

Issue: Administrative Review/Hearing decision appeal; Ruling Date: February 27, 2007;
Ruling #2007-1524; Agency: Department of Transportation; Outcome: hearing officer
in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Transportation
Ruling No. 2007-1524
February 27, 2007

The grievant, through her attorney representative, has requested that this Department administratively review the hearing officer's decision in Case Number 8451.

FACTS

On August 9, 2006, the grievant was issued a Group III Written Notice with removal for violation of a safety rule with a threat of physical harm and for failure to follow her supervisor's instructions.¹ The grievant challenged the disciplinary action by initiating a grievance on October 17, 2006.² The grievance was subsequently qualified for hearing and a hearing was held on November 8, 2006.³ In a November 22, 2006 hearing decision, the hearing officer upheld the Group III Written Notice with removal.⁴

Thereafter, the grievant requested that the hearing officer reconsider his November 22nd decision. In her request for reconsideration, the grievant states:

Grievant would like to obtain a video tape of tunnel entrance to establish that arrow board was not towed through tunnels entrance east and westbound on day of incident. This would be critical to establish veracity of Agency's witness, [name of witness], who testified that he had to move the arrow board back to Frederick Blvd. Tape is in possession of Agency.

In a December 21, 2006 reconsideration decision, the hearing officer denied the grievant's request for reconsideration because the grievant had failed to identify any

¹ See Decision of Hearing Officer, Case Number 8451 ("Hearing Decision"), issued November 22, 2006.

² Hearing Decision at 1.

³ *Id.*

⁴ *Id.* at 6.

newly discovered evidence or any incorrect legal conclusions.⁵ More specifically, in his reconsideration decision, the hearing officer opines: “Grievant seeks to reopen the hearing in order to present a video tape of the tunnel entrance to establish that the arrow board was not towed as alleged by the Agency. Since the tape existed at the time of the hearing, the tape is not new evidence.”⁶

The grievant also requested an administrative review of the hearing officer’s decision by the EDR Director and the Director of the Department of Human Resource Management (DHRM). In her request for administrative review to this Department, the grievant states:

Grievant feels that the Agency did not produce video tape of the occurrence which would have shown whether or not the Agency’s main witness, [name of witness] was truthful in his testimony. [Name of witness] stated that he had to remove Arrow Board Safety sign and tow it through both east and west board [sic] tunnel to reset the board per Grievant’s directions.

Additionally, during this Department’s investigation, the grievant’s attorney stated that the grievant was told by a co-worker, after the hearing, that a “continuous videotape is made at all times of the entrance and exits of the tunnels.” Further, the grievant’s attorney told this Department that the grievant did not request a copy of the alleged videotape prior to hearing because the grievant “had no knowledge in advance of the hearing” that the agency witness would testify as he did with regard to the movement of the arrow board and that “no discussion of the videotapes occurred at the hearing.”

DISCUSSION

By statute, this Department 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, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁸

Because there was no request by the grievant for the video tape prior to the hearing and the grievant admits that the tape was not discussed at all at the hearing, there can be no error and/or abuse of discretion on the part of the hearing officer with regard to whether he failed to order the production of the tape and/or continue the hearing so that the grievant could obtain a copy of the video tape. As such, the only question is whether

⁵ See Reconsideration Decision of Hearing Officer, Case Number 8451-R (“Reconsideration Decision”), issued December 21, 2006.

⁶ *Id.*

⁷ Va. Code §§ 2.2-1001(2), (3), and (5).

⁸ *Grievance Procedure Manual* §§ 6.4; 7.2.

the hearing officer erred and/or abused his discretion in finding that the videotape is not “newly discovered evidence” warranting a reopening of the hearing.

Newly discovered evidence is evidence that was in existence at the time of the trial, but was not known (or discovered) by the aggrieved party until after the trial ended.⁹ However, the fact that a party discovered the evidence after the trial does not necessarily make it “newly discovered.” Rather, the party must show that

- (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.¹⁰

The above definition and principles regarding newly discovered evidence were recently adopted as an appropriate standard to follow when determining what constitutes “newly discovered evidence” under the grievance procedure.¹¹

In his reconsideration decision, the hearing officer concluded that the video tape in question is not newly discovered evidence because “the tape existed at the time of the hearing.”¹² However, as stated above, newly discovered evidence, by definition, is evidence that existed at the time of the trial. As such, in this case, the determination of whether the video tape constitutes newly discovered evidence hinges on whether the video tape was discovered after the hearing, the grievant exercised due diligence to discover the tape, the tape is not merely cumulative or impeaching, the tape is material, and the tape is likely to produce a new outcome or would require the decision to be amended. Accordingly, the hearing officer is directed to reconsider and clarify his reconsideration decision in accordance with the newly discovered evidence standards and principles set forth in this ruling.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, the hearing officer is ordered to reconsider his decision in accordance with this ruling. 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.¹³ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the

⁹ See *Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989).

¹⁰ *Id.* (emphasis added) (quoting *Taylor v. Texgas Corp.*, 831 F. 2d 255, 259 (11th Cir. 1987)).

¹¹ See EDR Ruling No. 2007-1490.

¹² See Reconsideration Decision at 1.

¹³ *Grievance Procedure Manual* § 7.2(d).

circuit court in the jurisdiction in which the grievance arose.¹⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁵

Claudia T. Farr
Director

¹⁴ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁵ *Id.*; see also *Virginia Dep't of State Police vs. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).