Issue: Administrative Review of Hearing Officer's Decision in Case No. 9198; Ruling Date: December 10, 2009; Ruling #2010-2467; Agency: Virginia Department of Transportation; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of the Department of Transportation
Ruling Number 2010-2467
December 10, 2009

The grievant has requested an administrative review by this Department of the hearing officer's decision in Case No. 9198. For the reasons set forth, the grounds cited by the grievant do not constitute a basis for overturning the hearing decision.

FACTS

On May 8, 2009, the Department of Transportation issued the grievant a Group I Written Notice of disciplinary action.[1] The grievant timely initiated a grievance challenging the disciplinary action, and a hearing was held on the grievance on November 3, 2009.[2] On November 9, 2009, the hearing officer issued a decision upholding the Group I Written Notice.[3] The grievant has requested administrative review by this Department and by the Department of Human Resource Management.

DISCUSSION

The grievant asserts that the hearing officer "could not render an accurate decision due to a redacted e-mail attached to my original grievance." The grievant states that when he "submitted [his] grievance, [he] thought the redacted e-mail was sufficient evidence without causing a further burden to [Human Resources]." After receiving the hearing decision, which suggests that the redactions affected the hearing officer's ability to determine which manager decided the level of disciplinary action taken, the grievant apparently obtained an unredacted copy of the e-mail, which he submitted with his request to this Department for administrative review.

[1] Decision of the Hearing Officer, Case No. 9198, November 9, 2009 ("Hearing Decision") at 1.
[2] *Id.*
[3] *Id.* at 1, 6.

Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence."[4] 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.[5] 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.[6]

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 basis to re-open or remand the hearing for consideration of this additional evidence.[7]

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.[8] 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.[9] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[10]

Claudia T. Farr
Director

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[4] *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).

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

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

[7] The grievant also appears to argue that the hearing officer erred by not identifying the appearance of seven witnesses at the hearing. This omission, even if error, would not constitute a basis for reversing the hearing decision.

[8] *Grievance Procedure Manual* § 7.2(d).

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

[10] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).