Issue: Administrative Review of Hearing Officer's Decision in Case No. 9240; Ruling Date: May 27, 2010; Ruling #2010-2582; Agency: Department of Corrections; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2010-2582
May 27, 2010

The grievant has requested that this Department administratively review the hearing decision in Case Number 9240. The grievant had challenged a Group II Written Notice and a Group III Notice, both issued for insubordination.[1] The discipline included a five day suspension and a disciplinary transfer with a nine percent pay reduction.[2] The hearing officer upheld the Group II Notice but reduced the Group III to a Group II.[3] He nevertheless upheld the suspension and disciplinary transfer with pay reduction, observing that the sustained discipline could have resulted in the grievant's termination but the agency had chosen to mitigate.[4] For the reasons set forth below, we will not disturb the decision.

FACTS OF THE CASE

The facts and related conclusions of this case, as set forth in the hearing decision in Case Number 9240, are as follows.

> The Agency employed Grievant, a woman, as a counselor senior and director of an agency program. The Grievant's former supervisor, a woman, served as her advocate and character witness in this grievance hearing. Shortly after the former supervisor moved to a different agency location, in April 2009, a new supervisor, a male, took the position directly supervising the Grievant. The new supervisor testified that he had difficulty with the Grievant accepting his supervision, leading up to two instances of insubordination that occurred on June 8, 2009, and June 9, 2009, respectively, forming the bases for the two Group Notices. Aside from these two Group Notices, the Grievant has no other active Group Notices. The Grievant's advocate and former supervisor testified that the Grievant was an exceptionally good employee.
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> The June 17, 2009, written notices are as follows:

[1] Decision of the Hearing Officer in Case Number 9240 issued March 10, 2010 ("Hearing Decision") at 1. (The hearing decision was erroneously dated March 10, 2009.) Footnotes from the original decision have been omitted.
[2] *Id.*
[3] Hearing Decision at 9.
[4] *Id.*

- 06/08/09 offense date. Group II. "Insubordination. By your own admission in a due process hearing, you knowingly and willfully refused to comply with your Supervisor's instruction on June 08, 2009. Your refusal to comply is unacceptable as a supervisor and is insubordination." Offense code 56 is noted, "Insubordination." Agency Exh. 7.
- 06/09/09 offense date. Group III. "Insubordination, repeated offense. On June 09, 2009, you again refused to obey another instruction from your Supervisor. This behavior is insubordinate." Offense code 56 is noted, "Insubordination." Agency Exh. 8

The facility's warden sent the Grievant a memo scheduling a pre-disciplinary conference that indicated he was considering issuing two Group II Written Notices for the two instances of insubordination. The memo stated:

> Please report to my office [four days later] for (two) 2 disciplinary hearings for "insubordination", which are Group II offenses. As you know, we discussed these matters [two days earlier] during a conference that we had.
>
> You are encouraged to bring any documentation that you feel will help you to support your position in this meeting.

Agency Exh. 1, item 13. At this due process meeting, the warden indicated that he would instead issue a Group II and a Group III Written Notice. The warden justified the Group III as the appropriate consequence of repeating the misconduct of insubordination. The Grievant asserts that the Group III level offense is not only inappropriate but also contrary to notice to her. Grievant also contends that the Agency's discipline against her is improperly motivated by discrimination, retaliation, harassment, and intimidation.

The Grievant also asserts that the Group Notices are too vague in their descriptions to be valid under the grievance procedural requirements.

Each side identified one of the witnesses, an office services assistant (OSA) who witnessed the act of insubordination on June 8, 2009—the claimant's refusal to complete audit files as requested by her supervisor. This witness corroborated the supervisor's version of the event and she did not testify to any actions by the supervisor that could be described as discriminatory, retaliatory, harassing, or intimidating. While the Grievant testified that she considered the supervisor to be discriminatory, retaliatory, harassing, and intimidating, in his demeanor, the Grievant did not produce any corroborating evidence or testimony. While such evidence might be difficult to produce, the one witness who was in a position to provide corroboration, the OSA, did not testify to any suggestion of improper conduct by the supervisor.

In addition to the OSA, the warden, assistant warden, the Grievant's direct supervisor, and a corrections officer also testified for the Agency. The Grievant testified on her own behalf, and voiced strong concerns about the effectiveness and motivation of her direct supervisor. The Grievant's advocate and former supervisor testified to the Grievant's work performance as exceeding expectations during her tenure supervising her.

The Agency's witnesses testified that the Grievant was fully aware of the nature of the charges of insubordination, that the instances were specifically discussed with the Grievant, and that she was given detailed written memos describing the conduct. Agency Exh. 7 and 8. On June 8, 2009, the Grievant, after multiple requests, refused to complete audit folders her supervisor asked her to complete. On June 9, 2009, the Grievant's supervisor called her for a brief meeting at his office at 2:30 p.m. However, the Grievant left for the day at about 3:30 p.m. for a medical appointment without meeting her supervisor.

The Grievant admits the essential facts of the alleged insubordination, but she submits that her conduct should be excused because of her other work duties and the hostile work environment created by her supervisor's discrimination, retaliation, harassment and intimidation. Other than an instance in which the Grievant describes her supervisor as having a clinched fist, the Grievant complains that her supervisor verbally abused, harassed, and bullied her in private. The Grievant complains of her supervisor sexually harassing other female employees, lying about her, and insisting that the Grievant be submissive to him. The Grievant further testified that she did not understand what "submissive" meant in an employment situation. The Grievant produced typed journal entries she kept that details some alleged antics of her supervisor involving other staff.

The supervisor denied the Grievant's contentions of misconduct. No other testifying witnesses corroborated the Grievant's complaints and allegations against her supervisor. The Grievant's journal entries are not subject to cross-examination and cannot be accorded weight sufficient to satisfy her burden of proof of a hostile working environment of discrimination, retaliation, harassment, and intimidation.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458

(2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

Based on the manner, tone, and demeanor of the witnesses, I find that the Grievant admitted the conduct forming the basis of the two Group Notices. Accordingly, I find that the Grievant committed the misconduct charged. The next question, then, is whether the misconduct is properly characterized as Group II and Group III offenses.

I find merit to the Grievant's argument that a Group III Written Notice was not justified under the circumstances. The notice to the Grievant specifically referenced two Group II Written Notices, and issuance of a Group III is a significant departure from the notice. Aside from the notice factor, in accord with DOC Operating Procedure 135.1, the Agency has not shown that the insubordination on June 9, 2009, presented any unique impact on the agency or substantially exceeded agency norms. Further, the Agency has not shown that the insubordination on June 9, 2009, was of the most serious or severe nature. Thus, I find that the June 9, 2009, offense was inappropriately elevated to a Group III offense.

As for the Grievant's complaint that the Written Notices did not put her on sufficient notice, the hearing officer recognizes that procedural due process is inextricably intertwined with the grievance procedure. The *Rules for Conducting Grievance Hearings* state:

> In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.

In support of this principal, the *Rules* cite *O'Keefe v. USPS*, 318 F.3d 1310 (Fed. Cir. 2002). In *O'Keefe*, the agency removed an employee with the general charge of "improper conduct/ fraudulent use of personal identifiers." The Court reversed the agency's action because the facts and reasons for the removal were not written in the Notice of Proposed Removal given to the employee.

Agencies are expected to issue Written Notices that properly place employees on notice of the supporting facts and reasons for the agency's disciplinary actions. To satisfy the requirements of procedural due process, an agency is required, at a minimum, to give the employee (1) notice of the charges against him or her, and (2) a meaningful opportunity to respond. It is incumbent on the agency to specify the employee's conduct or actions that are being disciplined. Whether an agency has met this standard is often a matter of degree.

Under the *Rules for Conducting Grievance Hearings,* the first issue in every disciplinary grievance is:

Whether Grievant engaged in the behavior described in the Written Notice?

If the standard set forth in *O'Keefe* is to be applied meaningfully, careful review of the Written Notice is necessary when compared to the facts shown. Here, the Written Notice is for insubordination, and the evidence shows that the Grievant had direct and specific information as to the nature of the alleged offense, including written notification. The agency's Written Notice and other related documentation sufficiently detailed the nature of the offense. Accordingly, the Agency has met its burden of proving that Grievant committed two distinct acts of insubordination.

However, the Grievant advances her defense based on extenuating circumstances of her supervisor's alleged discrimination, harassment, intimidation, and general hostile work environment. The Grievant seeks rescission or reduction of the discipline on the ground that the discipline is essentially retaliatory.

An agency may not retaliate against its employees. To establish retaliation, a grievant must show she (1) engaged in a protected activity, *see Va. Code § 2.2-3004(A)(v) and (vi)*; (2) suffered a materially adverse action, *see EDR Ruling Nos. 2005-1064, 2006-1169* and *2006*-1283; 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 raises a sufficient question as to whether 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. *See EDR Ruling No. 2007-1530,* page 5 (Feb. 2, 2007) and *EDR Ruling No. 2007-1561* and *1587*, page 5 (June 25, 2007).

The Grievant has alleged retaliation but has failed to carry her burden of proof in this regard. Concerning both Written Notices, the Agency has articulated

and proven by evidence, and by the Grievant's admission, legitimate, non-retaliatory reasons for its discipline. The Agency has also clearly justified issuance of the two Group Notices, although the Group III is modified to Group II.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to the Standards of Conduct, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

Mitigation. The Grievant argues, reasonably, that the Agency could have exercised discipline along the continuum short of five days suspension and disciplinary transfer with 9% pay reduction. The Grievant actually desired a transfer from her previous position as a supervisor to a counselor, and she requested not to be supervised by the same supervisor. Although with the reduction of the Group III to a Group II Written Notice, the Grievant still has two Group II Written Notices. Under applicable policy, a second Group II Written Notice should normally result in removal. The Agency's warden testified that he recognized the Grievant's contributions to the Agency and potential value to the Agency; that the Grievant enjoyed a good work record; and that the Agency could continue to benefit from the Grievant's contributions in another setting. After weighing the totality of the circumstances, he concluded that termination, while justifiable by either two Group II Notices or the Group II and Group III Notices, was too severe.

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…." Va. Code § 2.2-3005. 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 contends the disciplinary action should be mitigated further. Grievant contends the hostile work environment she described, if not justifying sufficient excuse for the insubordination or the improper motivation for her discipline, should provide enough consideration to mandate a lesser sanction. However, the Grievant failed to show, by a preponderance of the evidence, that the Agency or her supervisor created a hostile work environment, discriminated against her, or retaliated against her. Without such finding, the hearing officer is left only to consider whether the Agency considered mitigating factors in a reasonable fashion. Otherwise satisfactory work performance, alone, is insufficient for a hearing officer to overrule an agency's mitigation determination. EDR Ruling No. 2007-1518 (October 27, 2009) held:

> Both length of service and otherwise satisfactory work performance are grounds for mitigation by agency management under the Standards of Conduct. However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become.

> The Agency argues that its action was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. In light of the standard set forth in the *Rules*, the Hearing Officer finds that the Agency, in the face of two Group II Written Notices, has not exceeded the bounds of reasonableness in the discipline levied. Accordingly, I find that no further mitigating circumstances exist to reduce the disciplinary action.[5]

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."[6] 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.[7]

Due Process and Notice

The grievant asserts that "written notices are to be specific and mine were vague." This challenge could potentially be viewed as claim that her due process rights have been violated. It may also be viewed as a grievance procedure-based objection.

Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[8] is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[9] However, the grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of compliance with the grievance procedure's *Rules for Conducting Grievance Hearings (Rules)*. Section VI (B) of the *Rules* provides that in every instance, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the

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[5] *Id*. at 3-9.
[6] Va. Code § 2.2-1001(2), (3), and (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Matthews v. Eldridge, 424 U.S. 319, 348 (1976) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it'.") (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (alteration in original)); Bowens v. N.C. Dep't of Human Res., 710 F.2d 1015, 1019 (4th Cir. 1983) ("At a minimum, due process usually requires adequate notice of the charges and a fair opportunity to meet them."). *See also* Huntley v. N.C. State Bd. Of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974) (holding that the notice prior to the hearing was not adequate when the employee was told that the hearing would be held to argue for reinstatement, and instead was changed by the agency midstream and held as an actual revocation hearing). *See also* Garraghty v. Jordon, 830 F.2d 1295, 1299 (4th Cir. 1987) ("It is well settled that due process requires that a public employee who has a property interest in his employment be given notice of the charges against him and a meaningful opportunity to respond to those charges prior to his discharge.")(citing to Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 545-546, 105 S. Ct. 1487, 1495 (1985); Arnett v. Kennedy, 416 U.S. 134, 170-71, 40 L. Ed. 2d 15, 94 S. Ct. 1633, reh'g denied, 417 U.S. 977, 41 L. Ed. 2d 1148, 94 S. Ct. 3187 (1974).
[9] *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

charge."[10] Our rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.[11] In addition, the *Rules* provide that "[a]ny issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing."[12] Under the grievance procedure, charges not set forth on the Written Notice (or an attachment thereto) cannot be deemed to have been qualified. Thus, such unstated charges are not before a hearing officer.

In this case, the Group II Written Notice charges the grievant with the following: "[b]y your own admission in a due process meeting, you knowingly and willfully refused to comply with your Supervisor's instruction on June 08, 2009. Your refusal to comply is unacceptable as a supervisor and is insubordination." The second Written Notice, the Group III, charged the grievant with: "Insubordination, repeated offense. On June 09, 2009, you again refused to obey another instruction from your Supervisor. This behavior is insubordinate."

Under the particular facts of this case, the absence of the full description of the content of the orders purportedly not followed does not constitute a violation of the grievance procedure or the *Rules*. It is true that neither Written Notice describes the actual instruction purportedly disregarded. This Department agrees that the Written Notices could have provided more information thus eliminating any *potential* argument that the grievant did not know what particular instructions were allegedly not followed on June 8th and 9th. But while the grievant asserts that the charges were vague, she does not claim that she was unaware of the conduct for which she was disciplined. In other words, she does not assert that she is unclear of the particular instruction that she allegedly ignored. Both Written Notices identify the dates that the grievant allegedly failed to comply with orders, the Group II reflects that the conduct was discussed in a due process meeting, and the hearing decision notes that "[t]he Agency's witnesses testified that the Grievant was fully aware of the nature of the charges of insubordination, that the instances were specifically discussed with the Grievant, and that she was given detailed written memos describing the conduct. Agency Exh. 7 and 8."[13] Thus, it appears that the grievant received notice of the charges in sufficient detail to allow her to provide an informed response to the charges both prior to the discipline being issued and at the grievance hearing. (The hearing officer addressed this objection in his hearing decision and appeared to reach the same conclusion.)

Agency Designee Testifying

The grievant asserts that the Warden was present throughout the entire hearing. She believes that he should have testified and then left the hearing.

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[10] *Rules for Conducting Grievance Hearings* § VI(B) citing to O'Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002), which holds that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply."

[11] *See* EDR Rulings Nos. 2007-1409; 2006-1193; 2006-1140; 2004-720.

[12] *Rules for Conducting Grievance Hearings § I.*

[13] The hearing record supports this hearing decision finding. *See* Testimony of the Warden beginning at Tape 1, Side A, at 390.

Under the *Rules*, "parties to the grievance are the employee and the agency. The agency may select an individual to serve in its capacity as a party."[14] The *Rules* further state that "[t]he fact that the individual selected by the agency is directly involved in the grievance or may testify is of no import," and that "[e]ach party may be present during the entire hearing and may testify."[15] The Warden was identified at the beginning of the hearing as the agency's party designee.[16] Thus, he was permitted to remain present through the entire hearing. We thus find no error as to this issue.

Hearing Officer's Findings of Fact and Conclusions

The grievant appears to challenge the hearing officer's findings and conclusions.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[17] and to determine the grievance based "on the material issues and grounds in the record for those findings."[18] 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.

Based upon a review of the hearing record, sufficient evidence supports key hearing officer findings such as "the Agency has met its burden of proving that the Grievant committed two distinct acts of insubordination."[19] Accordingly, this Department cannot conclude 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. Consequently, this Department has no reason to disturb the hearing decision on this basis.

Perjury

The grievant makes various assertions about "utterly and completely one sided" testimony, emails "riddled with false accusations," and other allegedly untrue statements.

One of the central purposes of the grievance hearing is to ferret out any falsity or inaccuracies. The grievant had this opportunity at hearing. This Department has consistently denied party requests for a rehearing or reopening on the basis of alleged perjury at hearing.[20] In denying such requests, we have found Virginia court opinions to be persuasive. Even where there is a claim of perjury and some supporting evidence, Virginia courts have consistently

[14] *Rules* § IV(A).
[15] *Id.*
[16] Tape 1, Side A, at 10-30.
[17] Va. Code § 2.2-3005.1(C).
[18] *Grievance Procedure Manual* § 5.9.
[19] *See* Testimony of the Treatment Program Specialist beginning at Tape 1, Side B, at approximately 230.
[20] *See e.g.*, EDR Ruling #2010-2451; 2006-1383.

denied rehearing requests arising after a final judgment.[21] Those courts reasoned that the original trial (or hearing) was the party's opportunity to cross-examine and impeach witnesses, and to ferret out and expose any false information presented to the fact-finder. Those courts also opined that to allow re-hearings on the basis of perjury claims after a final judgment could prolong the adjudicative process indefinitely, and thus hinder a needed finality to litigation. The same principles described above generally apply to other forms of allegedly false evidence as well as one-sided or incomplete testimony. Accordingly, we decline to disturb the decision on this basis.

New Evidence

The grievant asserts that "[i]f you interview the counselors at [another agency facility] they will provide incidents of abuse from [the grievant's immediate supervisor] while under his supervision that parallel to mine."

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[22] 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.[23] 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:

> (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.[24]

Here, the evidence that the grievant seeks to have considered is not "newly discovered." The grievant has proffered nothing that shows that, with due diligence, she would have been unable to procure such statements prior to hearing.[25] Moreover, the grievant could have requested that the hearing officer order these potential witnesses to appear at her hearing. Thus, we decline to disturb the decision on this basis.

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[21] *See, e.g.*, Peet v. Peet, 16 Va. App. 323 (1993); Jones v. Willard, 224 Va. 602 (1983).
[22] *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).
[23] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).
[24] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[25] Due diligence is also discussed in the "Continuance" section of this ruling.

Continuance

Related to the grievant's "new evidence" objection is the grievant's contention that she was unable to obtain a statement from a Counselor at another facility because of medical issues and her work schedule.

The grievant has provided no evidence that she had requested a delay in the hearing that was not granted. The hearing officer twice delayed the hearing due to the grievant's medical issues but the grievant has provided this Department with no evidence of a third request for delay which was subsequently denied. She has offered no evidence that she even made a third request. Thus, there is no reason to disturb the decision on this basis.

Mitigating Circumstances: Inconsistent Discipline

Finally, the grievant claims that she has been treated more harshly than other employees. She asserts that a sergeant took a state vehicle home without permission and that a major "has received 'numerous' disciplinary actions . . . but he has not been demoted."

Under the *Rules*, inconsistency in the application of discipline for similar misconduct by other employees is clearly a potential mitigating factor.[26] 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. As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors.[27]

The first factor that the grievant has the burden of establishing is the existence of appropriate comparators—persons who committed similar infractions—who are "similarly situated" to the grievant. While the grievant points to the sergeant and major as a potential comparators, she offered no evidence as to how any charges leveled against them are similar to those leveled against her. The key in establishing an appropriate comparator—a similarly situated employee—is that the misconduct of both the accused and any other potential comparator be of the same character. Thus, for example, in a case such as this where the grievant was issued Written Notices for failing to follow her supervisor's instructions, only misconduct in the form of comparators' failure to follow their supervisors' instructions is relevant. Evidence pertaining to agency responses to other *dissimilar* incidents of misconduct,

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[26] *Rules* VI(B)(1) describe as a mitigating circumstance: "Inconsistent Application: The discipline is inconsistent with how other similarly situated employees have been treated." The *Rules* do not expressly address what constitutes a similarly situated employee. However, courts have held that in order "[t]o make out a claim of disparate treatment the charges and the circumstances surrounding the charged behavior must be substantially similar." Abaqueta v. U.S.A., 255 F. Supp. 2d 1020, 1029 (2003 D. Ariz.) quoting Archuleta v. Department of Air Force, 16 M.S.P.R. 404, 406 (1983).

[27] *See e.g.*, EDR Rulings 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also* Bingham v. Dept. Of Veterans Affairs, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to Kissner v. Office of Personnel Management, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

such as tardiness, is generally irrelevant for mitigation under an inconsistent discipline theory.[28] Here, the grievant has not met her burden of establishing that an appropriate comparator exists because she has offered no evidence that the potential comparators (sergeant and major) committed the similar misconduct of insubordination.

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.[29] 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.[30] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[31]

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Claudia T. Farr
Director

[28] EDR Ruling No. 2010-2376, note 19.
[29] *Grievance Procedure Manual* § 7.2(d).
[30] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[31] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).