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ADMINISTRATIVE REVIEW

In the matter of Southwest Virginia Higher Education Center
Ruling Number 2021-5136
August 18, 2020

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11487. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11487, as found by the hearing officer, are as follows:[1]

> . . . . Generally, Grievant alleged people were against Grievant because he was trying to generate change in an 18-year-old system [at the Southwest Virginia Higher Education Center ("the agency")]. . . . Grievant considered himself "… the Agent of Change." The staff was working for the government and "… had no concept of how the real-world works." They were jealous of the things that Grievant knew and they didn't want to be told they did it the wrong way.
>
> . . . . Grievant said he didn't remember saying the only place for a woman in the workplace is on her knees under a man's desk.
>
> Grievant stated he did ask female employees to go out of town with him, but only on a friendly basis, and none ever did. He only offered because [witnesses] 2F [and] 7F said how much they would like to see the locations to which he was going. 2F hung around Grievant and [employee] 3M because she (2F) said, "they were the two most intelligent people she knew." Grievant agreed he used the phrase "wine, dine, and 69" but only because he was quoting from a movie . . . . Grievant admitted "69" meant a sexual act.
>
> Grievant denied he ever told an employee she was giving him a bulge in his pants. He did tell her she looked nice in the new agency blue shirt.

[1] Decision of Hearing Officer, Case No. 11487 ("Hearing Decision"), July 1, 2020, at 3-9 (citations omitted).

Grievant first denied saying he would "have (a female) employee for lunch" then later stated it was taken out of context as it was a "play on words."

Grievant admitted to calling women "bitch" but never to their face so he believed it was appropriate to do and he had only done it 2 or 3 times at work.

When asked if he took a sandwich belonging to a female employee, cut a slit in the wrapper, urinated in it and returned it to the employee refrigerator, he stated he only said it as a joke and [it] never actually happened.

Grievant stated he never talked about his penis at work. When he referred to the "throbbing three" he was never talking about his penis but did admit "throbbing three" meant "penis." But, again, was just a quote from a movie. Grievant stated it was ok to use this phrase at work because it is only joking, and someone must have taken it out of context.

Grievant stated one of his staff persons told Grievant that he, 3M, had a wife that had sex with other women before they married, and that 3M was getting ready for a threesome for his birthday. Grievant was asked why he did not tell the employee this was inappropriate to discuss at work. Grievant's response was that everybody, everybody talked about that kind of stuff at work. Others should not be throwing the "first stone" at Grievant. Grievant noted 1M makes more money than Grievant and he talks about sex at work.

. . . .

Grievant admitted he discussed with 3M that he had a date with 3M's mother-in-law and that he may have said he had "fingered" her, and her vagina smelled good. When asked if that was appropriate conversation at the workplace, he believed it was ok because his subordinate, 3M, had asked for details.

Grievant may have used the phrase "suck a golf ball through a hose" but wasn't referring to anyone.

Grievant did say an employee needed to be taken to river and held under water till bubbles stopped.

Grievant admitted he had stated he would like to throw his superior, 10M, into an electrical box, but he was angry with him and he didn't mean he would actually do it.

Grievant admitted to calling people "bitch" or "stupid idiots."

Grievant never told an employee he would like to strangle her.

Grievant stated it was possible he sometimes waved his pocketknife around, but he never had a gun at work.

Grievant stated he said he would staple an employee's mouth shut but it was just a joke, and everyone knew it.

Grievant did not recall saying he would "beat the fucking cancer out of her," but if he had said it, it would only be a joke.

Grievant knew 3M was having some problems with his wife and Grievant allowed she could be drowned.

Grievant said there could have been 250 calls to 2F but couldn't tell by looking at the primitive record system. He did not think 250 calls excessive because he doesn't text and calls other people 3 times more than 2F.

. . . .

Grievant told 3M that Grievant had a sexual dream about 3M's wife.

. . . .

Grievant was asked to refer to Policy 2.35 regarding sexual harassment. He was questioned if he believed he had done any of the described negative behaviors and he stated he did "nothing to trigger 2.35." He stated he probably did make some verbal comments, but everybody was saying such things.

Grievant was asked to refer to Policy 2.35 regarding hostile environment. He didn't think he had made any comments that were unwelcomed. Yes, he made some sexual comments, but they were only when he was asked and in the privacy of his office, so it was okay.

. . . . [Agency witness 2F] believed Grievant was an asset to the Agency when he first came into the Agency. However, after a period of time he started asking her to dinner and commenting on her clothing. One time he told her "you look nice today and it's giving me a bulge in my pants." Grievant offered to take 2F on road trips which later included Grievant saying they could "wine, dine, and 69." He told 2F that he (Grievant) would make her feel like a new woman.

Grievant talked about a woman he knew in Chattanooga that couldn't get enough of him, so they added another guy. 2F felt she was told this so she would think a threesome was normal. Grievant suggested to 2F that they go to 3M's house, switch partners and later Grievant and 3M could watch 2F and 3M's wife do lesbian acts.

2F had a phone record of 255 calls from Grievant from January 2019 to November 2019. About July of 2019[,] 2F started blocking Grievant's calls. Some calls were legitimate calls about business needs, but she estimated about 80 percent of the calls were of a personal nature. Grievant would ask how 2F was and what she was doing, talk negative about other employees and ask her to go out with him and so forth.

One time, Grievant saw 2F talking to another employee and told him he had better not be talking to "his woman" and shoved a knife in his face. 2F stated that Grievant never physically attacked her. Grievant stated the only place for a woman [in the workplace] was on her knees.

There were two housekeeper women who worked nights at the Agency. Both were heavy and one had a foreign accent. Grievant was in a controversy with them about the level of air conditioning in the facility at night. Grievant made comments about their weight and that they needed to go back where they came from.

. . . . 2F produced a voice message she received when 3M and Grievant were in a vehicle going to lunch. Grievant invited 2F saying "maybe I'll have you for lunch," which 2F took as a sexual comment.

Grievant stated he knew people who could take care of 3M's wife by holding her head under water 'til the bubbles stopped. He also used this phrase in referring to two other employees he had controversy with. One person asked Grievant about the trash cans not being emptied. Grievant called her a "bitch." He also referred to two other employees as "bitches." 2F believed Grievant tried to destroy people's character and confidence.

2F was afraid of what Grievant might do. 2F related that Grievant stated, "no one wants to mess with Grievant." Grievant bragged he had gotten the best of his boss. Grievant bragged about cutting the water lines of a person he disliked and trying to strangle another person. 2F said she had security cameras installed at her home for fear of Grievant or a person he might hire would do her harm.

. . . .

2F heard Grievant scream into a phone in a public hallway of the Agency. 2F felt Grievant's behavior was escalating. Grievant took a dislike to an employee and Grievant bragged he took her sandwich out of the refrigerator, slit a hole in it, urinated in it and put it back in the refrigerator.

When asked by counsel if Grievant's remarks were unwelcomed, 2F stated "yes." Did they intimate you in your workplace? 2F stated "yes." Were they severe and repeated? 2F stated "yes." 2F stated she loved her job but hated to come to

work because of Grievant. 2F stated because of Grievant she started working a later shift to avoid him.

. . . .

2F responded to questions:

Had 2F ever made sexual comments to Grievant – No
Has 2F ever talked about her sexual experiences to Grievant – No
Who else knew you were asked on road trips or had excessive phone calls – a friend and wife of 3M.

. . . .

2F was asked if she thought there was any lesser solution than to terminate Grievant. She stated "no," he needed to be gone. 2F liked her job – Grievant made it miserable.

. . . Of the remaining . . . witnesses . . . , there were numerous confirmations of actions/events already stated: of sexual comments made by Grievant, threatening behavior by Grievant, name calling by Grievant, harassment by Grievant, profanity used by Grievant, private use of company time by Grievant. . . . At least 3 employees stated they were planning to resign their jobs due to the tension and harassment caused by Grievant.

. . . .

Grievant soon came to believe people at the Agency were out to get him or didn't appreciate him. Grievant started keeping a "dossier" of other persons' actions. Grievant felt he wasn't fired because of the reasons given in the Written Notices but because the Agency Director, 10M, was frustrated with him and took a first opportunity to get rid of him. . . .

Grievant stated he had never hurt anyone in his life. Grievant did not believe anyone took any of his comments as anything but a joke. Grievant stated 2F had him over to her home to work on home improvement projects. Grievant's 2nd job was his company in construction and solar energy.

Grievant admitted he made some personal business calls at work but felt it was ok as he testified everyone else did it. Grievant did not produce any witnesses to substantiate this allegation.

Grievant felt he was not given proper justice by the requirements of the state (DHRM) termination policy. . . . Grievant felt he was denied an attorney's advice although DHRM policy does not provide for such during the termination process.

> Grievant felt he was treated unjustly because he had done so much good for the [agency] and he was being terminated because of joking language. Grievant stated he felt "100% innocent" of the charges against him. He said any of his comments lacked intent and no one felt harassed by them.

On December 3, 2019, the agency issued to the grievant a Group III Written Notice for harassment of employee 2F, a second Group III Written Notice for harassing and/or violent statements to others in the work environment more broadly, and a Group I Written Notice for conducting personal business on agency time.[2] Both Group III Written Notices marked termination as an additional disciplinary action.[3] The grievant timely grieved these actions, and a hearing was held on March 3 and June 4, 2020.[4] In a decision dated July 1, 2020, the hearing officer determined that the grievant had admitted to several allegations that constituted violations of DHRM Policy 2.35, *Civility in the Workplace*, and sustained the two Group III Written Notices.[5] The hearing officer further determined that the grievant used work time for personal business, sustaining the Group I Written Notice.[6] Accordingly, and finding no mitigating circumstances, the hearing officer upheld the grievant's termination.[7] The grievant has requested that EDR administratively review the hearing officer's decision.

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."[8] 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 a party; the sole remedy is that the hearing officer correct the noncompliance.[9] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[10] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request, the grievant has raised four grounds for administrative review. First, the grievant asserts that the hearing decision did not account for procedural defects in the agency's issuance of the Written Notices. Second, the grievant argues that the hearing decision did not properly consider whether Written Notices at the Group III level were warranted under the circumstances. Third, the grievant contends that the hearing officer did not allow him to recall employee 3M as a witness to offer new evidence, after 3M allegedly recanted his earlier testimony. Finally, the grievant claims that the hearing officer misapplied the burden to prove mitigation.

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[2] *See id.* at 1; Agency Exs. 19, 21, 22.
[3] Agency Exs. 19, 21.
[4] Hearing Decision at 1.
[5] *Id.* at 9-11.
[6] *Id.* at 10-11.
[7] *Id.*
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

Notice of Allegations

The grievant contends that the agency did not give him "fair notice of what the Written Notices were about," both prior to their issuance and prior to the hearing.[11] Thus, he claims, "the evidence at the hearing went off in new and unforeseen directions,"[12] leading the hearing officer to conclude that the grievant "failed to produce corroborating evidence about disputed matters of fact that he never hear[d] about before the hearing."[13] The grievant asserts that the agency's failure to adequately notify him of the charges against him was inconsistent with DHRM Policy 1.60, *Standards of Conduct*.

The United States Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[14] DHRM Policy 1.60, *Standards of Conduct*, requires that an employee "be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond" in light of the "nature of the offense."[15] Likewise, a disciplinary Written Notice Form issued pursuant to Policy 1.60 will include a brief description of the offense and an explanation of the evidence.[16]

Pre-disciplinary notice and opportunity to be heard need not be elaborate, nor resolve the merits of the discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[17] On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine adverse witnesses in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[18] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[19] EDR has consistently adopted the reasoning of many

[11] Request for Administrative Review at 4.
[12] *Id.*
[13] *Id.* at 5.
[14] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property.").
[15] DHRM Policy 1.60, *Standards of Conduct* at 15-16.
[16] *See generally id.* at 7-8.
[17] *Loudermill*, 470 U.S. at 545-46.
[18] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).
[19] See Virginia Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an

jurisdictions holding that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[20]

Applying these principles to the grievant's claim of insufficient notice, EDR cannot conclude that the agency's communication of its allegations against the grievant fell short of what Policy 1.60 requires. The due process memorandum issued to the grievant explained that:

> - During the time period from approximately January, 2019 until October, 2019 you engaged in harassing behavior toward an employee, to include inappropriate and sexual comments, excessive calling during and after work hours and on weekends, leaving inappropriate messages. . . .
> - Throughout 2018-2019, you were heard making sexual and derogatory comments, using threatening, inappropriate language, and using profanity to staff members, management, vendors, clients, customers, and visitors to the [agency]. Examples: you made comments about putting your hands around a staff member's throat; you made comments about pushing the director into an open breaker box; you used profanity and made sexual comments in referring to female staff members; you were heard using profanity on the phone with vendors for the [agency] and in open hallways in front of the public. . . .
> - During 2018-2019, you conducted personal business on agency time. Examples: during work hours you were heard on the phone conducting business not related to the [agency]; you traveled during work hours for business not related to the [agency].[21]

These descriptions allege patterns of behaviors repeated over a long period of time, which, while not exhaustively listed, reasonably articulate the policy violations charged.[22] Thus, EDR cannot say that these descriptions fail to satisfy the pre-disciplinary notice standards set forth in Policy 1.60.

Even assuming that the grievant was entitled at the pre-disciplinary stage to more specifics such as names and dates, as he argues, any deficiencies in that regard would appear to have been cured by the grievant's full hearing before an impartial decision-maker; his opportunity to present evidence and to confront and cross-examine the agency's witnesses in the presence of the decision-maker; and his opportunity to have counsel present. The grievance procedure includes provisions for a party to obtain evidence relevant to the grievance in preparation for a hearing.[23] Although he

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appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing); *Rules for Conducting Grievance Hearings* § VI(B) (citing O'Keefe v. U.S. Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002) (holding that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.")).

[20] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572, at 5 (and authorities cited therein).

[21] Agency Ex. 14, at 6.

[22] *See Loudermill*, 470 U.S. at 545-46.

[23] *See Grievance Procedural Manual* § 8.2; *Rules for Conducting Grievance Hearings* § III(E).

asserts that the hearing went in "unforeseen directions," the grievant's request for administrative review cites no particular noncompliance in either the agency's production of evidence or the hearing officer's admission of evidence into the record. Nor does the grievant suggest how his defense would have changed had he appreciated the scope of the agency's case.[24] As such, EDR is unable to identify any record evidence that would have been unforeseeable to the grievant such that a new hearing is required, and we will not disturb the hearing decision on these grounds.

Level of Discipline

The grievant next argues that "the hearing decision does not address the rationale for the classification of [the grievant's misconduct] within the hierarchy of Group I, II, and III offenses."[25] The grievant asserts that he "was punished solely for his words," in contrast to the "criminal conviction and other actions analogous to criminal actions" that Policy 1.60 lists as examples of offenses typically meriting discipline at the Group III level.[26]

Under Policy 1.60, Group III offenses are generally appropriate for "acts of misconduct of a most serious nature that severely impact agency operations,"[27] such as acts that "constitute illegal or unethical conduct; . . . disruption of the workplace; or other serious violations of policies, procedures, or laws."[28] Illustrative examples include certain criminal behavior, threatening others, excessive unauthorized absences, unauthorized use of state records, and sleeping during work hours.[29] State policy also explicitly recognizes that misconduct under Policy 2.35 (*e.g.* unprofessional conduct, harassment, bullying, violence) may vary in severity and effect on the workplace and that such misconduct may constitute a Group I, II, or III offense, depending on its nature.[30]

Here, the hearing officer made factual findings that the grievant discussed another employee's mother-in-law in graphic sexual terms, used sexual innuendo in inviting female employees to go out of town with him, and made profane and/or threatening statements about coworkers.[31] The hearing officer "counted 21 comments or events" confirmed by at least two

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[24] For example, EDR's review of the record reveals no request by the grievant's attorney at the hearing stage for an additional opportunity to rebut the agency's allegedly unforeseen evidence, nor does the grievant identify what evidence would be presented if such an additional opportunity were presented.
[25] Request for Administrative Review at 6.
[26] *Id.*
[27] DHRM Policy 1.60, *Standards of Conduct*, Att. A
[28] DHRM Policy 1.60, *Standards of Conduct*, at 9.
[29] DHRM Policy 1.60, *Standards of Conduct*, Att. A.
[30] *Id.*; *see* DHRM Policy 2.35, *Civility in the Workplace*, at 5; *see, e.g.*, EDR Ruling No. 2020-5003 ("an employee who is disciplined for engaging in workplace harassment will not usually be disciplined for each individual incident of harassing behavior, any one of which could amount to a finding of misconduct. Rather, the employee would be disciplined for the ongoing course of harassing conduct as a whole, which amounts to many different actions or inactions over time.").
[31] The hearing officer's findings of fact included substantial detail from the testimony of 2F, the employee to whom the agency's first Group III Written Notice related. *See* Hearing Recording (Day 1), at 2:20-5:40. These details included numerous graphic sexual comments that 2F testified the grievant made to her; 255 calls made by the grievant to her, 80 percent of which she estimated were of a personal nature; and calling other employees "bitches" and discussing them in threatening terms. 2F testified that she "loved her job but hated to come to work because of

witnesses[32] to conclude that the grievant "did numerous times violate [Policy 2.35] by making unwanted sexual comments and by intimidation."[33] The hearing officer noted that at least three agency employees "stated they were planning to resign their jobs due to the tension and harassment caused by Grievant;"[34] she further found that "Grievant's lack of understanding that any of his comments or actions . . . were unwanted, sexually charged, or harassing . . . is all the more reason to remove him from the workplace as he has all but guaranteed the behavior would continue if he were re-employed."[35] These findings describe behavior sufficiently severe to be sanctioned at a Group III level.[36] Because the hearing decision makes the rationale for the Group III Written Notices sufficiently apparent, EDR will not disturb the decision on this basis.

Newly Discovered Evidence

Additionally, the grievant argues that the hearing officer failed to comply with the *Rules for Conducting Grievance Hearings* by "refusing to allow the Grievant to recall the Agency witness who recanted his testimony before the hearing was completed."[37] The grievant contends that the hearing officer erroneously excluded the proposed testimony as newly discovered evidence and then relied on the witness's earlier testimony to uphold "all three of the offenses."[38]

EDR's review of the hearing proceedings shows that the first day (March 3, 2020) concluded before the grievant's presentation of his case.[39] Shortly thereafter, the Governor of Virginia declared a public health emergency that ultimately contributed to a significant delay in holding the second day of proceedings. On March 19, 2020, the grievant requested to recall witness 3M and/or to proffer an affidavit from him. The hearing officer declined to permit new testimony or to accept new evidence, based on the grievant's representation of his case as the first day of proceedings concluded; *i.e.* the grievant's own testimony and three exhibits already admitted into the record. During the grievant's testimony, he expressed his understanding that witness 3M wished to alter his testimony given as a witness for the agency.[40] In her decision, the hearing officer declined to make findings as to 3M's testimony, either on the record or as subsequently requested, and did not cite any such evidence to support her determinations.[41]

Grievant"; she "started working a later shift to avoid him"; and "she had security cameras installed at her home for fear [that] Grievant or a person he might hire would do her harm." Hearing Decision at 6-8.

[32] Hearing Decision at 9.

[33] *Id.* at 10.

[34] *Id.* at 9.

[35] *Id.* at 11.

[36] To the extent that the grievant argues that an employee's words alone, in the absence of "property destruction" or "actual physical danger," would not normally cause sufficient harm to merit a Group III offense, EDR does not find support for that view in state policy. Indeed, Policy 2.35 identifies numerous prohibited verbal behaviors that, if severe or pervasive, could create a "hostile" work environment – by definition, a severe impact on the workplace. *See* Policy Guide – DHRM Policy 2.35, *Civility in the Workplace*.

[37] Request for Administrative Review at 6.

[38] *Id.* at 7.

[39] *See* Hearing Decision at 9.

[40] Hearing Recording (Day 2), at 42:15-43:20 (Grievant's testimony).

[41] Contrary to the grievant's assertion that 3M's testimony "was cited through the hearing decision," EDR is unable to locate any reference to 3M's testimony in the hearing decision.

Based on this background, EDR perceives no basis for remand. Hearing officers have broad authority and discretion to resolve evidentiary issues that may arise during the hearing phase of the grievance process.[42] In this case, the hearing officer ruled that the second day of the hearing would be limited to the evidence identified by the grievant as of the conclusion of the first day of hearing. Although the grievant raises concerning allegations that witness 3M may have given untruthful testimony due to agency coaching,[43] the hearing officer was not required to address those allegations by admitting potentially self-incriminating evidence by 3M into the record. It appears that the hearing officer chose instead to consider the allegations in the weight she assigned to 3M's record testimony, ultimately relying exclusively on other evidence – primarily the grievant's own testimony – to uphold the agency's disciplinary actions.

For similar reasons, EDR cannot find that the alleged untruthful testimony is grounds for remand as newly discovered evidence. 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.[44] 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.[45]

Here, even viewing the evidence as effectively discovered post-hearing, EDR perceives no basis to conclude that it would be more than merely impeaching or that it would be likely to produce a new outcome. The grievant asserts that 3M "will now say that the witness 2F and others were not harassed by [the grievant], that he was not harassed by [the grievant], and that [the grievant] did not misuse company time."[46] However, as explained above, the hearing officer found that the grievant admitted under oath to multiple instances of graphic sexual language and other profane, threatening, and unprofessional language in the workplace; she further noted that the grievant appeared to maintain that this language was acceptable. In addition, the hearing officer found that the grievant testified to attending to his private business and other personal matters during agency work hours. Accordingly, it is not apparent how 3M's testimony, either as admitted into the record or as allegedly recanted, would produce different findings in the hearing decision.[47] Thus, EDR will not disturb the decision on these grounds.

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[42] *See generally* Va. Code 2.2-3005(C); *Rules for Conducting Grievance Hearings* § III(E).
[43] Request for Administrative Review at 7.
[44] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[45] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[46] Request for Administrative Review at 7.
[47] Consistent with his testimony, the grievant does not appear to challenge the hearing officer's findings as to what conduct occurred, but rather its characterization as terminable misconduct.

Mitigation

Finally, the grievant contends that the hearing officer improperly required him to carry his burden to prove claims in mitigation with evidence additional to his own testimony. The grievant notes that he testified as to other employees' attention to private business during agency work hours and that there was no finding that his testimony lacked credibility. The hearing officer noted that "[t]here were no witnesses to [corroborate] Grievant's opinion that 'everyone' made sexual comments, and 'everyone' used company time for personal business."[48] Thus, the grievant claims that the hearing officer effectively required him to prove mitigation by more than a preponderance of the evidence.[49]

Here, EDR's review of the record does not indicate that the hearing officer failed to properly consider the grievant's testimony or misapplied the grievant's burden to prove mitigation. While more favorable treatment of similarly situated employees may be a mitigating circumstance, a grievant bears the burden to prove that such comparator employees engaged in like misconduct but received lesser discipline, such that the agency's discipline of the grievant exceeded the bounds of reasonableness.[50] In assessing the grievant's argument on mitigation, the hearing officer was required to weigh the grievant's testimony as to how similar other specific employees' alleged misconduct was to his own, including the degree or severity of the respective offenses and their effect on agency operations. Such considerations of weight may include not only truthfulness but also personal knowledge and other indicia of reliability. 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. Here, the hearing officer reasonably concluded that the grievant's own impressions of other employees' conduct were not sufficient to prove that the agency's discipline exceeded the bounds of reasonableness. 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.[51] Thus, EDR will not disturb the hearing decision on this basis.

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 the circuit

[48] Hearing Decision at 10.
[49] Request for Administrative Review at 8.
[50] *See Rules for Conducting Grievance Hearings* § VI(B)(2); *see, e.g.*, EDR Ruling No. 2020-5004.
[51] *See, e.g.*, EDR Ruling No. 2014-3884.
[52] *Grievance Procedure Manual* § 7.2(d).

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]

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[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).