Issue: Administrative Review of Hearing Officer's Decision in Case No. 8777/8860; Ruling Date: August 22, 2008; Ruling #2009-2093; Agency: Department of State Police; Outcome: Hearing decision affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of State Police
Ruling Number 2009-2093
August 22, 2008

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8777/8860. For the reasons set forth below, there is no reason to disturb the hearing officer's decision.

FACTS

This case concerns a Group III Written Notice with a demotion, disciplinary transfer, and a 10% disciplinary pay reduction for falsifying official State documents.[1] The hearing officer upheld the disciplinary action.[2] The grievant now requests administrative review from this Department.

In his administrative review request, the grievant challenges the hearing officer's determinations regarding the demotion and the hearing officer's finding that the grievant's permanent position was Special Agent with a temporary assignment as a Task Force Coordinator. The grievant argues that he held the position of Task Force Coordinator and, as such, a demotion to Senior Trooper was a "demotion of two positions." The grievant states that the "standard policy for the Department regarding disciplinary demotions is one position and the pay associated with that position." The grievant has submitted a document recently received from the Department of State Police (the agency) in support of this statement. The grievant additionally asserts that the hearing officer "violated EDR policy by not completing the hearing and forwarding his finding within the prescribed 35 calendar days."

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."[3] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department

[1] Decision of Hearing Officer, Case No. 8777/8860, July 21, 2008 ("Hearing Decision"), at 1.
[2] *Id.* at 6.
[3] Va. Code § 2.2-1001(2), (3), and (5).

does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[4]

Timeliness of the Hearing Decision

The grievant asserts that the hearing officer erred because the hearing decision was not issued within thirty-five days of the appointment of the hearing officer. According to the grievance procedure and rules established by this Department, absent just cause, hearing officers are to hold the hearing and issue a written decision within 35 calendar days of appointment.[5] Preferably, hearings take place and decisions are written within this 35-day timeframe. This Department recognizes, however, that circumstances may arise that impede the issuance of a timely decision, without constituting noncompliance with the grievance procedure so as to require a rehearing.[6] There is no indication of inappropriate or improper delay in this case.

New Evidence

The grievant has submitted for consideration on administrative review a document recently obtained from the agency that was not presented at hearing. Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence."[7] 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 trial ended.[8] 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.[9]

Here, the grievant has provided no information to support a contention that the document should be considered newly discovered evidence under this standard. Specifically, there is no evidence that the grievant diligently attempted to discover this evidence prior to the hearing. Indeed, it appears that the grievant submitted a request to the agency for the documentation *after* the hearing decision was issued. Consequently, there is no basis to re-open the hearing for

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[4] *See Grievance Procedure Manual* § 6.4(3).
[5] *Grievance Procedure Manual* § 5.1.
[6] *See, e.g.*, EDR Ruling No. 2008-1747; EDR Ruling No. 2006-1135.
[7] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd on reh'g*, 399 S.E.2d 29 (Va. Ct. App. 1990) (en banc) (explaining "newly discovered evidence" rule in state court adjudications); *see also* EDR Ruling No. 2007-1490 (explaining "newly discovered evidence" standard in context of grievance procedure).
[8] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).
[9] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

consideration of this document and it cannot be considered in this administrative review as it is not part of the hearing record.

Demotion

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 the 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] 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, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

The grievant challenges the hearing officer's determinations regarding the effect of holding the position of Task Force Coordinator. The hearing officer found that the grievant's permanent position was that of Special Agent with a temporary assignment as a Task Force Coordinator.[13] Some of the documents referenced by the grievant indicate that the position he held as Task Force Coordinator and his status in that position could be disputed issues of fact. In making this challenge, the grievant contests the hearing officer's findings regarding these disputed facts, the weight and credibility that the hearing officer accorded to the testimony of witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.[14] As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings. Based upon a review of the hearing record, substantial evidence supports the hearing officer's decision.[15] Although the grievant disagrees with the hearing officer's conclusions, this Department cannot find that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence and the material issues in the case.

Given the hearing officer's factual determination that the grievant's permanent position was Special Agent, the demotion to Senior Trooper was only a demotion of one position. Therefore, the grievant's argument regarding a "demotion of two positions" is not supported by the record. Furthermore, there is no evidence in the record indicating that it was the agency's

[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B).
[13] Hearing Decision at 3-5.
[14] *Rules for Conducting Grievance Hearings* § VI(B).
[15] *E.g.*, Hearing Recording at 1:14:50 – 1:14:55, 1:18:50 – 1:19:15.

practice to demote by only one position. This Department has no basis to disturb the hearing decision on these grounds.

APPEAL RIGHTS AND OTHER INFORMATION

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.[16] 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.[17] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[18]

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Claudia T. Farr
Director

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