EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the College of William & Mary
Ruling Number 2020-4953
August 1, 2019

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM")[1] administratively review the hearing officer's decision in Case Number 11304. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11304, as found by the hearing officer, are as follows:[2]

> The College of William and Mary [the "agency" or the "College"] employed Grievant as a Marine Scientist I. He began working as a temporary employee for the College in 2012. He became a full time employee in March 2013. Grievant received favorable annual performance evaluations including a rating of Exceptional in 2016. No evidence of prior active disciplinary action was introduced during the hearing.
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> The College received funding for its Northeast Area Monitoring and Assessment Program (NEAMAP) Inshore Ocean Trawl Survey from the United States Marine Commission. How well the College administered its program affected its ability to continue receiving funding.
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> The NEAMAP Trawl Survey was designed to monitor late juvenile and adult finfishes inhabiting the coastal ocean of the United States between Cape Hatteras, NC and the western shores of Martha's Vineyard, MA. Data generated

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

[2] Decision of Hearing Officer, Case No. 11304 ("Hearing Decision"), June 24, 2019, at 2-6 (citations omitted).

by the survey was to be compared with data from other surveys to describe the status of living marine resources along the US Atlantic Coast.

Animal handling protocols proposed for use on the NEAMAP Survey were submitted to the William and Mary Institutional Animal Care and Use Committee (IACUC) for approval. These protocols followed the Guidelines for the Use of Fishes in Research published by the American Fisheries Society (2014). The William and Mary Animal Care and Use program operated under the Federal National Institutes of Health, Office of Animal Laboratory Welfare, Animal Welfare Assurance.

In September 2012, Grievant received training governing the IACUC protocol and the American Fisheries Society Guidelines for the Use of Fishes in Research.

The Guidelines for the Use of Fishes in Research provide:

> In all cases, studies should be designed to use the fewest animals necessary to reliably answer the questions posed. *** In general, experimental endpoints other than death of the experimental subjects should be developed unless death is required by the study protocol.

Euthanasia is the act of killing animals using methods that cause minimal animal pain, distress, and anxiety prior to rapid loss of consciousness and death. Stingrays are not processed for their biological material and, thus, do not require euthanasia. There is no scientific basis for them to be intentionally injured or killed. Euthanasia of injured fishes was not a common practice during the survey.

On April 10, 2018, Grievant was promoted from the position of Laboratory and Research Specialist II to Marine Scientist I. He was designated as Chief Scientist for the Spring 2018 NEAMAP Survey cruise for the period May 10, 2018 through May 18, 2018. Grievant was responsible for leading a team of six scientists in the collection of field data on the abundance, distribution, and biology of living marine resources.

On May 10, 2018, Grievant was given a Survey Operations Manual containing a copy of the 2018 NEAMAP IACUC protocol. Grievant's cruise was governed by protocol number IACUC-2017-02-02-11789-[name].

Under this protocol, all specimens collected were to be weighted, enumerated, measured, and returned to the water immediately with the exception of those subsampled for additional processing. A representative subsample of each species on a list entitled "Species Selected for Full Processing" could be removed from the catch.

The College used a 90 foot trawler to allow employees to travel for several days along the East coast to catch marine life and measure and record the size,

weight, gender, and other factors relating to each catch. Approximately seven employees lived and worked on the boat during the cruise. The Captain and Mate operated the boat. Everyone worked ten or more hours each day. The boat had stations for employees to perform different tasks. Employees wore waterproof boots as they worked. They also wore bib overall pants and gloves as they processed the catch.

On May 10, 2018, the boat and crew departed from Hampton to begin a nine day cruise.

A trawl is a net that is dragged along the sea bottom to gather fish or other marine life.

The crew began fishing by placing a trawl net or tow into the water. The tow was kept in the water for approximately 20 minutes. It was pulled onboard the boat and the catch was dumped onto the boat checker. The checker did not hold seawater. It was designed to shed seawater. There was a hose on the boat that could be used to spray salt water into the checker or onto the deck if needed. If endangered species such as sturgeon were in the catch, they were immediately separated from the rest of the catch and returned to the sea. If the catch produced more than ten rays, it was a significant number of rays. Crew would process other marine life except for stingrays. After finishing with a catch, the crew would repeat the process.

Employees working on the cruise were supposed to be familiar with the priority species list. A priority species list was printed out on waterproof paper, put in a paper holder, and taped to the side of a workstation near the sorting area.

Stingrays had sharp barbs that could cause injury to an employee who came into contact with the barb. An employee handling a stingray could remove the barb with his hand or a knife. Once the barb was removed, the stingray was no longer dangerous. The rays were placed in baskets. A stingray's barb eventually grows back.

When stingrays were dropped on the deck of the boat, at least 90 percent were alive. Rays could be returned to the water in approximately ten to fifteen minutes from the time they are brought onboard.

Most catches resulted in the death of some stingrays. Stingrays could suffocate if they were out of the water for too long. The risk of stingray mortality increased during days of high temperatures and for large catches with more stingrays. The team had to work efficiently to minimize the risk of stingray mortality.

Atlantic sturgeon were listed as endangered by the National Oceanographic and Atmospheric Administration. Sturgeons were given priority in returning them to the sea. For example, if the catch included sturgeon, the

sturgeon were processed immediately and returned to the sea as quickly as possible to ensure they did not die.

Mr. H worked was a Research Lab Specialist I. He was one of the employees working on the May 10, 2018 cruise. It was his first cruise. He worked at Station 3 which was close to the stern of the boat. Mr. H had been told how to handle stingrays to avoid being injured by the stingray's barb.

Mr. H felt working on the cruse was a "hard environment to get adjusted to" because of the long work hours and having to work every day of the week. Mr. H wore latex gloves and blue deck gloves.

On May 16, 2018, a catch resulted in 16 stingrays and three sturgeons being brought on board the ship. Mr. J and Mr. T immediately began processing the sturgeon.

Mr. H grabbed a ray to remove its barb. He lost his grasp of the ray's tail and the barb swung backwards and forwards and lodged itself into his hand. The barb was as sharp as a knife and cut his hand. The injury was not severe, but Mr. H's hand was bleeding.

Mr. H said loudly that he was barbed by a ray. Grievant heard Mr. H. Grievant became upset. It was an "injury on his watch." Grievant considered safety his number one priority. Grievant had instructed Mr. H regarding how to safely remove barbs from the stingrays, but Mr. H was not following Grievant's instructions. Grievant instructed Mr. H to quickly take off his work gear and go to the galley and submerse his thumb in very warm water.

Grievant told the Specialist Senior to "back up" because he would "take care of it", referring to the stingrays. Grievant pointed to the back of the file of the catch. Grievant assumed responsibility for the rays. As Mr. H began to leave the deck, Grievant began killing rays. Grievant killed rays using a mallet and a knife. Grievant was angry as he killed the rays.

Grievant separated rays from the other species, sliced off their barbs, and cut down into the heads to kill them. He would stab the rays and slice down their backbones to kill them. Grievant was "swinging" but not "wildly swinging" the knife to kill the rays. He was killing rays with more aggression than other fish would be euthanized. The Specialist Senior did not believe Grievant's killing of rays was necessary because they did not "process rays." She recognized that Grievant was "pretty angry" and knew it was "better to walk away than to have a conversation" with Grievant.

Grievant killed between six and 12 rays out of the 16 rays brought aboard the ship as part of the catch. He tried to kill larger rays because they posed a greater risk of harm. By killing the rays, Grievant caused additional blood to be spilled on the deck that would not otherwise have been spilled.

> Grievant's method of killing the rays was different from how other fish were euthanized. Grievant was more aggressive and displayed his frustration as he did so.
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> The Captain went to the galley and told Mr. H to heat up water with salt and disinfect the wound. After about 7 to 10 minutes, Mr. H finished soaking and wrapping the wound. He returned to work.
>
> Grievant told Mr. H, "You're not allowed to touch rays anymore." Grievant was expressing his anger that Mr. H had been hurt by the ray.
>
> Mr. H later expressed to Agency managers his displeasure with how Grievant treated the stingrays.

On November 13, 2018, the grievant was issued a Group III Written Notice with removal for failure to follow written policy related to the ethical treatment of animals.[3] The grievant timely grieved the disciplinary action and a hearing was held on March 13, 2019.[4] In a decision dated June 24, 2019, the hearing officer determined that "the Grievant's removal must be upheld" because the College had "presented sufficient evidence to support the issuance of a Group III Written Notice."[5] The hearing officer also found no mitigating circumstances warranting reduction of the disciplinary action.[6] The grievant now appeals the hearing decision to EDR.

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] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[9] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Inconsistency with Agency Policy

In his request for administrative review, the grievant asserts that the hearing officer's decision is inconsistent with agency policy.[10] Having reviewed the grievant's submission, EDR

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[3] *Id.* at 1.
[4] *See id.*
[5] *Id.* at 6.
[6] *Id.* at 7-8.
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[10] *See* Grievant's Request for Administrative Review at 2-4. The grievant also appears to allege that the decision is contradictory to law. *See id.* at 2. This argument must be addressed by the circuit court in the jurisdiction in which the grievance arose. Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a); *see also* Va. Dep't of State

finds that the grievant's policy-related arguments are better characterized as disputes with the hearing officer's factual conclusion that the grievant's decision to kill the stingrays justified the issuance of a Group III Written Notice. EDR has not identified any argument, not otherwise addressed herein, that raises any way in which agency policy was not properly applied by the hearing officer. Accordingly, there is no basis to conclude that the hearing decision is inconsistent with policy.

Hearing Officer's Consideration of Evidence

In essence, the grievant contends that the hearing officer erred by concluding that he was not "permitted to kill stingrays in the factual circumstances presented in this case."[11] Hearing officers are authorized to make "findings of fact as to the material issues in the case"[12] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[13] 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.[14] 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.[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. 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.

In the decision, the hearing officer discussed the evidence regarding the grievant's actions as follows:

> Grievant was in charge of a marine life survey on May 16, 2018. When an employee became injured by a stingray, Grievant became angry and began killing stingrays. Stingrays were not authorized to be killed by the study protocols. Stingrays were not to be euthanized, but Grievant chose to kill several stingrays. By taking the lives of stingrays without a reasoned basis to do so, Grievant acted contrary to the College's ethics, principles, and policies prohibiting the taking of marine life except when necessary. The College presented substantial evidence showing that an employee who unnecessarily killed marine life could place its reputation and program at risk from unwanted criticism from its governing authorities.[16]

Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002). The "Conclusion and Appeal Rights" section of this ruling contains further information about filing a circuit court appeal.

[11] Grievant's Request for Administrative Review at 2.

[12] Va. Code § 2.2-3005.1(C).

[13] *Grievance Procedure Manual* § 5.9.

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

[15] *Grievance Procedure Manual* § 5.8.

[16] Hearing Decision at 6.

Based on this analysis, the hearing officer determined that the College had "presented sufficient evidence to support the issuance of a Group III Written Notice," and that, "[u]pon the issuance of a Group III Written Notice, an agency may remove an employee."[17]

The determination as to whether a Written Notice was issued at the appropriate level (or whether the behavior constituted misconduct at all) is a mixed question of fact and policy, and the grievant's arguments challenge the hearing officer's application of the College's policies to the facts of this case, as well as the hearing officer's factual findings on certain issues. Significantly, in his request for administrative review, the grievant does not appear to dispute the hearing officer's underlying factual conclusions regarding whether he engaged in the behavior charged on the Written Notice. He instead asserts that (1) "[t]he situation on deck and the number of stingrays to be processed and rendered safe clearly permitted the euthanasia of the subject stingrays" based on the Guidelines for the Use of Fishes in Research; (2) the Captain of the ship, who was responsible for ensuring the safety of the College employees on board, "testified that [the grievant]'s actions were proper and appropriate to ensure the safety of the crew"; and (3) the "factual record presented at the hearing . . . do[es] not present an appropriate Group III offense warranting termination."[18]

With regard to the applicability of the Guidelines for the Use of Fishes in Research, the hearing officer found that the College created an IACUC protocol for the 2018 NEAMAP Survey that "followed the Guidelines for the Uses of Fishes in Research . . . ."[19] The IACUC protocol itself, in describing the approved "method(s) of animal euthanasia" for the 2018 NEAMAP Survey, acknowledges that the Guidelines for the Use of Fishes in Research permit "exemptions from standard practices of euthanasia," but further states that staff "will strive to minimize the stresses experienced by the specimens collected."[20] In other words, the IACUC protocol is consistent with, but more specific and restrictive than, the Guidelines for the Use of Fishes in Research. For example, the IACUC protocol describes the method of approved "[e]uthanasia for injured fishes" and notes that this should "not [be] a common practice" on the 2018 NEAMAP Survey.[21] The IACUC protocol further states the "specimens collected will be weighed [], enumerated, measured, and returned to the water immediately" unless they were approved for "additional processing."[22] Stingrays do not appear on the list of species for which euthanasia was permitted for biological sampling during the 2018 NEAMAP Survey,[23] and two of the College's witnesses confirmed that the grievant's actions were a violation of the IACUC protocol.[24]

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[17] *Id.*
[18] Grievant's Request for Administrative Review at 2-4.
[19] Hearing Decision at 2-3.
[20] Agency Ex. 4 at 7.
[21] *Id.* At the hearing, the grievant alleged that the College had not complied with other provisions of the IACUC protocol relating to the euthanasia of animals under approved circumstances. *See, e.g.*, Hearing Recording at 4:15:36-4:16:26 (Grievant's testimony). It is unclear what impact this evidence had on the hearing officer's analysis of whether the disciplinary action issued to the grievant was warranted and appropriate under the circumstances. In any event, however, the grievant has not raised this matter in his request for administrative review.
[22] Agency Ex. 4 at 10.
[23] *Id.* at 20.
[24] Hearing Recording at 30:42-31:32 (Assistant Research Scientist's testimony), 2:08:19-2:08:28 (Professor's testimony).

Moreover, there is evidence in the record to support the hearing officer's factual conclusion that the "Grievant killed the stingrays out of anger and not for safety reasons."[25] The Specialist Senior testified that there was no danger from the number of stingrays in the catch such that they had to be killed, and that she had never seen an animal euthanized on a NEAMAP Survey for safety reasons.[26] She further explained that normally, if there were too many stingrays in a catch, the staff would have weighed and counted the stingrays, then tossed them overboard.[27] In addition, the Specialist Senior and Mr. H described the grievant's demeanor as "visibly upset" and "aggressive" while he killed the stingrays.[28] Although the Captain of the vessel may have been responsible for ensuring the safety of those on board, EDR has not identified any evidence in the record to show that the grievant was instructed to kill the stingrays because they created a safety concern.[29]

In summary, the hearing officer clearly considered the evidence presented by the grievant that he believed it was necessary for him to kill the stingrays for safety reasons and that it was acceptable for him to do so under the IACUC protocol and/or College policy.[30] The hearing officer did not find these arguments persuasive and concluded that the College had presented evidence to show that the grievant's actions supported the issuance of a Group III Written Notice.[31] This determination was based on testimony from the College's witnesses that "an employee who unnecessarily killed marine life could place its reputation and program at risk from unwanted criticism by its governing authorities."[32] Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts 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. 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.[33]

While the grievant may disagree with the hearing officer's decision, there is nothing to indicate that his consideration of the evidence was in any way unreasonable or not based on the actual evidence in the record. 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 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. Accordingly, EDR declines to disturb the decision on this basis.

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[25] Hearing Decision at 6.
[26] Hearing Recording at 1:59:08-2:00:28 (Specialist Senior's testimony).
[27] *Id.* at 1:59:08-1:59:56 (Specialist Senior's testimony).
[28] *Id.* at 1:19:34-1:20:23 (Mr. H's testimony), 1:55:29-1:55:50 (Specialist Senior's testimony).
[29] The Master and Mate of the vessel testified that they did not see the grievant do anything unprofessional when he killed the stingrays. Hearing Recording at 2:41:56-2:42:12 (Captain's testimony), 2:59:49-3:00:13 (Mate's testimony).
[30] *See* Hearing Decision at 6-7.
[31] *Id.*
[32] *Id.* at 6; *see* Hearing Recording at 30:49-31:32 (Assistant Research Scientist's testimony), 2:07:00-2:14:31 (Professor's testimony).
[33] *See, e.g.*, EDR Ruling No. 2014-3884.

Mitigation

The grievant appears to further argue that the hearing officer erred by not mitigating the disciplinary action and/or his termination. In particular, the grievant contends that the stingrays "were sliding about the deck and generally presented a safety hazard," the number of staff available to properly process the catch was limited, and, under these circumstances, it "was not possible, safe or efficient" to take any action other than killing the stingrays.[34] By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[35] The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "a hearing officer is not a 'super-personnel officer'" and that "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."[36] 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.[37]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

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.[38] EDR will review a hearing officer's mitigation determination for abuse of discretion,[39] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. Furthermore, and especially in cases involving a termination, mitigation should be utilized only in the exceptional circumstance. Arguably, when an agency presents sufficient evidence to support the issuance of a Group III Written Notice,

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[34] Grievant's Request for Administrative Review at 5.
[35] Va. Code § 2.2-3005(C)(6).
[36] *Rules for Conducting Grievance Hearings* § VI(A).
[37] *Id.* § VI(B).
[38] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, 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).
[39] "'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.*

dismissal is inherently a reasonable outcome.[40] It is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline. However, EDR also acknowledges that certain circumstances may require this result.[41]

In this instance, the hearing officer found no mitigating circumstances that would support a decision to reduce the discipline issued by the College.[42] A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[43] Even considering those arguments advanced by the grievant in his request for administrative review as ones that could reasonably support mitigating the discipline issued, EDR is unable to find that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. As such, EDR will not disturb the hearing officer's decision on this basis.

Newly Discovered Evidence

Finally, the grievant argues that he has identified newly discovered evidence after the hearing and requests that EDR remand the case to the hearing officer for consideration of this evidence. More specifically, he has provided EDR with photographs and a video recording which he claims demonstrate that "prior, significant euthanization [sic] of large numbers of fish, and especially stingrays, was a normal occurrence." Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[44] 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.[45] 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.[46]

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[40] Comparable case law from the Merit Systems Protection Board provides that "whether an imposed penalty is appropriate for the sustained charge(s) [is a] relevant consideration[] but not outcome determinative . . . ." Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, 664 n.4 (2010).

[41] The Merit Systems Protection Board views mitigation as potentially appropriate when an agency has "knowingly and intentionally treat[ed] similarly-situated employees differently." Parker v. Dep't of the Navy, 50 M.S.P.R. 343, 354 (1991) (citations omitted); *see* Berkey v. U.S. Postal Serv., 38 M.S.P.R. 55, 59 (1988) (citations omitted).

[42] Hearing Decision at 7-8.

[43] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).

[44] *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).

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

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

The grievant alleges that he requested the additional evidence he has provided on administrative review in advance of the hearing, but it was not produced by the College.[47] In response, the College argues that the evidence in question was never in its possession, and that it did not withhold any evidence that was it was ordered to produce to the grievant.[48] EDR has not reviewed anything to show that the photographs and/or the video recording offered by the grievant were in the College's possession and improperly withheld. Indeed, some of the photographs in question appear to consist of text messages from third parties. EDR is not persuaded that the grievant 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 EDR may remand the decision.

Moreover, even assuming that the grievant could satisfy all of the elements necessary to consider the evidence in question newly discovered under this standard, the grievant has not demonstrated that the information he has offered would have an impact on the outcome of this case. The grievant appears to offer this evidence to show that he was disciplined inconsistently with other similarly situated employees who engaged in similar behavior (i.e., killing stingrays in violation of the IACUC protocol). At the hearing, the grievant testified in support of this position, stating he had seen other staff euthanize stingrays for safe handling.[49] One of his witnesses, on the other hand, testified that it was not a standard practice or routine occurrence for stingrays to be euthanized.[50] Most importantly, however, there is no evidence to show that College management was aware of and condoned such a practice, even if it did in fact occur as the grievant argues. This conclusion is supported by testimony from one of the College's witnesses that no incident like the one at issue in this case had been reported to management in the past.[51]

Although 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, as discussed more fully above. EDR has reviewed nothing to suggest that the additional evidence offered by grievant would have any impact on the hearing officer's findings. Accordingly, there is no basis for EDR to re-open or remand the hearing for consideration of this additional evidence.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR 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.[52] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to

[47] Grievant's Request for Administrative Review at 4.
[48] Agency Response to Request for Administrative Review at 3.
[49] Hearing Recording at 3:54:40-3:55:18 (Grievant's testimony).
[50] *Id.* at 3:17:54-3:20:23 (Mr. G's testimony).
[51] *Id.* at 2:13:18-2:13:32 (Professor's testimony).
[52] *Grievance Procedure Manual* § 7.2(d).

the circuit court in the jurisdiction in which the grievance arose.[53] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[54]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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