

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8985;  
Ruling Date: February 6, 2009; Ruling #2009-2214; Agency: Department of State  
Police; Outcome: Hearing Decision Affirmed.



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**ADMINISTRATIVE REVIEW RULING OF DIRECTOR**

In the matter of the Department of State Police  
Ruling Number 2009-2214  
February 6, 2009

On January 14, 2009, this Department (EDR) received a letter from the grievant requesting administrative review of the hearing decision in Case Number 8985. As set forth below, there is no reason to disturb the hearing officer's decision.

FACTS

The hearing decision for Case Number 8985 was issued December 23, 2008.<sup>1</sup> On January 5, 2009, the grievant submitted to the hearing officer a request to reopen or reconsider the case based on additional evidence. The hearing officer addressed that matter in a Reconsideration Decision issued on January 8, 2009, which found that the additional evidence would not be considered as it was not "newly discovered."<sup>2</sup> The grievant now appears to raise similar arguments about the additional evidence to this Department. According to the grievant, these materials were requested from the agency in a meeting on December 23, 2008 and in a follow-up e-mail dated December 28, 2008. The grievant sought various records that were contained in the computer in his office prior to the hearing date. The grievant also states that he chose not to include these records in his exhibits for the hearing and was planning to ask the hearing officer to visit the office to "walk him through" the evidence.

DISCUSSION

In addition to the issues regarding the additional "newly discovered" documents, the grievant appears to have also challenged the evidence submitted by the agency and ultimate decision by the hearing officer. The Grievance Procedure Manual provides that "all requests for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision."<sup>3</sup> Further, the December 23, 2008 hearing decision advised the parties that any request they may file for administrative review to the hearing officer, the Department of Human Resource Management (DHRM) or EDR must

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<sup>1</sup> Decision of Hearing Officer, Case No. 8985, Dec. 23, 2008 ("Hearing Decision"), at 1.

<sup>2</sup> Reconsideration of Decision of Hearing Officer, Case No. 8985, Jan. 8, 2009 ("Reconsideration Decision"), at 2-3.

<sup>3</sup> *Grievance Procedure Manual* § 7.2(a).

be received by the reviewer within 15 calendar days of the date the decision was issued.<sup>4</sup> This Department received the grievant's request for administrative review on January 14, 2009, one week beyond the 15 calendar days following the December 23, 2008 decision. Furthermore, the grievant has presented no evidence of a "just cause" for the delay.<sup>5</sup> Accordingly, the grievant's request for administrative review of the hearing decision to this Department is untimely.

However, the grievant also appears to be arguing that the hearing officer erred in the Reconsideration Decision by not considering the additional evidence he seeks to offer after the hearing decision was issued. Although the grievant's letter was received by this Department outside of the 15 calendar day period following the original decision, this Department will address this portion of the grievant's request because the hearing officer's Reconsideration Decision raises an issue that could not have been challenged by the grievant until after the Reconsideration was issued.<sup>6</sup>

Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence."<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

Here, the grievant has provided no information to support a contention that the additional records should be considered newly discovered evidence under this standard. Specifically, the grievant was apparently aware of the evidence prior to the hearing. Indeed, it appears that the grievant intentionally chose not to submit this evidence at hearing and submitted a request to the agency for the documentation *after* the hearing. Consequently, there is no reason to

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<sup>4</sup> Hearing Decision at 4-5.

<sup>5</sup> "Just cause" is defined as a "reason sufficiently compelling to excuse not taking a required action in the grievance process." *Grievance Procedure Manual* § 9.

<sup>6</sup> See EDR Ruling No. 2007-1556; EDR Ruling No. 2007-1576.

<sup>7</sup> 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).

<sup>8</sup> See *Boryan v. United States*, 884 F.2d 767, 771 (4<sup>th</sup> Cir. 1989).

<sup>9</sup> *Id.* (emphasis added) (quoting *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11<sup>th</sup> Cir. 1987)).

disturb the hearing officer's determination that this evidence was not "newly discovered."<sup>10</sup> There is no basis to re-open the hearing for consideration of this additional evidence.

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.<sup>11</sup> 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.<sup>12</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>13</sup>

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Claudia T. Farr  
Director

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<sup>10</sup> Reconsideration Decision at 3.

<sup>11</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>12</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>13</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).