Issue: Administrative Review of Hearing Officer's Decision in Case No. 11284; Ruling Date: February 20, 2019; Ruling No. 2019-4853; Agency: Virginia Department of Transportation; 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 Virginia Department of Transportation
Ruling Number 2019-4853
February 20, 2019

The grievant has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11284. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11284, as found by the hearing officer, are as follows:[1]

> The Virginia Department of Transportation employs Grievant as a Transportation Operator II at one of its locations. He has been employed by the Agency since 2016. No evidence of prior active disciplinary action was introduced during the hearing.
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> The Agency requires employees operating Agency-owned vehicles to wear seatbelts while the vehicles are moving. Agency supervisors observed several employees not wearing seatbelts as required and issued those employees written counseling memos. Agency managers realized that not all employees were wearing seatbelts as required and instructed Agency supervisors to inform crewmembers of the safety rule requiring the use of seatbelts.
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> On August 1, 2018, the Maintenance Operations Manager sent supervisors an email stating:
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> > We recently have had a couple situations where the operators and passengers in state owned equipment were discovered not wearing their seatbelts. We have recently issued counsel letters for employees failing to comply with this safety rule and I wanted to make myself clear that from this point forward anyone discovered not wearing their seatbelt will be subject to a standards of conduct. This is to include any equipment that is equipped with a safety belt …. This is a safety rule #5 on your list of safety rules that are to be posted at your Ahqs. This is not only VDOT policy but a state law and we need to be utilizing the safety device. Please share this with

[1] Decision of Hearing Officer, Case No. 11284 ("Hearing Decision"), Jan. 16, 2019, at 2-3 (citations omitted).

> your employees and print a copy and have each employee sign it to show that [they] have been made aware of this and returned it to me please. One copy with all signatures will suffice for each Ahq.
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> Grievant reviewed the email and signed a printed copy.
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> On August 15, 2018, Grievant entered an Agency-owned truck to perform his work duties. The truck had a safety belt with a lap belt and shoulder harness attached. Grievant sat in the driver's seat. He pulled the safety belt from his left to his right and inserted the safety belt tongue into the seat buckle. The safety harness rubbed against his neck so he used his right arm to put the safety harness behind him. When he leaned back in his seat, the safety harness was between his back and the seat cushion. In the event of a front end vehicle accident, the safety harness would not be able to prevent his upper body from moving forward and hitting the steering wheel. This created a safety risk.
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> Another employee observed Grievant operating the Agency-owned vehicle. Because the shoulder harness was not visible to that employee, the employee concluded that Grievant was operating the vehicle without wearing a seatbelt. The matter was reported to Agency managers. Grievant was honest throughout the Agency's investigation.
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> On May 22, 2018, Grievant wrote a statement saying in part:
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> The seatbelts in truck number [number] are dark gray in color, and I was wearing a dark colored shirt. I do not feel that accusing me of not wearing a seatbelt is fair. I was, in fact, wearing my seatbelt; however, it was not compliant with DMV's guidelines. My seatbelt was hooked, but the shoulder belt was placed behind my back since it does not fit me properly and I do not feel that having my seatbelt up against my neck is safe should an accident occur.

On August 24, 2018, the grievant was issued a Group I Written Notice for unsatisfactory performance, failure to follow policy, and a safety rule violation.[2] The grievant timely grieved the disciplinary action and a hearing was held on January 15, 2019.[3] In a decision dated January 16, 2019, the hearing officer concluded that the agency had presented sufficient evidence to demonstrate that the grievant's failure to properly wear his seatbelt while operating a State-owned vehicle constituted unsatisfactory work performance and upheld the issuance of the Written Notice.[4] The grievant now appeals the hearing decision to EEDR.

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[2] *Id.* at 1. The disciplinary action was initially issued as a Group II Written Notice, which was reduced to a Group I Written Notice during the management resolution steps. Agency Exhibit 2 at 11. The revised Group I Written Notice was the matter before the hearing officer for adjudication. Agency Exhibit 1.

[3] Hearing Decision at 1.

[4] *Id.* at 1, 3-5.

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."[5] 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 either party; the sole remedy is that the hearing officer correct the noncompliance.[6]

In his request for administrative review, the grievant argues that he has identified newly discovered evidence after the hearing and requests that EEDR remand the case to the hearing officer for consideration of this evidence. The grievant has described the evidence in question as follows: (1) the agency did not comply with its policy relating to investigations because one of the witnesses to the incident shared his written statement with another witness; (2) the grievant was removed from an agency leadership program based upon his receipt of the Written Notice, while another employee who received disciplinary action was allowed to continue in a different agency program;[7] (3) an employee who received a Written Notice for not wearing a seatbelt after the grievant was disciplined received additional information from the agency about the consequences of such misconduct; and (4) the agency's safety policy states that a seatbelt's shoulder harness should fit across one's torso and not under the arm.

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 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 provided no information to support a contention that the additional information he has offered should be considered newly discovered evidence under this

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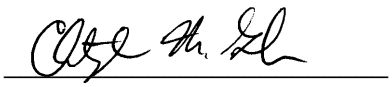
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] The grievant's removal from a leadership program could be the subject of a grievance itself and, if it was a result of the disciplinary action issued, potentially a subject the hearing officer could have addressed in this hearing. However, there is no indication that the grievant challenged this issue in his grievance and no evidence about his removal from the program was presented at hearing. Accordingly, there is no basis to address it further here.
[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).
[10] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

standard. Some of the evidence identified by the grievant—for example, the witness statements that form the basis of his arguments about the agency's allegation failure to follow its investigations policy, evidence about another employee who was disciplined for a seatbelt violation after the grievant, and details from the agency's safety policy about wearing seatbelts properly—already appear to be part of the hearing record.[11] To the extent any of the evidence cited in the grievant's request for administrative review was in existence at the time of the hearing and is not already part of the hearing record, the grievant has presented nothing to indicate that he was unable to obtain this evidence prior to the hearing. The grievant had the ability to offer all relevant evidence and call all necessary witnesses at the hearing, and it was his decision as to what evidence he should present. Although the grievant may now realize he could have provided additional evidence to support his arguments, this is not a basis on which EEDR may remand the decision.

Moreover, even assuming that the grievant could satisfy all of the other elements necessary to support a contention that the evidence in question should be considered newly discovered evidence under this standard, the grievant has not demonstrated that the information he has offered would have any impact on the outcome of this case. While it is apparent that the grievant disagrees with the hearing officer's decision, there is evidence in the record to show that the grievant engaged in the behavior charged on the Written Notice, that the behavior constituted misconduct, and that the discipline was consistent with law and policy.[12] EEDR has reviewed nothing to suggest that the additional evidence offered by grievant would have any have any impact on the hearing officer's findings. Accordingly, there is no basis for EEDR to re-open or remand the hearing for consideration of this additional evidence.

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 decision becomes a final hearing decision once all timely requests for administrative review have been decided.[13] 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.[14] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[15]



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[11] *See* Agency Exhibit 5 at 1-2; Agency Exhibit 8 at 3; Agency Exhibit 11.
[12] *E.g.*, Agency Exhibit 2 at 7; Agency Exhibits 4, 5, 7, 8.
[13] *Grievance Procedure Manual* § 7.2(d).
[14] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[15] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).