Issue: Administrative Review of Hearing Officer's Decision in Case No. 8768; Ruling Date: April 17, 2008; Ruling #2008-1975; Agency: Department of Social Services; Outcome: Remanded to Hearing Officer.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Social Services
Ruling Number 2008-1975
April 17, 2008

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8768. For the reasons set forth below, the grievance is remanded for further proceedings in accordance with this ruling.

FACTS

On August 27, 2007, the grievant was issued a Group I Written Notice of disciplinary action for inadequate job performance.[1] On September 26, 2007, the grievant timely filed a grievance to challenge the disciplinary action.[2] The grievance was qualified for a hearing and a hearing was subsequently held on February 11, 2008.[3] In a February 13, 2008 decision, the hearing officer upheld the disciplinary action.[4]

On February 26, 2008, the grievant requested a reconsideration decision by the hearing officer as well as administrative review by this Department. In her request to both the hearing officer and this Department, the grievant states: "I have a breakdown of the time my time which was not accepted in the hearing. No one requested a break down of my time before the hearing." In a decision dated February 27, 2008, the hearing officer denied the grievant's request for reconsideration.[5] More specifically, in his February 27th reconsideration decision, the hearing officer states:

> Grievant did not attach any such breakdown to her request for reconsideration. She has not established that the evidence was newly discovered since the date of the hearing decision. She has not established that she used due diligence to discover the possible new evidence. She has not established that the evidence is material. She has not established that

[1] *See* Decision of Hearing Officer, Case No. 8768 ("Hearing Decision") issued February 13, 2008 at 1.
[2] *Id*.
[3] *Id.*
[4] *Id.* at 6.
[5] *See* Reconsideration Decision of Hearing Officer, Case No. 8768-R ("Reconsideration Decision") issued February 27, 2008 at 2.

> the evidence is such that it would likely produce a new outcome if the case were retried. Grievant is responsible for presenting her evidence at the hearing. Accordingly, Grievant has not presented newly discovered evidence that would affect the outcome of this case.[6]

This Department will now address the grievant's request for administrative review.

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]

As stated above, in her request for administrative review, the grievant writes: "I have a breakdown of the time my time which was not accepted in the hearing. No one requested a break down of my time before the hearing." To the extent the grievant is arguing that the hearing officer should accept any such breakdown of her time as "newly discovered evidence," this Department finds that the hearing officer was correct in his conclusion[9] that a breakdown of the grievant's time is not "newly discovered" as the grievant presumably was aware of how much time she spent performing her duties at the time of the hearing.[10] Accordingly, this evidence cannot be considered newly discovered.

However, although not addressed by the hearing officer in his Reconsideration Decision, the grievant's request for administrative review appears to also challenge the hearing officer's failure to allow her to present a breakdown of her time during the hearing. More specifically, the grievant was disciplined for failure to timely complete error reports, a responsibility included in her employee work profile (EWP).[11] During the hearing, the agency presented testimony and a corresponding exhibit of the percentages of time the grievant devoted to various work duties and the resultant percentage of time

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[6] *Id.* at 1-2.
[7] Va. Code § 2.2-1001(2), (3), and (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] *See* Reconsideration Decision at 1-2.
[10] To establish that evidence is "newly discovered," the moving party must show "(1) the evidence was first discovered after the hearing; (2) due diligence on the moving party's part to discover the new evidence had 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 reheard, or is such that would require the hearing decision to be amended." *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989) (citing Taylor v. Texgas Corp., 831 F. 2d 255, 259 (11th Cir. 1987)). *See also* EDR Ruling No. 2007-1490 which adopted the Texgas standard.
[11] *See* Hearing Decision at 2-3.

she had available to complete her error reports.[12] Although the grievant admitted during the hearing that she had failed to complete all of the error reports, the grievant argued that the discipline should be mitigated because her other duties prevented her from completing the error reports.[13] As evidence in support of this proposition, prior to closing statements, the grievant stated that she had something else that she would like to add. More specifically, the grievant offered a document she had composed that included a "tracking as far as [where she] was at different places." In response, the hearing officer stated that because the document had not been exchanged with the agency representative, he was not going to "try and sort that out."[14]

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."[15] Moreover, by statute, hearing officers have the duty to receive probative evidence and to exclude only evidence which is irrelevant, immaterial, insubstantial, privileged, or repetitive.[16] Thus, where a grievant or agency seeks to introduce probative evidence at hearing, but has previously failed to identify the evidence in accordance with the hearing officer's prehearing orders, this Department has held the hearing officer must nevertheless admit the evidence, but in the interests of due process, must ensure that the opposing party is not prejudiced by the dilatory proffer of evidence, for instance by adjourning the hearing to allow the opposing party time to respond.[17]

Here, the grievant was attempting to offer evidence in mitigation of the offense (i.e., the time she devoted to other duties prevented her from completing the error reports).[18] This evidence would appear to be potentially probative of the reasonableness of the disciplinary action taken against the grievant and as such, should have been admitted if it was not "irrelevant, immaterial, insubstantial, privileged, or repetitive." The hearing officer in this case did not determine that the evidence proffered was "irrelevant, immaterial, insubstantial, privileged or repetitive," but rather disallowed the evidence because it had not been exchanged with the opposing party in advance of hearing.

Based on the foregoing, this Department concludes that the hearing officer erred when he prevented the grievant from offering potential evidence in mitigation of the

[12] Hearing Recording at 09:00 through 10:19.
[13] Hearing Recording at 2:04:04 through 2:05:00.
[14] Hearing Recording at 2:13:35 through 2:13:56.
[15] Va. Code § 2.2-3005(C)(6).
[16] Va. Code § 2.2-3005(C)(5).
[17] *See* EDR Ruling #2006-1387 and EDR Ruling #2006-1290.
[18] While the hearing officer must "give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances," the hearing officer is permitted to mitigate a disciplinary action if it exceeds the limits of reasonableness. *Rules for Conducting Grievance Hearings* § VI.B.1. The Rules for Conducting Grievance Hearings also provide a list of three *examples* of mitigating circumstances: lack of notice, inconsistent application, and improper motive. *Id.* This list is not exhaustive, but merely meant to describe some examples of potential mitigating circumstances.

disciplinary action.[19] Accordingly, the hearing decision must be remanded and the hearing reopened for further consideration of this potentially mitigating evidence.[20]

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the hearing officer must reopen the hearing and consider the grievant's evidence of mitigating circumstances and determine, based on this evidence, whether the discipline exceeded the limits of reasonableness and provide the analysis and rationale for his conclusions in his 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.[21] 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.[22] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[23]

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Claudia T. Farr
Director

[19] Further, even though the exhibit being offered by the grievant was not admitted into the record evidence, the hearing officer should have at a minimum placed a copy of the document in the hearing file to preserve the record for any future administrative review or other appeal. *Cf.* Va. Sup. Ct. R 5:10(a)(3) (each exhibit offered in evidence, whether admitted or not, shall be included in the record on appeal from the trial court).
[20] A hearing officer's authority to reopen a hearing is not without limitation. In particular, where a hearing officer has not previously excluded evidence in error, allowing parties to submit additional evidence on reconsideration would generally be inappropriate. Therefore, in this case, it would constitute an abuse of discretion for the hearing officer to accept additional evidence which he had not previously and erroneously excluded, either through instructions at the pre-hearing conference or at hearing. Notwithstanding the foregoing, it would be appropriate for the hearing officer to allow the agency to provide evidence to rebut any evidence previously excluded in error.
[21] *Grievance Procedure Manual* § 7.2(d).
[22] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[23] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).