, and EEDR has identified nothing in the hearing decision to support such a conclusion. Moreover, the grievant does not appear to argue that Mr. B's testimony would include evidence that is not already part of the hearing record. Rather, the grievant asserts that Mr. B would corroborate matters about which the grievant testified at the hearing, and that appear to have been considered credible by the hearing officer. In this instance, therefore, EEDR has no basis to conclude that Mr. B's testimony would be anything other than cumulative evidence in this case.

Finally, even assuming the grievant was able to demonstrate that he had discovered Mr. B's testimony since the hearing decision was issued and that it was not merely cumulative, EEDR is unable to determine how this evidence would impact the outcome of the case. The grievant appears to argue that, on January 31, 2017, he did not "instruct[]"[11] Mr. B to seize the money at the Lodge, but rather told him to seize any evidence that could be legally seized if the game was illegal. The grievant also appears to claim that he spoke with Mr. B on February 1, 2017, and that they discussed seizing items in plain view at the Lodge. In the decision, the hearing officer found that the grievant "failed to obtain a search warrant and authorized a search of the Lodge" in violation of agency policy, that Mr. B searched the Lodge and seized property at the grievant's direction, and that it was reasonable to hold the grievant accountable for Mr. B's actions.[12] It is unclear how evidence from Mr. B would alter those findings in such a way that the disciplinary action would be reduced or rescinded, as the grievant does not appear to dispute that events at the Lodge actually occurred as found by the hearing officer. Accordingly, EEDR has no basis to conclude that Mr. B's testimony would impact the outcome of this case, even if it were otherwise considered newly discovered evidence. For these reasons, EEDR declines to re-open or remand the hearing for consideration of witness testimony by Mr. B on the basis that such testimony constitutes newly discovered evidence.

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[10] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[11] Hearing Decision at 5.
[12] *Id.* at 9-11.

Mr. B's Decision Not to Testify at the Hearing

In addition, the grievant's request to present testimony from Mr. B raises other potential issues relating to the Mr. B's appearance at the hearing. EEDR has held that a material witness's participation in a grievance hearing should not be viewed as a discretionary, voluntary process.[13] While a hearing officer has no specific authority to compel testimony or to hold a witness in contempt, an agency presumably can, in most cases, compel an employee to provide testimony in a grievance hearing just as it can require an employee to participate in an investigation.[14] The *Rules for Conducting Grievance Hearings* provide that it is the agency's responsibility to require the attendance of agency employees who are ordered by the hearing officer to attend the hearing as witnesses.[15] Furthermore, in the absence of evidence of extenuating circumstances preventing the agency employee from attending the hearing, when an agency fails to require the employee to appear for the hearing, the hearing officer has the authority to draw an adverse inference against the agency if warranted by the circumstances.[16]

Moreover, due process requires the accused be granted the opportunity to question and cross-examine witnesses. When a witness who potentially has relevant and material information refuses to answer questions, a grievant is potentially denied due process.[17] The agency may be in a position to prevent such a denial by instructing employees to, in good faith, participate in the process. If an agency does not instruct witnesses to participate in the grievance hearing process, a hearing officer has the authority to draw an adverse inference against an agency on any factual basis that could have been addressed by the absentee witness.[18]

In this case, the hearing officer issued an order for Mr. B to appear at the hearing. Mr. B appears on the list of potential witnesses for both the agency and the grievant. The agency called Mr. B as a witness at the hearing. However, he refused to testify on the basis that he had a pending grievance of his own.[19] Neither party appears to have asked the hearing officer to draw an adverse inference as a result of Mr. B's decision not to testify. EEDR has not identified anything to show that the agency failed to fulfill its obligations under the grievance procedure, and the grievant has not raised any such argument on administrative review. Under these circumstances, EEDR has no basis to remand this case for the hearing officer to further address

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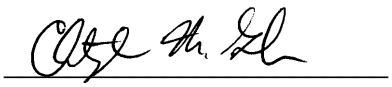
[13] EDR Ruling No. 2012-3290.
[14] Though not at issue here, an agency could likely not compel an employee to testify against him or herself in a matter that could potentially result in criminal prosecution, absent a *Garrity* warning. The *Garrity* rule comes from the United States Supreme Court case of *Garrity v. New Jersey*, 385 U.S. 493 (1967). It is essentially the right of a governmental employee to be free from compulsory self-incrimination. The basic thrust of the *Garrity* Rule is that an employee may be compelled to give statements under threat of discipline or discharge, but those statements may not be used in the criminal prosecution of the individual.
[15] *Rules for Conducting Grievance Hearings* § III(E) ("The agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness. . . . The agency shall then provide a copy of the order to the employee and require his/her attendance at hearing.").
[16] *Id.* § V(B) ("Although a hearing officer does not have subpoena power, he or she has the authority to and may draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents, has failed to make available relevant witnesses as the hearing officer or EEDR had ordered, or against an agency that has failed to instruct material agency employee witnesses to participate in the hearing process.").
[17] *See* Detweiler v. Va. Dep't of Rehab. Servs., 705 F.2d 557, 562 (4th Cir. 1983).
[18] EDR Ruling No. 2012-3290.
[19] Hearing Recording at 4:39:22-4:41:27.

any issues with the appearance and/or testimony of Mr. B. Accordingly, EEDR declines to remand the decision on this basis.[20]

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EEDR declines 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.[21] 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.[22] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[23]



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[20] This ruling only addresses the grievant's claims regarding Mr. B's testimony as a matter of the grievance procedure. Whether any of the alleged issues raised by the grievant could support a contention that the decision is contrary to law may be raised in a legal appeal to the appropriate circuit court. *See* Va. Code §2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[21] *Grievance Procedure Manual* § 7.2(d).
[22] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[23] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).