Issue: Administrative Review of Hearing Officer's Decision in Case No. 9176; Ruling Date: January 5, 2010; Ruling #2010-1448; Agency: Virginia Department of Transportation; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Transportation
Ruling Number 2010-2448
January 5, 2010

The Virginia Department of Transportation ("VDOT" or the "agency") has requested that this Department ("EDR") administratively review the hearing officer's decision in Case Number 9176. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision in this case.

FACTS

The facts of this case as set forth in the Hearing Decision in Case Number 9176 are as follows:

> Grievant filed a timely appeal from a Group III Written Notice with termination (effective date: 6/23/09). The date of offence was 6/15/09. The Written Notice indicated, under *Nature of Offense and Evidence*, "Violation of Policy 1.05, Alcohol and Other Drugs. On 6/15/2009, [Grievant's name] tested positive for alcohol by a breathalyzer test. Further, he tested positive for marijuana on the same date." Section IV of the Written Notice indicated Grievant had an active Group II issued on 1/10/08.
>
> Following the failure to resolve the matter at the third resolution step, this grievance was qualified for a hearing on August 3, 2009. A hearing was held on September 14, 2009.
>
> Grievant is an employee of Agency, Job Title: T.O. III. Grievant, at the time the Group III Written Notice was issued, had one active Group II Written Notice for failure to report to work during an emergency event for snow when directed by supervisors that crew would be working.[1]

The hearing officer reversed the agency action and reinstated the grievant based on the following reasons as set forth in hearing decision:

[1] Decision of Hearing Officer in the matter of Case No. 9176, issued September 21 at 1.

The unlawful or unauthorized use of alcohol or other drugs in the workplace is a violation of Policy No. 1.05. Agencies may promulgate policies that more strictly regulate alcohol and other drugs in the workplace provide such policies are consistent with Policy No. 1.05, Department of Human Resources Management Policies and Procedures Manual, *Alcohol and Other Drugs*. Agency has adopted Safety Policy and Procedure "Workforce Safety and Health Division, *Drug and Alcohol Testing Policy*" (SPP#4) and, it is set forth therein as follows:

> "This safety policy and procedure is established in accordance with 49 CFR 29, 40. 98, 382, 383, 390, 391, 392, 393, 395, 396, 397 399 of the United States Department of Transportation (USDOT), the Federal Motor Carrier Safety Administration (FMCSA) and Standards of Conduct Policy 1.60, and Alcohol and other Drugs Policy 1.05, issued by the Department of Human Resources Management DHRM)."

Agency instituted *SPP#4, Safety Policy and Procedure* for the detection and deterrence of drug and alcohol abuse and to maintain a safe, healthy, and efficient workplace. Employees are to ensure their ability to perform job duties is not impaired by alcohol or drugs, legal or illegal, while on the job.

Agency has adopted policy *SPP#4 - Drug and Alcohol Testing Policy - Safety Policy and Procedure.* This policy imposed requirements upon both the employee and the Agency concerning testing for drugs and for blood alcohol levels and imposes minimal requirements as to the level of the blood alcohol. Included in the policy requirements set forth in *SPP#4 - Drug and Alcohol Testing Policy - Safety Policy and Procedure are* the following requirements:

> § 6.2.2.1 *Drug and Alcohol Testing Policy-SPP#4-Safety Policy and Procedure* provides:
> "Testing of an individual's breath for the presence of alcohol using breath-testing devices shall only be performed by personnel trained to conduct such tests."
>
> § 6.2.2.2 *Drug and Alcohol Testing Policy-SPP#4-Safety Policy and Procedure* provides:
> "Testing of an individual's collected urine specimen shall check for the presence of the following drugs, except as noted, by a certified laboratory..."
>
> § 6.2.2.3 *Drug and Alcohol Testing Policy-SPP#4-Safety Policy and Procedure* provides:
> "Any laboratory performing specimen analysis for drugs shall be certified by the Department of Health and Human Services and shall meet the requirements set forth in 49 CFR Part 40.
>
> All positive tests shall be forwarded to the MRO for final review. A positive test result does not automatically identify an employee/applicant as having use drugs in violation of DOT regulations or this policy. It is the responsibility of the medical

> review officer to review, interpret and verify a test as positive or declare the test as negative."
>
> § 6.2.2.5 *Drug and Alcohol Testing Policy-SPP#4-Safety Policy and Procedure* provides:
> "A MRO shall review each report received from the laboratory to verify test results. The medical review officer shall meet the qualifications established in 49 CFR Part 40."
>
> § 6.2.4.1 *Drug and Alcohol Testing Policy-SPP#4-Safety Policy and Procedure* references employees having a blood alcohol level equal to or greater than .02.

Agency has not addressed these policy requirements and Agency has failed to establish these policy requirements were met by Agency in Grievant's blood alcohol testing and/or drug testing. The Agency has not submitted evidence of Grievant having a blood alcohol level equal to or greater than .02. It is alleged in the Written Notice that Grievant tested positive on 6/15/09 for alcohol by a breathalyzer test and Grievant indicated a breathalyzer test in his Grievance Form A. No other evidence was introduced concerning blood alcohol testing. The Agency has not submitted evidence of <u>any</u> blood alcohol level. The evidence did not address or indicate if the testing of Grievant's breath for the presence of alcohol using breath-testing devices was performed by a person trained to conduct such tests.

As to Grievant's drug testing, no documentary evidence or testimony concerning the drug test itself was admitted. No evidence was presented as to the testing indicating whether a laboratory performed a specimen analysis for drugs or whether drug testing involved any specimen at all. There was no evidence of whether the laboratory, if a laboratory did perform an analysis for drugs, was certified. No evidence was presented whether Grievant's test was forwarded to an MRO for final review. Policy charges the Medical Review Officer with the duty to review, interpret and verify a test as positive or declare the test as negative.

<u>Evidence and the burden</u>

Section II. of the *Rules for Conducting Grievance Hearings* charges the Hearing Officer with conducting the hearing in an equitable manner. Section V. of the *Rules for Conducting Grievance Hearings* provides the Hearing Officer is to deliberate on the evidence <u>admitted at the hearing</u> in arriving at a decision.

"The responsibility of the hearing is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency's discipline was consistent with

> law (e.g. free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense) and, finally, (iv) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances."
>
> In disciplinary actions, the agency must present its evidence first and must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances.
>
> In arriving at a decision the Hearing Officer takes into consideration only the evidence that was presented at hearing. Witness testimony and documents admitted were taken into consideration. The Hearing Officer makes no assumptions. As above discussed, policy mandated that certain standards, requirements, and procedures be met by Agency in alcohol and drug testing. Agency did not address these matters in their evidence. Agency has not established that alcohol and drug testing policy was followed and that the requirements imposed by policy were met.
>
> Grievant did not present witnesses at hearing or testify at the hearing. Grievant only presented as evidence, one letter from a Certified Substance Abuse Counselor.
>
> The burden of proof is not Grievant's. The burden of proof belongs to the Agency and burden of proof is a material consideration in this cause. Agency has failed to prove, by a preponderance of the evidence, that policy was properly followed. Agency has failed to prove, by a preponderance of the evidence, that the action taken in issuing Grievant a Group III Written Notice and termination was warranted and appropriate under the circumstance.
>
> Agency has established Grievant had one active Group II at the date of the offense alleged in the Group III Written Notice. Under the *Standards of Conduct*, Written Notices which are active may be utilized in conjunction with other disciplinary actions as a basis for termination. However, in light of the decision in this cause, termination on account of accumulated discipline is not warranted or appropriate.[2]

The agency asked the hearing officer to reconsider his decision and in an October 21, 2009 reconsideration decision, the hearing officer affirmed his decision.[3]

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 …

[2] *Id.* at 3-6.
[3] Reconsideration Decision of Hearing Officer in Case No. 9176, issued October 21, 2009 ("Reconsideration Decision").

on all matters related to procedural compliance with the grievance procedure."[4] 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.[5]

Adding Issues to the Grievance/Burden of Proof

The agency raises several objections to the decision. First, the agency asserts that the grievant only raised three issues in his grievance: (1) he did not believe that his blood alcohol level had been measured; (2) he felt that he should have been evaluated by a substance abuse professional; and (3) he felt that he should not have been terminated as this was his first positive drug test. The agency accordingly concludes that because the grievant never disputed: (1) the qualification of the personnel who administered the breathalyzer test, (2) the certification of the laboratory where the tests were conducted, (3) the review by the Medical Review Officer (MRO), or (4) the results of the breathalyzer and urinalysis tests, these are new "issues" outside the scope of the grievance.

As an initial point, we cannot conclude that these are new issues added to the grievance. The issues raised in this grievance were as follows: "I believe that I was wrongfully dismissed. Policy and procedures were not properly followed by management." The facts of the grievance read, in part, that: "According to Section 6.2.4.1 of the Safety Policy and Procedures my blood alcohol level had to be .02 or greater. My blood alcohol level was never measured." Thus, a reasonable reading of this grievance is that the grievant has challenged the heart of the charge against him—the propriety and results of drug/alcohol testing that led to his termination. Moreover, with all disciplinary actions the "*Rules*" state that:

> The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense) and, finally, (iv) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.[6]

Thus, in a drug/alcohol-test based case such as this, it is axiomatic that the hearing officer must always determine whether the agency has proven by a preponderance of evidence that grievant actually failed the test. As the hearing decision notes, this requires that the hearing officer make no assumptions regarding alleged facts. The *Rules* require that he examine the "facts de novo (afresh and independently, as if no determinations had yet been made)." Moreover, the agency

[4] Va. Code § 2.2-1001(2), (3), and (5).
[5] *Grievance Procedure Manual* § 6.4.
[6] *Rules for Conducting Grievance Hearings* ("Rules") at VI(B).

must present evidence in support of the charges. Also, as the decision reflects and review of the hearing record confirms, policy mandated that certain standards, requirements, and procedures be met by the agency in alcohol and drug testing but the agency did not address these matters in their evidence. A review of a record appears to confirm the hearing officer's conclusion that the agency has not submitted evidence of Grievant having a blood alcohol level equal to or greater than .02.[7] Therefore, we find no error with the hearing officer's findings as to the agency's failure to meet its burden to show that alcohol and drug testing policy was followed or that Grievant failed his alcohol or drug tests.

The agency appears to contend in its request for administrative review that the grievant stipulated that he was not contesting the test results. The grievance record contains no evidence of any pre-hearing stipulation of fact as to the drug test. The document that the agency asserts reflects an alleged stipulation appears to be notes taken by someone who attended the second step grievance meeting. That person indicated in her notes that the grievant stated that he was not contesting the results of the tests. However, when viewed in its entirety the statement does not appear to be an acceptance of the tests results, and more importantly, it is not a joint stipulation of fact presented to the hearing officer.[8]

New Evidence

The agency sought to introduce evidence relating to the drug test after the hearing had concluded. The hearing officer denied the evidence. Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence."[9] 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.[10] The fact that a party discovered the evidence after the trial does not necessarily make it "newly discovered." Rather, the party claiming evidence was "newly discovered" must show that

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[7] At the conclusion of the closing statements the hearing officer said:
"Let's get into it. Where's the positive test?" The agency representative replied: "I don't have a copy of it." The hearing officer replied: "How do I know he had a positive test? (No response from the agency representative.) Hearing officer: Okay. Seriously, I'm serious. Agency representative: I understand—I do. Hearing officer: "Okay. Thank you very much. We're concluded." Hearing Tape 1, Side A, at 504-509.

[8] The purported stipulation is found under a separate bullet in the "Grievance Meeting Minutes" which reads:

> [The grievant] said he had not smoked marijuana in over 10 years and he felt that the positive test *was suspicious.*
>
> - I asked [the grievant] if he was contesting the results of the test
> - He said that no, he was not contesting the results
> - I asked [the grievant] if he has smoked marijuana recently.
> - He hesitated before replying then stated that he had not smoked in a long time and didn't know how it could still be showing up.

(Emphasis added).

[9] *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).

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

> (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.[11]

Here, the evidence that the agency sought to introduce was certainly not newly discovered. To the contrary, it existed and was available well before the hearing. Indeed, it would have provided the primary support for the discipline issued against the grievant. Moreover, the agency alluded to this evidence at hearing. Thus, it is neither new nor newly discovered. Consequently, there is no basis to re-open the hearing for consideration of this evidence.

In sum, because the record evidence supports the findings of the hearing officer, this Department has no basis to disturb the decision.

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 and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.[12] 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.[13] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[14]

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Claudia T. Farr
Director

[11] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[12] *Grievance Procedure Manual* § 7.2(d).
[13] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[14] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).