Issue: Administrative Review of Hearing Officer's Second Reconsideration Decision in Case No. 9115; Ruling #2010-2509; Ruling Date: March 4, 2010; Agency: Norfolk State University; Outcome: Remanded to Hearing Officer.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Norfolk State University
Ruling No. 2010-2509
March 4, 2010

The grievant has requested that this Department administratively review the hearing officer's second reconsideration decision in Case Number 9115.

FACTS

The facts of this case as set forth in the hearing decision in Case Number 9115 are as follows. [1]

> Norfolk State University (the "agency") employs Grievant as an Administrative Office Specialist II. The purpose of his position is:
>
> > Serves as data entry operator for the Admissions Office. Accurately enters data from numerous types of source documents including but not limited to the non-international and non-degree applicants. Provides professional customer service to all students, prospective students, parents, faculty, staff and the general public via telephone, e-mail, walk-ins, and counter.
>
> Some of Grievant's Core Responsibilities include:
>
> > Process all L-Z non-international transcripts. ***
> >
> > Enter daily, all incoming transcripts, test scores, recommendations and comments into [the Student Information Systems]. ***
> >
> > Scan all incomplete, admitted, and partial applicant transcripts, recommendations, fee waivers, test scores, in all of the documents related to admissions split and match documents with proper folder. ***

[1] Footnotes from the original decision have been omitted.

On March 28, 2007, Grievant received a written counseling from the Supervisor "in an attempt to resolve your input of applications and transcript entry in a timelier manner."

On December 20, 2007, Grievant received a written counseling from the Supervisor stating, in part:

> After close observation of the applications for data entry process, it is clear that you have not met your expected level of completion for entering the applications into the Datatel SIS System. This counseling is intended to correct a deficiency. It is expected that upon receipt of the applications each day, that you complete the necessary data entry in a timely manner.

On January 18, 2008, the Acting Director sent Grievant a counseling memorandum stating, in part:

> During your recent meeting with our Associate Vice President …, you cited that due to equipment concerns you were unable to produce the expected results. Since this occasion, your scanner has been replaced by a model that would allow you to be more productive in processing and scanning documents.
>
> As a result of this counseling session, you will have until January 31, 2008 to complete the entire backlog of applications and supporting documents. You will be relieved of counter and phone duties during this period.

Norfolk State University has a rolling admissions process. Once a student's application is completed and the appropriate information received by the University, the University may admit or deny the student.

On October 6, 2008, the Agency received an official transcript from a high school for the Student. A temporary employee stamped the date on the document. Grievant wrote an identification number on the document. He did not enter receipt of the transcript into the Datatel Student Information System. Because Grievant did not enter receipt of the transcript into the information system, the student's application for admission appeared incomplete and not ready for a determination of the student's admissions to the University.

On November 6, 2008, the Student's transcript was scanned and made a part of the Keyfile. The original transcript, however, remained in Grievant's manual files.

The Student's mother called Grievant regarding the status of her son's application. Grievant told her he had not received the high school transcript. The high school sent a second transcript that was received on December 9, 2008. The Receptionist stamped the date December 9, 2008 on the transcript. Grievant wrote an identification number on that second transcript. He did not enter receipt of that transcript into the Datatel Student Information System. The application was not processed because the Agency's records did not show the application was ready to be processed.

On January 28, 2009, the Student's mother called the President's office to complain about Grievant. She said she wanted all of the money she had paid to the Agency to be returned to her because she did not want her son to attend a university that allowed people like Grievant to work for it. She explained that her son's transcript along with SAT scores and recommendations were sent to the Agency for [sic] times, each time she was told by Grievant that the Agency had not received them. The Assistant Director for Admissions contacted Grievant and asked if he had received any transcripts for the Student. Grievant said he had not received them. The Assistant Director examined the documents that had been scanned into the Keyfile. The Student's transcript appeared in the Keyfile along with all supporting documents. The Assistant Director looked to Grievant's manual files and found the transcript received on October 6, 2008. She also found the transcript received on December 9, 2008.[2]

Based on the above "Findings of Fact," the hearing officer reached the following "Conclusions of Policy":

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Unsatisfactory work performance as a Group I offense. Failure to follow a supervisor's instructions is a Group II offense. On December 20, 2007, Grievant was instructed by a supervisor that "upon receipt of the applications each day, that you complete the necessary data entry in a timely manner". Transcripts are a part of a student's application for admission. Grievant received the transcript stamped October 6, 2008 and the transcript stamped December 9, 2008 but he failed to make the necessary data entry to record those transcripts in the Datatel SIS. His failure to do so was contrary to a supervisor's instructions thereby justifying the issuance of a Group II Written Notice for failure to follow a supervisor's instructions. Upon the issuance of a Group II Written Notice, the Agency may

[2] Decision of Hearing Officer in Case 9115 issued, July 7, 2009 ("Hearing Decision"), pp. 2-4.

suspend an employee for up to 10 workdays. In this case, Grievant was suspended for five work days and, thus, his suspension must be upheld.

Grievant argued that each time the Student's mother called him, he searched his files and could not find the transcript. He indicated that he had given the transcript of Mr. G so that the GPA could be calculated. He argued that some of the items on his desk had been removed and were put back at a later time. This argument fails. If the Hearing Officer assumes for the sake of argument that Grievant's assertions are true, they show how important it was for Grievant to immediately enter his receipt of the transcript into the computer system. Had he done so, whether someone removed the transcript from his desk would become irrelevant.

Grievant argued that his health concerns may have affected his ability to timely process the Student's transcript. The evidence showed, however, Grievant's illness was many months prior to October 2008 and it did not affect his work performance in October 2008 or December 2008.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…." Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued that the Agency inconsistently disciplined its employees. He contends that other employees made mistakes but were not disciplined. The evidence is insufficient for the Hearing Officer to conclude that the Agency had inconsistently disciplined its employees. The details of the alleged errors made by other employees were not explained. Several of Grievant's coworkers were not classified employees and thus not subject to receiving Written Notices. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity; (2) suffered a materially adverse action; and (3) a causal link exists between the

> adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.
>
> The nature of Grievant's protective activity is unclear. Grievant suffered a materially adverse action because he received a Written Notice. No credible evidence was presented to suggest that the Written Notice was issued as a form of retaliation. The Agency did not discipline Grievant as a pretext for retaliation.[3]

Based on these "Conclusions of Policy," the hearing officer upheld the Group Notice II and suspension.[4]

The grievant requested an administrative review from this Department on several bases. With few exceptions, this Department did not disturb the hearing officer's holdings. We, however, ordered the hearing officer to consider further his decision to reject potential evidence that might show inconsistencies in how the agency disciplined other employees. At the outset of the hearing, the grievant had raised a concern regarding an apparent request for documents relating to complaints lodged against two supervisors.[5] The agency had apparently refused to provide him with the documents, asserting that such documents were irrelevant.[6] The hearing officer agreed that the documents were irrelevant. He drew a distinction between the inconsistent application of disciplinary actions -- which he appeared to consider only as formal discipline (e.g., Written Notices) -- and mere complaints, which he deemed irrelevant.[7] As noted above, the hearing officer held that:

> Grievant argued that the Agency inconsistently disciplined its employees. He contends that other employees made mistakes but were not disciplined. The evidence is insufficient for the Hearing Officer to conclude that the Agency had inconsistently disciplined its employees. The details of the alleged errors made by other employees were not explained. Several of Grievant's coworkers were not classified employees and thus not subject to receiving Written Notices. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.[8]

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[3] Hearing Decision at 4-6.
[4] *Id*. at 6.
[5] Hearing at 2:00-6:00.
[6] *Id.*
[7] *Id.*
[8] Hearing Decision at 5-6.

EDR's Administrative Review Ruling No. 2010-2376 held that "without further explanation, a hearing officer cannot conclude that an agency's treatment of non-classified employees is wholly irrelevant."[9] In addition, we held that:

> [T]he hearing officer erred by concluding that only actual discipline issued to other employees is relevant. To the contrary, complaints of misconduct and, more to the point, all documents (or the lack of documents) relating to how an agency responded to complaints can be relevant. For example, if one employee receives a Written Notice for a founded complaint of misconduct and a second employee receives only a counseling memorandum, or nothing at all, for the same confirmed misconduct, a hearing officer may consider the disparity in the discipline as a potential mitigating circumstance. Even documents pertaining to unfounded complaints could be relevant. Accordingly, the hearing officer is ordered to instruct the agency to produce documents pertaining to the two individuals in question that relate to any alleged acts of failure to follow their supervisor's instructions. To the extent that such documents exist, the hearing officer shall consider the weight to be assigned to them in his reconsidered decision, and whether inconsistent discipline, if any, should be viewed as a mitigating circumstance in this case.[10]

In Response to EDR Ruling 2010-2376, the hearing officer issued his November 23, 2009, Reconsideration Decision in which he held:

> [T]he Agency is **ordered** to produce the documents in accordance with the EDR Director's Ruling. The Agency is **ordered** to redact personal identifying information from those documents. The Agency should produce those documents to the Hearing Officer (with copies to the Grievant) within 30 calendar days of the date of this decision and order.[11]

On December 30, 2009, the hearing officer issued his Second Reconsideration Decision in which he held:

> The Hearing Officer ordered the Agency to produce documents in accordance with the EDR Director's Ruling No. 2010-2376. The Agency, by counsel, informed the Hearing Officer that a review of the personnel files of Mr. S and Ms. J showed that neither of them had been counseled or disciplined for failure to follow a supervisor's instructions. Grievant was disciplined for failure to follow a supervisor's instructions. There is no evidence upon which to conclude that Mr. S and Mr. [sic] J failed to follow a supervisor's instructions and then were not disciplined for failing to do so. There is no basis for the Hearing Officer to conclude that Grievant was similarly situated to either Mr. S or Ms. J and then

[9] EDR Ruling No. 2010-2376 at 8.
[10] *Id.* (footnotes omitted).
[11] Reconsideration Decision at 2.

> treated differently from them by the Agency. There is no basis to mitigate the disciplinary action against Grievant.[12]

In a footnote to the above quoted passage the hearing officer held that:

> Mr. J [sic] was issued a counseling memorandum for failing to follow a supervisor's instructions. This counseling was issued after the Hearing Officer's reconsideration order. If the Hearing Officer assumes for the sake of argument that such counseling is relevant, it is consistent with the disciplinary pattern the Agency demonstrated with Grievant. Grievant was counseled several times before disciplinary action was taken. Mr. J [sic] had no prior counseling before he was counseled on November 25, 2009.[13]

DISCUSSION

In his most recent request for administrative review, the grievant claims that the November 25, 2009 counseling letter given to Mr. S, referenced in the Second Reconsideration Decision footnote above, was issued merely to "appease" the hearing officer. In addition, the grievant has attached several news articles that he contends relate to his case. Both the counseling letter to Mr. S and the news articles are discussed below in the *New Evidence* section. The grievant also contends that the hearing officer did not properly consider complaints filed against Mr. S and Ms. J., which is discussed below in the *Consideration of Complaints* section.

New Evidence

In support of his case, the grievant has proffered two news articles that were published after the hearing. He also asserts that a counseling memorandum issued to Mr. S. after the hearing supports his case.

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[14] 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.[15] 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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[12] Second Reconsideration Decision at 1.
[13] *Id*. By "Mr. J" a close reading of the Second Reconsideration Decision reveals that the hearing officer intended to instead reference "Mr. S" in this footnote.
[14] *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).
[15] *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.[16]

Here, the evidence that the grievant seeks to have considered is not "newly discovered," it is new. "Newly discovered evidence" as defined under case law does not include events that occurred after the trial or hearing.[17] The evidence cited by the grievant was created after the hearing ended. The hearing occurred on July 6, 2009. The counseling memorandum cited by the grievant that was issued to Mr. S was issued on November 25, 2009. The two newspaper articles referenced by grievant were published on December 12, 2009, and January 5, 2010. Thus, under the rules set forth above, this evidence would not be considered newly discovered evidence warranting a reopening of the hearing.

Consideration of Complaints

The grievant also contends that the "hearing officer did not go back far enough in the customer complaint logs." The hearing officer likely did not "go back" into the customer complaint logs as it does not appear that any such logs were ever produced, nor does it appear that the agency informed the hearing officer or the grievant that customer complaint logs did not exist. The hearing officer ordered the agency to produce documents in accordance with the EDR Director's Ruling. In response, the agency's counsel merely informed the hearing officer that a review of the personnel files showed that neither of the two supervisors had been counseled or disciplined for failure to follow a supervisor's instructions.[18]

Documents contained in the personnel files of Mr. S and Ms. J might be relevant but the personnel files of these two employees are not the only potential source of responsive documents. In EDR Ruling No. 2010-2376 we held that:

> [C]omplaints of misconduct and, more to the point, all documents (or the lack of documents) relating to how an agency responded to complaints can be relevant. For example, if one employee receives a Written Notice for a founded complaint of misconduct and a second employee receives only a counseling memorandum,

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

[17] *See* Lowe v. Mercedes Benz of N. Am., Inc., Nos. 95-3038, 96-1501, 1996 U.S. App. LEXIS 31215 at *8 (4th Cir. Dec. 5, 1996)("Events occurring after trial are not 'newly discovered evidence' within the meaning of 60(b)(2).")(unpublished opinion). citing to 11 C. Wright & A. Miller, Federal Practice and Procedure § 2859 (2d ed. 1995) ("Under both rules [59 and 60(b)(2)], the evidence must have been in existence at the time of the trial."); Boyd v. Bulala, 672 F. Supp. 915, 922 (W.D. Va. 1987) (same), rev'd in part on other grounds, 877 F.2d 1191 (4th Cir. 1989).

[18] A review of the November 6, 2008 counseling memorandum issued by the agency to Ms. J appears to indicate that she was counseled after her subordinates failed to timely open the Admissions Office on "at least three separate occasions" during the semester.

> or nothing at all, for the same confirmed misconduct, a hearing officer may consider the disparity in the discipline as a potential mitigating circumstance.[19]

In his original request for documents, the grievant asked for "'any and all files, records, e-mails *and/or complaints* and any disciplinary action that have been filed in the Customer Care department or Enrollment Management' on Mr. S and Ms. J."[20] The agency does not appear to have stated whether or not any such complaints exist outside of the personnel files for Mr. S. and Ms. J. To the extent that any such complaints exist, they must be provided to the grievant and hearing officer within 5 workdays of receipt of this ruling. If such complaints do not exist, the agency shall inform the grievant and hearing officer. To the extent that such complaints exist and are relevant,[21] the hearing officer shall consider them as evidence that may support mitigation. The hearing officer may allow the parties to submit briefs in conjunction with the submission and receipt of any such documents and may reopen the hearing if necessary.

APPEAL RIGHTS AND OTHER INFORMATION

This case is remanded to the hearing officer for further consideration as set forth above. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[22] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[23]

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.[24] 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.[25] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[26]

Claudia T. Farr
Director

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[19] EDR Ruling No. 2010-2376 at 8. *See also* Fearon v. Dept. of Labor 99 M.S.P.R. 428, 434; 2005 MSPB LEXIS 4785, 12 (2005) (evidence regarding similarly-situated employees who received no discipline after committing similar misconduct would also support the appellant's disparate penalty claim).
[20] *See* July 1, 2009, correspondence from agency counsel to the hearing officer (emphasis added).
[21] As we noted in EDR Ruling 2010-2376, any such complaints would have to be of the same character as the charge against the grievant. EDR Ruling 2010-2376 at 8, note 19.
[22] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[23] *See Grievance Procedure Manual* § 7.2(a).
[24] *Grievance Procedure Manual* § 7.2(d).
[25] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[26] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).