Issue: Administrative Review of Hearing Officer's Decision in Case No. 9248; Ruling Date: June 16, 2010; Ruling #2010-2630; Agency: Virginia Community College System; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Virginia Community College System
Ruling Number 2010-2630
June 16, 2010

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9298. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision in Case No. 9298.

FACTS

On November 11, 2009, the grievant was issued a Group III Written Notice with removal for failure to report to work without notice, failure to follow a supervisor's instructions, late arrival to work, leaving work early without permission, and falsification of records.[1] The grievant challenged the disciplinary action by filing a grievance on December 10, 2009.[2] After the parties failed to resolve the grievance during the management resolution steps, the grievance proceeded to a hearing on April 13, 2010.[3]

The salient facts as set forth in the April 16, 2010 decision are as follows:

> On October 22, 2009, Grievant sent the Supervisor an email indicating that she would be returning to work on Friday, October 23, 2009. On October 23, 2009, Grievant failed to report to work and she also failed to notify the Supervisor regarding her inability to work that day. On October 26, 2009, Grievant did not report to work as scheduled. She did not notify the Supervisor that she would be absent that day. Grievant was unable to contact the Agency to inform them of her absence due to a medical condition.
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> On June 29, 2009, the Vice President sent staff including Grievant an email stating, in part:
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> As a reminder, it is the policy of the Information Technology Division that employees do not bring children to work during work hours for long periods of

[1] *See* Decision of Hearing Officer, Case No. 9298, Apr. 16, 2010 ("Hearing Decision") at 1.
[2] *Id.*
[3] *Id.*

> time. While there is not a formal [Facility] policy that specifically prohibits children on the campus, [Facility] Policy 12.6, Children on Campus, does speak to the liabilities that the college will not assume if a child is injured. I love children as much as anyone; however, the workplace is really not the place for children other than for a brief visit (less than 1 hour).
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> On October 28, 2009, Grievant left the office in the afternoon to take one of her children to a doctor's appointment. Grievant received the Supervisor's approval to do so. Grievant returned to the office with both of her children. At approximately 3:15 p.m. another employee observed that Grievant's children were in her office. At 4:20 p.m., Grievant's children were again observed in Grievant's office
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> Grievant's normal work shift was from 8 a.m. until 5 p.m. On November 6, 2009, Grievant reported to work at approximately 10 a.m. She left work that day at approximately 3:30 p.m. prior to the end of her shift. Grievant did not notify her Supervisor or receive permission from the Supervisor to arrive late to work or to leave work early.
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> On November 10, 2009, Grievant submitted a Non-Exempt Employee Attendance and Leave Record. The purpose of this form was to enable employees to identify the hours they worked and leave taken. The form had a place for the employee to sign and for the supervisor to signify his or her approval. Grievant wrote on the form that she had worked eight hours on November 6, 2009. She signed the form to certify that, "[t]he information on this form is accurate and complete." [4]

In his April 16, 2010 hearing decision, the hearing officer makes the following conclusions:

> The Agency alleged that Grievant failed to report to work as required on October 23 and October 26, 2009. Grievant testified that she was unable to call due to a medical condition. Grievant's inability to contact the Agency because of a medical condition is a mitigating circumstance that excuses her failure to call and report to work on October 23 and October 26, 2009. Grievant presented an excuse from a medical provider excusing her absence from work from October 21, 2009 through October 27, 2009. There is no basis to discipline Grievant for her absence on those dates.
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> Failure to follow a supervisor's instruction is a Group II offense. Grievant was instructed by the Vice President, a supervisor, not to have her children in the office for more than one hour. On October 28, 2009, Grievant brought her children to the office and the children remained with her for over an hour.

[4] *Id.* at 2-3.

Tardiness is a Group I offense. Leaving work without permission is a Group II offense. On November 6, 2009, Grievant was tardy to work in the morning and she left the workplace early without permission in the afternoon.

Grievant argued that she was at work on time at 8 a.m. on November 6, 2009 and that she did not leave the Facility campus until the end of her shift at 5 p.m. At 8:15 a.m., the Vice President noticed that Grievant's vehicle was not in the parking lot. She continued to check the parking lot to see if Grievant's vehicle was there. At 9:40 a.m., the Vice President knocked on Grievant's office door and no one answered. Grievant did not logon to her computer until approximately 10 a.m. Grievant was first observed by the Administrative Assistant in the restroom at approximately 10:05 a.m. Grievant's car was observed in the parking lot. At approximately 3:20 p.m., the Vice President went to Grievant's office and knocked on the door. Grievant was not there. The Vice President went to the parking lot and noticed that Grievant's vehicle was no longer in the parking lot. At approximately 4:45 p.m., the Supervisor attempted to contact Grievant. Grievant was not in her office. The Vice President worked until 6 p.m. that night and did not see Grievant's vehicle return to the parking lot. The Agency has presented sufficient evidence to support its assertion that Grievant's reported to work late and left the workplace early.

Falsification of records as a Group III offense. Grievant knew or should have known that she worked fewer than eight hours on November 6, 2009. Grievant drafted a leave record that she submitted to the Agency. In that record she asserted that she worked eight hours when in fact she had not worked eight hours on November 6, 2009. The definition of "Falsify" is found in Blacks Law Dictionary (6^{th} Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

Grievant knew that she had worked fewer than eight hours on November 6, 2009. She falsely wrote on her time record that she had worked eight hours. Grievant falsified the Non-Exempt Employee Attendance and Leave Record submitted to the Agency thereby justifying the issuance of a Group III Written Notice of disciplinary action.

Grievant contends that she did not falsify any records because she was at work on November 6, 2009 for her entire shift. The evidence showed that Grievant was not at work for eight hours on November 6, 2009. Four days later, Grievant submitted a leave record falsely claiming that she was present on November 6, 2009.

> Upon the issuance of a Group III Written Notice, and [sic] employee may be removed from employment. Accordingly, the Agency's decision to remove Grievant from employment must be upheld.

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. With the exception of the allegation regarding Grievant's failure to report to work on October 23 and October 26, 2009, there are no other mitigating circumstances that would justify a reduction of the Group III Written Notice with removal.

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.

Grievant engaged in protected activity because she filed a grievance against the Supervisor on June 17, 2009. Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established any causal link between the adverse action and the protected activity. Grievant did not present any testimony during the hearing that would support her claim of retaliation. Based on the evidence presented there is no reason for the Hearing Officer to conclude that the Agency retaliated against Grievant.[5]

[5] *Id.* at 3-6. Footnotes from the hearing decision have been omitted here.

Based on the foregoing findings and conclusions, the hearing officer upheld the Group III Written Notice with removal.[6] The grievant subsequently sought a reconsideration decision by the hearing officer. In a reconsideration decision dated May 26, 2010, the hearing officer denied the grievant's request and upheld the April 16, 2010 decision.[7]

The grievant now seeks administrative review of the hearing officer's April 16, 2010 decision by this Department. In her request for administrative review, the grievant challenges the hearing officer's findings and conclusions regarding the grievant's whereabouts and hours of work on November 6, 2009. In support of her request for administrative review and more specifically, her claims that she was at work all day on November 6, 2009 and her children were with her at work for less than an hour on October 28, 2009, the grievant provided this Department with an affidavit from her spouse, Mr. R.

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."[8] 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.[9]

The grievant's request for administrative review challenges the hearing officer's findings of fact. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10] and to determine the grievance based "on the material issues and grounds in the record for those findings."[11] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[12] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[13] 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.

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[6] *Id.* at 6.
[7] *See* Decision of Hearing Officer, Case No. 9298-R, May 26, 2010 ("Reconsideration Decision") at 1-2.
[8] Va. Code § 2.2-1001(2), (3), and (5).
[9] *See Grievance Procedure Manual* §§ 6.4(3), 7.2(a).
[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B).
[13] *Grievance Procedure Manual* § 5.8.

Here, the grievant simply contests the hearing officer's findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations of disputed facts are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.[14] This Department cannot find 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. In particular, there is evidence in the record, i.e., witness testimony and exhibits, to support the hearing officer's findings that the grievant's children were at the office on October 28, 2009 for a period in excess of one hour and that the grievant worked less than an 8 hour day on November 6, 2009 yet indicated on her time record that she worked a full 8 hour day on that day. [15] Accordingly, the hearing officer's findings are based upon evidence in the record and the material issues of the case and as such, this Department has no reason to remand the decision.

Moreover, in support of her overall claim that the hearing officer's findings and conclusions were incorrect, the grievant has provided this Department with an affidavit signed by her spouse, Mr. R., which states that (1) on November 6, 2009 he dropped the grievant off at work around 7:00 a.m. and picked her up that same day at around 5:30 p.m.; and (2) on October 28, 2009, he left the grievant's office with their children at 3:45 p.m.[16]

Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence."[17] 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 hearing ended.[18] The party claiming evidence was "newly discovered" must show that

> (1) the evidence was newly discovered since the judgment was entered; (2) due diligence…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.[19]

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[14] *Rules for Conducting Grievance Hearings* § VI(B).

[15] *See, e.g.*, Agency Exhibit 3; Hearing Recording in Case No. 9298 at 11:00 through 14:17 (testimony of grievant's supervisor) and 1:00:12 through 1:06:09 and 1:12:54 through 1:17:47 (testimony of grievant's supervisor's supervisor).

[16] This Department notes that the affidavit was not received until May 7, 2010, which is beyond the 15 calendar day period for administrative review requests. However, because the affidavit was provided in support of the grievant's timely claim that the hearing officer's findings of fact were erroneous, this Department considers the May 7, 2010 affidavit as supplemental evidence in support of her timely administrative review request.

[17] *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, e.g.*, EDR Ruling No. 2007-1490 (explaining "newly discovered evidence" standard in context of grievance procedure).

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

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

As correctly determined by the hearing officer in his Reconsideration Decision, Mr. R.'s statements are not newly discovered because such evidence was in existence and known by the grievant at the time of the hearing.[20] Consequently, there is no basis to re-open the hearing for consideration of this evidence.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, this Department will not disturb the hearing officer's decision. 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.[21] 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.[22] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[23]

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Claudia T. Farr
Director

[20] *See* Reconsideration Decision at 1-2.
[21] *Grievance Procedure Manual* § 7.2(d).
[22] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[23] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).