Issue: Administrative Review of Hearing Officer's Decision in Case No. 10541, 10542; Ruling Date: August 28, 2015; Ruling No. 2016-4199; Agency: Department of Alcoholic Beverage Control; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Alcoholic Beverage Control
Ruling Number 2016-4199
August 28, 2015

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Numbers 10541/10542. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant was employed as a store manager by the Department of Alcoholic Beverage Control ("agency").[1] On December 4, 2014, the grievant was issued a Group II Written Notice for failure to follow a supervisor's instructions and a Group III Written Notice with termination for falsification of records.[2] The grievant timely grieved the disciplinary action.[3] A hearing was subsequently held on March 4, 2015.[4] On July 10, 2015, the hearing officer issued a decision rescinding the Group II Written Notice but upholding the Group III Written Notice and termination.[5] The grievant has now requested administrative review of the hearing officer's decision.[6]

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]

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[1] *See* Decision of Hearing Officer, Case No. 10541/10542 ("Hearing Decision"), July 10, 2015, at 2.
[2] Agency Exhibit 1.
[3] Agency Exhibit 2; *see* Hearing Decision at 1.
[4] *See* Hearing Decision at 1.
[5] *Id.* at 5-7.
[6] The agency asserts that the grievant's administrative review request is untimely, as the fifteenth calendar day after the hearing decision was Saturday, July 25, 2015, but the grievant's request was not received until Monday, July 27, 2015. However, when the fifteenth day falls on a weekend or holiday, as was the case here, the parties have until the following business day to timely seek an administrative review. *See* EDR Ruling No. 2013-3541.
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).

Inconsistency with State and Agency Policy

Fairly read, the grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with state and agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[9] The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

Findings of Fact

The grievant's request for administrative review also appears to challenge the hearing officer's findings of fact. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10] and to determine the grievance based "on the material issues and grounds in the record for those findings."[11] 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.[12] 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.[13] 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.

Based on a review of the record, there is sufficient evidence to support the hearing officer's factual findings. The hearing officer based his conclusion that the grievant engaged in falsification on his findings that the grievant knew that the store had an additional six bottles of vodka and hid two bottles "to alter the appearance of inventory at her store."[14] These findings are supported by record evidence and the hearing officer's assessment thereof.[15] 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. Because 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. Accordingly, we decline to disturb the decision on this basis.

Delay of Decision

The grievant argues that the hearing officer erred by failing to issue his decision within 35 days of the hearing assignment. EDR is not aware of any such statutory requirement. To the

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[9] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B).
[13] *Grievance Procedure Manual* § 5.8.
[14] Hearing Decision at 5-6.
[15] *See, e.g.*, Agency Exhibits 14, 16. 17, 18. 20, 21. Whether these facts as found by the hearing officer amount to the offense charged in the Written Notice is potentially a question of policy for DHRM.

contrary, Section V(C) of the *Rules for Conducting Grievance Hearings* provides that the written decision "shall be issued as promptly as reasonably possible after the close of the evidentiary record." Further, although the grievant asserts that the delay had an adverse effect on the hearing officer's "interpretation of the evidence," for the reasons set forth above, EDR's review indicates that the hearing officer's decision was supported by record evidence. For these reasons, the hearing decision will not be remanded on this basis.

Newly-Discovered Evidence

In her request for administrative review, the grievant argues that the hearing record should be reopened to allow for the admission of "newly discovered evidence." Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[16] 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.[17] 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.[18]

In this case, the grievant argues that pages from the Regional Manager Handbook should be introduced as newly discovered evidence. The grievant asserts that she only recently discovered the existence of these pages and made due diligence to obtain the document prior to hearing, but that the agency improperly withheld the documents during the course of discovery. The grievant further argues that admission of these pages would likely change the outcome of the case.

To be considered on appeal, the pages at issue from the Regional Manager Handbook must meet the elements of newly discovered evidence. However, even if EDR were to assume, for the sake of argument, that the document has only been recently discovered by the grievant despite her own due diligence, EDR does not agree that reopening the hearing to admit these documents would result in a different outcome by the hearing officer. First, the charge before the hearing officer was not to determine whether the agency followed its investigatory policy prior to the disciplinary action, but whether the disciplinary action itself was warranted and appropriate. Thus, violation of the investigatory policy would not have required the hearing officer to award relief in the grievant's favor. Further, it is unclear what impact these pages have, if any, on this case, as the pages that the grievant seeks to introduce relate to potential criminal investigations, not the issuance of disciplinary actions. For these reasons, there is no

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[16] *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).

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

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

ground on which EDR can conclude that the admission of these documents would likely change the outcome of this case. Accordingly, there is no basis to re-open or remand the hearing for consideration of additional evidence on this issue.

Alleged Agency Conduct

The grievant also appears to assert that the agency improperly withheld a portion of the Regional Manager Handbook during the course of discovery. Even if EDR were to assume for the sake of argument that the agency acted inappropriately, the remedy appropriate would be to allow for the admission of the document into evidence. However, as explained above, the inclusion of these pages in the record would not have been likely to produce a different outcome. Consequently, the grievant did not suffer any material harm from the non-disclosure, to the extent it even was inconsistent with the grievance procedure, such that any further remand or other relief is warranted to address the matter under the grievance procedure.

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.[19] 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.[20] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[21]

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