Issue: Administrative Review of Hearing Officer's Decision in Case No. 10578; Ruling Date: August 12, 2015; Ruling No. 2015-4183; Agency: Virginia Community College System; 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 Community College System
Ruling Number 2015-4183
August 12, 2015

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 10578. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10578, as found by the hearing officer, are as follows:[1]

> [The agency] employed Grievant as an Administrative Office Specialist at one of its campuses. At the time of termination, Grievant had 9 years of service with the Agency. During employment, Grievant received training in Fundamentals of EEO Law (1/3/2014); Preventing Workplace Harassment (12/16/2013) and Preventing Workplace Violence (12/17/13).
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> Grievant had prior active disciplinary action consisting of a Group I Written Notice for "Leaving work without permission" issued on October 31, 2014.
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> Grievant's work unit consisted of five individuals including a supervisor. The evidence indicated that Grievant had conflicts with fellow employees but overall unit employees maintained professional relationships. Although contradicted by Grievant, the overwhelming evidence was that Grievant and Supervisor [] had a close personal relationship on and off the worksite.
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> Grievant's ability to obey work hours continued to be a concern to her supervisor []. On December 4, days after she received the Group I Notice, referenced above Grievant and [Supervisor] exchanged the following excerpted text messages over her failure to return to the office at noon as approved by her supervisor.
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> *"Tried radio got nothing what is your ETA ([Supervisor])*

[1] Decision of Hearing Officer, Case No. 10578 ("Hearing Decision"), June 12, 2015, at 2-5 (citations omitted).

Hello []…. Tried the radio again nothing... when are you coming back. I should not have to tell you that you need to *be back here. You have* to *take company time more seriously it will be your demise.... ([Supervisor])*

Come on your killing me. Might as well come back and say F you [Supervisor]. I'm going to *do what I want. ([Supervisor])*

That's all I have ever asked of you was to *be at your station. You seem* to *lose that somewhere. ([Supervisor])*

You keep talking about what others are doing. ... as much as you want to *believe your being unfairly treated that's a joke. I have been more than fair with you and more than accommodating* to *some of these things. I'm not feeling it any more cause you fail* to *maintain any accountability for your time at the job station.... ([Supervisor])*

Don't talk to *me anymore. I can't stand you now.... (Grievant)*

I don't care if ur my *boss* or *not. (Grievant)*

U straight fake. (Grievant)

I'm not going to *fight with you over* my *trying* to *protect you from your self ([Supervisor])*

Fuck u (Grievant)

You don't have to *like* me *but you will respect your position at the college. ([Supervisor])*

You have just created your worst enemy your worst nightmare. (Grievant)

Don't forget I'm the one that does the paperwork. (Grievant)

I would hate to *become a disgruntled employee." (Grievant)*

On the morning of Friday December 5, 2014, [Supervisor] sent Grievant an email regarding his expectation that she work a full shift. Grievant was irate at receiving the email. She forwarded the email to other staff members, and sent two strongly worded emails to [Supervisor]. In the first one sent at 6:56 a.m. she wrote "BTW If you need to give me something to do, don't disrupt me and tell me what you n need, just put it in my inbox/desk...." In the second email sent at 6:57 a.m., she wrote "Oh did I forget to mention... don't ever touch me, and don't come within arm's length of my space, and don't hover over my chair. Your breath

smells and I can feel it on my neck... the smell is bad enough." I find these emails and text messages to be highly unprofessional and offensive.

Later in the morning of December 5, 2014, [Supervisor] and Grievant had a meeting in [Supervisor]'s office to discuss the text messages and emails. During the course of that meeting, voices were raised; Grievant became irate and smashed a large industrial type mirror with a metal mount on the floor in the direction of [Supervisor]. Grievant's version is that the mirror slipped out of her hand when [Supervisor] raised his voice and got into her personal space. The Hearing Office is unpersuaded by Grievant's version given her state of mind as evidenced by the text messages on December 4 and the emails on December 5. Moreover, the mirror had to have hit the carpeted floor with such force causing the heavy frame of the mirror to break and the carpet to tear. The Hearing Officer finds that the mirror was thrown by the Grievant in the direction of [Supervisor]. The Hearing Officer also finds that the mirror was college property. It was an industrial type mirror, not generally suitable for personal use and had been in different offices over a period of time prior to the incident.

[Supervisor] was shaken and felt threatened by the incident. Fearing that the situation would escalate further, he summoned [a] Campus Police Officer []. The officer promptly interviewed Grievant and [Supervisor]. In his police report he noted that Grievant was crying and shaking. He also noted that Grievant admitted that her correspondence to [Supervisor] was a mistake. Grievant also admitted to the Officer that she and [Supervisor] are close. [The] Officer [] asked Grievant to leave the facility and take her complaints to HR and he escorted her off the premises. After she was off campus, Grievant continued to send text messages to [Supervisor] to which [Supervisor] did not respond. One text stated "I'm sorry I lost my cool" "However this is the worst time of my life in all aspects including work"

On December 5, the very day she was escorted off campus, [an] HR specialist[] advised Grievant in a written memo that she was being placed on paid administrative leave effective that same day while the Agency investigates the incident in [Supervisor]'s office. The memo stated that while she was on Administrative Leave, "you are not allowed on any Agency premises. Should you require to be on campus, you must contact myself or [the] Director of Human Resources in advance to obtain permission." [The HR specialist] also left a voice mail message for Grievant to call her which she did. When they spoke [the HR specialist] explained that HR would be in touch with her in the coming days and directed her to the memo regarding Grievant's paid administrative leave.

On December 5, 2014, at 7:22 p.m., Grievant sent an email to [the Director of Human Resources] requesting access to the campus on Saturday to retrieve personal effects from her office. [The Director of Human Resources] was one of the persons the memo directed Grievant to for access. [The Director of Human Resources] promptly responded to Grievant to determine the need for campus access on a Saturday. Finding none, [the Director of Human Resources] did not approve Grievant's request to enter the campus. Later that night at 10:01

> p.m., Grievant sent yet another email to [the Director of Human Resources] declaring "I am going to be there in the morning so I can avoid the staff." At 6:30 am on December 6, 2014, [the Director of Human Resources] emailed Grievant "Please do not go to the campus until I have made arrangements for you..." Grievant ignored [the Director of Human Resources'] directive and went to the campus without authorization and removed property from her office. Grievant's excuse that she had not checked her email before she went on campus is contradicted by the evidence. Additionally in her statement to the investigative team, Grievant claimed that she had not read the administrative leave memo prior to entering the campus. That claim is not believable. The fact that [the HR specialist] directed her to the memo when they spoke on December 5, and the fact that she knew to contact [the Director of Human Resources] for permission clearly demonstrate that Grievant knew she could not enter the campus without authorization. The Hearing Officer therefore finds that Grievant disobeyed a clear directive from a superior when she entered the campus premises on the morning of December 6, 2014.
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> When business resumed at the college on Monday December 8, 2014, it became evident that Grievant had entered the premises and cleaned out her office. A security video revealed that Grievant had illegally parked her personal automobile next to a loading dock and entered and exited her work area 13 times each time carrying items from her office. The Agency claims that Grievant not only removed her personal property, but also emptied files containing essential documents for business and shredded invoices. The trash bag of shredded items is pictured at § 5 Ex. 6 p.6). The evidence presented by the Agency is insufficient to support the Agency's claim that business documents were removed or shredded by the Grievant.
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> When she met with the investigation team, Grievant alleged, for the first time, that she experienced race discrimination and sexual harassment at the Agency primarily by [Supervisor]. These claims were investigated and found to be without merit. Significantly, Grievant never reported these claims to Agency authorities until after the incident of December 5, 2014.

On or about February 13, 2015, the grievant was issued a Group III Written Notice with termination for violation of DHRM Policy 1.80, *Workplace Violence*, and damaging state property or records.[2] The grievant timely grieved the disciplinary action[3] and a hearing was held on April 23, 2015.[4] In a decision dated June 12, 2015, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant had engaged in workplace violence and destroyed state property and upheld the issuance of the Group III Written Notice with termination.[5] The grievant now appeals the hearing decision to EDR.[6]

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[2] Agency § 1, Exhibit 6.
[3] Agency § 1, Exhibit 1.
[4] *See* Hearing Decision at 1.
[5] *See id.* at 1, 6-9.
[6] The grievant also submitted a request for reconsideration to the hearing officer. While the parties could previously request a reconsideration decision from the hearing officer prior to seeking administrative review, that process was eliminated in July 2012. The parties now have the option to request administrative review from EDR and/or DHRM,

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."[7] 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.[8]

Sufficiency of the Evidence

In her request for administrative review, the grievant asserts that the agency did not prove she engaged in the conduct described on the Written Notice by a preponderance of the evidence. Specifically, she claims that Supervisor's testimony was not credible, that there was "no evidence to substantiate [Supervisor's] portrayal of facts," and that the evidence presented at the hearing supported the grievant's explanation of events. Consequently, the grievant argues that the hearing officer erred in upholding the disciplinary action.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[10] 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.[11] 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.[12] 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.

Here, the agency presented evidence that DHRM Policy 1.80, *Workplace Violence*, classifies actions such as "[e]ngaging in behavior that creates a reasonable fear of injury to another person" and "[i]ntentionally damaging property" as workplace violence which may be addressed through disciplinary action.[13] The hearing officer stated the following with regard to the evidence presented about the grievant's actions on December 5, 2014:

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as well as the right to appeal to the circuit court in the jurisdiction where the grievance arose. *Grievance Procedure Manual* §§ 7.2, 7.3; *Rules for Conducting Grievance Hearings* §§ VII(A), (C). We will, however, address the arguments presented in the grievant's request for reconsideration in this ruling; indeed, they appear to be identical to those raised in her request for administrative review from EDR.

[7] Va. Code §§ 2.2-1202.1(2), (3), (5).

[8] *See Grievance Procedure Manual* § 6.4(3).

[9] Va. Code § 2.2-3005.1(C).

[10] *Grievance Procedure Manual* § 5.9.

[11] *Rules for Conducting Grievance Hearings* § VI(B).

[12] *Grievance Procedure Manual* § 5.8.

[13] Agency § 7, Exhibit 1.

> Grievant argues that the mirror fell from her hands when [Supervisor] raised his voice and got into her personal space. The Hearing Office is unpersuaded by Grievant's version given her state of mind as evidenced by the text messages on December 4 and the emails on December 5. Moreover, the mirror had to have hit the carpeted floor with such force causing the heavy frame of the mirror to break and the carpet to tear. The more plausible explanation is that Grievant threw the mirror, as charged, thus generating the force to destroy it. Grievant's actions clearly violate Policy 1.80. Her actions clearly endangered her supervisor, subjected him to extreme emotional distress, fear of injury and disrupted the workplace.[14]

There is evidence in the record to support the hearing officer's conclusions regarding the altercation between the grievant and Supervisor on December 5. At the hearing, Supervisor testified that he and the grievant had a heated discussion in his office, that the grievant became irate, and that she threw the mirror on the floor in his direction.[15] The Campus Police Officer who responded to Supervisor's complaint stated that, when he interviewed the grievant shortly after the incident, she admitted to him that she had thrown the mirror.[16] While the grievant testified that she accidentally dropped the mirror,[17] the human resources employee who conducted the agency's investigation of the incident stated that, based on the damage to the mirror and the carpet, it was unlikely the grievant accidently dropped the mirror.[18] The contemporaneous written reports of the campus police officer and the human resources employee corroborate their testimony at the hearing.[19]

The agency also presented text messages and email communications between the grievant and Supervisor before and after the incident.[20] For example, the grievant sent Supervisor several angry messages before the incident occurred that the hearing officer found to be "highly unprofessional and offensive."[21] The grievant also sent text messages to Supervisor after the incident occurred, including one that stated "I'm sorry I lost my cool."[22] The hearing officer found that these communications showed the grievant's state of mind before and after the altercation with Supervisor.[23] Though the grievant asserts the hearing officer erred in basing his decision on "speculation based on a few angry emails or text messages," this evidence was relevant to show the grievant's behavior and the tone of her interactions with Supervisor during the time surrounding the incident, which were relevant factors for the hearing officer to consider in assessing the credibility of the witnesses, weighing the evidence, and making findings of fact as to the material issues in the case. Furthermore, the grievant is mistaken in asserting that hearing officer relied solely on the communications between the grievant and Supervisor in

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[14] Hearing Decision at 7. The grievant also asserts that the mirror was not agency property. The hearing officer determined that the mirror was agency property, *see* Hearing Decision at 4, and there is evidence in the record to support this conclusion. *See* Hearing Recording at Track 1, 5:19:09-5:21:06 (testimony of Witness L).
[15] Hearing Recording at Track 2, 28:04-28:58 (testimony of Supervisor). The agency presented photographs of the broken mirror frame and damage to the carpet where the mirror struck the floor. *See* Agency § 5, Exhibit 6 at 1-5.
[16] Hearing Recording at Track 1, 3:08:35-3:08:58 (testimony of Witness B).
[17] *Id.* at Track 2, 2:08:00-2:09:52 (testimony of grievant).
[18] *Id.* at Track 1, 5:21:13-5:23:18 (testimony of Witness L).
[19] *See* Agency § 5, Exhibits 1, 4.
[20] *See* Agency § 6, Exhibit 8.
[21] Hearing Decision at 3-4; *see* Agency § 6, Exhibit 8 at 1-17, Exhibits 11-12.
[22] Agency § 6, Exhibit 8 at 20.
[23] *See* Hearing Decision at 3-4, 7.

making his decision; as discussed above, there is additional evidence in the record to show that the grievant engaged in the conduct described on the Written Notice.

The grievant further asserts that the hearing officer erred in determining that Supervisor's testimony was credible. Specifically, she argues that Supervisor testified inaccurately as to the location of the mirror prior the incident, and that as a result "it is very likely that he lied about the mirror being thrown." At the hearing, Supervisor stated the mirror was in his office on the morning of December 5.[24] The grievant testified that she carried the mirror with her into Supervisor's office.[25] That Supervisor's testimony about the location of the mirror may have been inaccurate was one factor to be considered by the hearing officer in assessing whether he was a credible witness. The grievant presented this argument regarding Supervisor's credibility at the hearing and it was clearly rejected by the hearing officer, as he determined that Supervisor's explanation of events on December 5 was credible.[26] Conclusions as to the credibility of witnesses are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. EDR finds no basis to disturb the hearing officer's conclusion that Supervisor's testimony about the particulars of the altercation on December 5 was credible. Moreover, as discussed above, the hearing officer's findings of fact are based upon evidence in the record and the material issues of the case, and as a result EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and 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.[27] Because the hearing officer's findings are based upon evidence in the record and address the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer, and we decline to disturb the hearing decision on this basis.

Burden of Proof

The grievant also asserts that the hearing officer failed to apply the correct burden of proof in rendering his decision. As the grievant correctly notes, the agency was required to show by a preponderance of the evidence that the disciplinary action issued to her was warranted and appropriate under the circumstances.[28] It appears that the grievant's position is based upon her

[24] Hearing Recording at Track 2 at 19:45-20:28 (testimony of Supervisor).
[25] *Id.* at Track 2, 2:06:39-2:06:47, 2:08:25-2:08:40 (testimony of grievant). Ultimately, the question of where the mirror was located prior to the incident on December 5 is not material, as there was no dispute that it was in tSupervisor's office when the incident occurred. Though the grievant argues the hearing officer erred in not discussing the conflicting evidence about the location of the mirror, there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each piece of evidence that is presented at a hearing. Thus, mere silence as to any particular piece of evidence does not necessarily constitute a basis for remand in this case. Further, it is squarely within the hearing officer's discretion to determine the weight to be given to the evidence presented by the parties.
[26] *See* Hearing Decision at 7.
[27] *See, e.g.*, EDR Ruling No. 2012-3186.
[28] *Grievance Procedure Manual* § 5.8.

assertion that the evidence presented by the agency was insufficient to demonstrate she engaged in the conduct described on the Written Notice. We find the grievant's argument to be without merit.

The hearing decision sets forth in no uncertain terms that "[t]he burden of proof is on the Agency to show by a preponderance of the evidence that it's [sic] disciplinary action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not."[29] The hearing officer concluded that the agency met this burden on the basis of the evidence presented at the hearing.[30] As discussed above, there is evidence in the record to support the hearing officer's decision that the grievant engaged in the conduct described on the Written Notice. While the grievant may disagree with that decision, such disagreement is not a basis on which EDR may conclude that the hearing officer failed to comply with the grievance procedure. Accordingly, we decline to disturb the decision on this basis.

Agency's Production of Documents

The grievant further argues in her request for administrative review that she was prejudiced by the agency's failure to produce certain documents. Prior to the hearing, the hearing officer ordered the agency to provide the grievant with "[d]ocuments relevant to allegations of sexual or racial harassment by [the grievant] during her employment with [the agency], including, but not limited to, documents showing [the agency's] investigation and findings relevant to such allegations." The grievant claims that the agency failed to disclose all documents responsive to this request because witnesses testified at the hearing that Supervisor "lied to [the agency] concerning facts related to [the grievant] and her sexual harassment claims" and that "he had content on his phone of a sexual nature that [corroborated the grievant's] allegations of sexual harassment." The grievant apparently claims that the agency failed to comply with the hearing officer's order because it did not produce any information from Supervisor's phone.

Having reviewed the evidence in the record and the parties' submissions to EDR, we find that remanding the case is not warranted based on the grievant's allegation that the agency failed to produce certain documents in response to the hearing officer's order. The grievant has presented nothing to indicate that any responsive documents existed and were in the agency's possession at the time of the hearing.[31] For example, there is no evidence in the record to show that the agency had possession of the grievant's phone and no witnesses testified that they had created or were aware of any other documents in the agency's possession that were related to the investigation of Supervisor beyond those that were disclosed to the grievant.

In addition, it appears the grievant knew that Supervisor had been placed on administrative leave and was under investigation by the agency before the hearing, as demonstrated by her advocate's questioning of several witnesses about their knowledge of the

[29] Hearing Decision at 2 (citations omitted).
[30] *Id*. at 5-8.
[31] The agency was under no obligation to produce documents that were not in its possession or create documents that did not exist in response to the grievant's requests. Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

situation.[32] The Supervisor himself confirmed at the hearing that he was on administrative leave pending the completion of the investigation.[33] The agency has also asserted to EDR that, as the investigation of Supervisor was still in progress at the time of the hearing, there were no documents to disclose to the grievant. While the grievant presented witness testimony about content on Supervisor's phone that was related her claim of sexual harassment, there is nothing to indicate that the actual documents were in the agency's possession at the time of the hearing. That some witnesses testified about their knowledge of the reasons why Supervisor was under investigation and their personal knowledge about his conduct in the workplace does not, by itself, demonstrate that the agency possessed and withheld documents from the grievant.[34]

Furthermore, even assuming that the agency had possession of and failed to provide the grievant with information from Supervisor's phone, we do not find that the grievant suffered any material prejudice. At the hearing, the grievant had the opportunity to present her arguments regarding Supervisor's allegedly harassing behavior and the agency's investigation of Supervisor, call witnesses and question them about their knowledge of those issues, and also cross-examine any witnesses called by the agency about those topics. The grievant exercised these rights and presented evidence regarding Supervisor's allegedly harassing behavior in the workplace, including information about the content on his phone that was allegedly shown to other agency employees.[35] Though evidence from Supervisor's phone would undoubtedly have been relevant, there is no indication that presenting the actual documents would have had any impact on the outcome of the case. The hearing officer received and considered evidence about Supervisor's actions in the workplace, and specifically the content on his phone that other agency employees testified they had seen. Considering the totality of the evidence presented by the grievant at the hearing, EDR has no reason to conclude that the grievant's ability to mount a defense to the charges against her was jeopardized as a result of the agency's alleged failure to produce documents regarding the agency's investigation into Supervisor's conduct. Accordingly, we decline to disturb the hearing decision on this basis.

The grievant also asserts that the hearing officer erred in failing to take an adverse inference and/or order sanctions against the agency due to its alleged failure to provide documents related to its investigation of Supervisor. In cases where a party fails to produce relevant documents, hearing officers have the authority to draw an adverse inference against that party if it is warranted by the circumstances.[36] As discussed above, however, we do not find that the agency failed to produce relevant documents in this case, and thus there was no basis for the hearing officer to draw an adverse inference or order sanctions against the agency.[37]

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[32] *E.g.*, Hearing Recording at Track 1, 1:30:52-1:36:26 (testimony of Witness A), 3:38:13-3:38:51 (testimony of Witness B), 4:16:59-4:17:16 (testimony of Witness F), 4:42:19-4:44:26 (testimony of Witness P).
[33] *Id.* at Track 2, 3:28-4:31 (testimony of Supervisor).
[34] Even if EDR were to assume that some additional documents did exist, it would not necessarily have been improper in this case for the agency to withhold information related to its investigation of Supervisor's potential misconduct while that investigation was ongoing. Requiring the disclosure of such documents prior to the conclusion of the investigation could, for example, jeopardize the agency's ability to effectively gather information necessary to ensure that appropriate action was taken to address possible misconduct. *See* EDR Ruling No. 2014-3854.
[35] *E.g.*, Hearing Recording at Track 1, 42:02-42:55 (testimony of Witness DW), 1:25:02-1:29:29 (testimony of Witness A), Track 2, 4:59-5:26 (testimony of Supervisor).
[36] *Rules for Conducting Grievance Hearings* § V(B).
[37] The grievant also claims that she "did not have her full due process rights to prepare for the hearing" as a result of the agency's failure to produce requested documents. Constitutional due process, the essence of which is "notice of

Newly-Discovered Evidence

The grievant appears to further claim that evidence about the circumstances leading to the agency's investigation of Supervisor, as well as the information allegedly contained on Supervisor's phone, should be considered 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."[38] 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.[39] 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.[40]

The grievant has provided no information to support a contention that any documents should be considered newly discovered evidence under this standard. Even assuming that the grievant was able to show that the agency had possession of the cited evidence relating to the investigation of Supervisor and that it satisfied all the other requirements of newly discovered evidence, there is no basis for EDR to conclude that it is material or would result in a new outcome if the case were remanded to the hearing officer.[41] As discussed above, the grievant had the opportunity at the hearing to present evidence and argument regarding Supervisor's allegedly harassing behavior. She called witnesses to testify about their knowledge of the Supervisor's conduct in the workplace and cross-examined agency witnesses about their knowledge of those topics.[42] There is no question that the hearing record contains extensive evidence about Supervisor's actions in the workplace, the agency's investigation of his conduct, and the content on his phone that other agency employees testified they had seen. The grievant has presented

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the charges and an opportunity to be heard," *Davis v. Pak*, 856 F.2d 648, 651 (4th Cir. 1988), is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review. *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a). Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue. As discussed above, we do not find that the agency improperly withheld any documents and, thus, have no basis to conclude that the grievant suffered a due process violation as a matter of the grievance procedure in this case.

[38] *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).

[39] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

[40] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

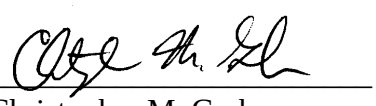
[41] It is unclear whether the other requirements would, in fact, be satisfied. For example, while evidence about the investigation of Supervisor and the information on his phone existed at the time of the hearing, it appears the grievant became aware of that evidence either before the hearing or at the hearing, not after the hearing decision was issued. Similarly, it appears that the grievant's intended use of this evidence would be to impeach the testimony of Supervisor and that much of this evidence would be cumulative, as multiple witnesses testified about the information on Supervisor's phone and the circumstances surrounding the investigation of Supervisor at the hearing.

[42] *See, e.g.*, Hearing Recording at Track 1, 42:02-42:55 (testimony of Witness DW), 1:25:02-1:29:29 (testimony of Witness A), Track 2, 4:59-5:26 (testimony of Supervisor).

nothing to indicate that there is additional material evidence about these issues beyond that which is already in the hearing record, or that presenting additional evidence about these issues to the hearing officer may have had any impact on his decision. Accordingly, there is no basis for EDR to re-open or remand the hearing for consideration of additional evidence about the agency's investigation of Supervisor or the documents contained on his phone.

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 decision becomes a final hearing decision once all timely requests for administrative review have been decided.[43] 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.[44] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[45]



Christopher M. Grab
Director
Office of Employment Dispute Resolution

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