Issue: Administrative Review of Hearing Officer's Decision in Case No. 9373; Ruling Date: October 28, 2010; Ruling #2011-2752; Agency: University of Virginia Health System; Outcome: Hearing Decision Affirmed.

# *COMMONWEALTH of VIRGINIA*
## *Department of Employment Dispute Resolution*

## ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of University of Virginia Health System
Ruling Number 2011-2752
October 28, 2010

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9373. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The salient facts as set forth in Case Number 9373 are as follows:

The Grievant was issued a Formal Performance Improvement Counseling Form on April 22, 2010 for:

> [Grievant] sent multiple inappropriate messages to a female nurse in the department on days when they worked together. This has been occurring off and on over the last 6 months but over the last 10 days has escalated from comments such as "you're sweet" and "you're cute" to "I am attracted to you and don't know what to do about it" and "In heaven we shall hang out." This is when the female nurse became frightened and notified management. [Grievant's] wife then contacted the female nurse, stating that [Grievant] told her they were having an affair with times and places they met together outside work, none of which is true. The female nurse is feeling threatened and unsafe at work. In June of 2008, [Grievant] was again counseled for making inappropriate comments regarding sexual orientation.

Pursuant to the Formal Performance Improvement Counseling Form, the Grievant was terminated on April 22, 2010. On May 10, 2010, the Grievant timely filed a grievance to challenge the Agency's actions. On July 6, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to

a Hearing Officer. On August 3, 2010, a hearing was held at the Agency's location.[1]

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In this matter, the Grievant worked as a nurse in the Emergency Department for the Agency. The Agency used an Intranet system known as Medihost. This system was used by the employees of the Agency to communicate with each other regarding official Agency business. Examples of print-outs of the logs produced by this system are found in Agency Exhibit 1. Medical Center Policy number 0202 deals with Intranet access and usage. That policy states that acceptable uses for the Intranet include communicating by electronic mail for purposes relevant to the mission of the Medical Center. Unacceptable uses of the Intranet include engaging in illegal or unethical activities as defined by this policy.

A fellow employee of the Grievant testified that over a period of time, she received text messages on the Intranet system from the Grievant. Her testimony was that she was certain that the Grievant was the sender of these messages as they were identical in verbiage to what he had previously said to her orally. Examples of those messages were, "You are sweet (sent on April 7, 2010); I think I am attracted to you, and I don't know how to handle it (sent on April 8, 2010); Smile you are cute (sent on April 15, 2010); OK, in Heaven we shall hang out (sent on April 15, 2010)"

In his testimony, the Grievant vigorously denied that he sent any of these messages.

The Medihost system did not provide the name of the sender of these messages. That system provides the sender with the ability to delete his or her name. On April 20, 2010, the Interim Director of the Emergency Department and a Human Resources Consultant met with the Grievant to discuss these issues. They both testified that the Grievant readily admitted that he had sent inappropriate text messages over the Intranet system and that he was able to quote them nearly verbatim without the need to look at the printed copies of the message log. Both of these witnesses were adamant that the Grievant admitted sending the messages.

The recipient of the messages testified that she only received them when she and the Grievant worked the same shift. When she went to a night shift, the messages stopped. The recipient testified that she was extremely fearful by the time she received the fourth message regarding, "hanging out in Heaven." On that

[1] Decision of Hearing Officer, Case No. 9373, issued August 9, 2010 ("Hearing Decision") at 1.

> same day, the recipient of the text messages testified that the Grievant's wife called her at work. Further, she testified that his wife indicated that the Grievant had told her that she (the recipient of the text messages) and the Grievant were having an affair and that she (the Grievant's wife) wished to come in and discuss this matter. Because of her fear, she moved out of her house for a period of time, changed the location of her employment parking space and had escorts to and from the parking lot to the Hospital.
>
> In the Grievant's testimony, he admitted that his wife called this employee but he denied that there was a statement regarding an affair.
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> While there is a conflict as to whether the Grievant was the author of the text messages, the Hearing Officer finds that the Agency has bourne its burden of proof and that it was more likely than not that it was the Grievant who sent the text messages and accordingly violated the Agency's rules governing the use of the MediHost system. Having found that the Grievant sent these messages, and that the recipient of these messages was frightened and concerned by them, the Hearing Officer finds that the recipient was harassed.[2]

Based on the foregoing findings of fact, the hearing officer concluded that the "Agency has reached its minimal burden of proof to show that the Grievant's fellow employee was in fact mistreated by him because of her receipt of these unwanted text messages which caused her significant fear and, accordingly, impacted her ability to perform her job as an employee of the Agency."[3] Accordingly, the hearing officer upheld the grievant's termination.

On August 23, 2010, the grievant timely requested an administrative review by this Department. In addition, on September 1, 2010, the hearing officer received a request from the grievant for an administrative review of the August 9, 2010 hearing decision. In a reconsideration decision dated September 14, 2010, the hearing officer declined to address the grievant's request for administrative review because the request was untimely.[4] On September 15, 2010, the grievant asked this Department to review the hearing officer's decision that the grievant's request for reconsideration was untimely. The grievant's requests are discussed below.

## 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."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department

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[2] Hearing Decision at 3-4.
[3] Hearing Decision at 5.
[4] *See* Hearing Officer's Response to Request for Reconsideration, Case No. 9373, issued September 14, 2010 ("Reconsideration Decision").
[5] Va. Code § 2.2-1001(2), (3), and (5).

does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

*Timeliness of Request for Reconsideration*

The grievant claims that the hearing officer erred by failing to address the grievant's request for reconsideration due to untimeliness. More specifically, the grievant claims that his request for reconsideration to the hearing officer should be considered because even though it was not timely received by the hearing officer, the grievant did not know until after the 15 calendar days had expired that he had the ability to request an administrative review by the hearing officer. More specifically, the grievant asserts that the hearing decision failed to notify the grievant of this appeal option and that he did not discover this right until he received a letter from this Department and the Department of Human Resource Management (DHRM) indicating that such an option in fact exists. The grievant asserts that as soon as he became aware of his right to do so, he sent the hearing officer a request for reconsideration.

The Grievance Procedure Manual provides that "all requests for review must be made in writing, and ***received*** by the administrative reviewer, within 15 calendar days of the date of the original hearing decision."[7] Further, despite the grievant's assertion to the contrary, the August 9, 2010 hearing decision clearly advised the parties that they have the right to request an administrative review by the hearing officer and that any request they may file for administrative review to the hearing officer, DHRM or EDR must be received by the reviewer within 15 calendar days of the date the decision was issued.[8] Here, however, the hearing officer received the grievant's request for administrative review on September 1, 2010, well beyond the 15 calendar days following the August 9, 2010 decision. Furthermore, this Department has long held that it is incumbent upon each employee to know his or her responsibilities under the grievance procedure.[9] A grievant's lack of knowledge about the grievance procedure and its requirements does not constitute just cause for failure to act in a timely manner. Accordingly, this Department finds no error by the hearing officer in failing to address the grievant's untimely request for administrative review.

*Findings of Fact*

The grievant's request for administrative review primarily 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

[6] *See Grievance Procedure Manual* § 6.4(3).
[7] *Grievance Procedure Manual* § 7.2(a).
[8] Hearing Decision at 6.
[9] *See, e.g.,* EDR Ruling No. 2009-2252; EDR Ruling No. 2009-2079; EDR Ruling No. 2002-159; EDR Ruling No. 2002-057.
[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.

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.

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--specifically, witness testimony--to support the hearing officer's findings that the grievant used the agency Medihost system to send inappropriate messages to a female co-worker, the co-worker became frightened by these messages and the grievant's wife contacted the co-worker and told her that the grievant had told her that he and the co-worker were having an affair.[15] In addition, the grievant's supervisor testified at hearing that the grievant admitted to her that he engaged in the behavior described by the female co-worker.[16] Accordingly, because the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department has no reason to remand the decision.

*Evidence of Discrimination*

In addition, the grievant appears to be arguing that the hearing officer failed to consider the grievant's claim that his termination was discriminatory. The grievant appears to have clearly raised the issue of discrimination on the basis of religion, national origin and sex in the attachments to his Form A. However, this Department's review of the hearing tapes revealed that the grievant presented very little evidence at the hearing to support his claim of discrimination. That is, at hearing, the grievant asked his supervisor if she recalled him complaining to her that he had been called a "terrorist" by staff. The witness denied ever receiving such a complaint from the grievant.[17] It appears that the only other evidence presented by the grievant at hearing regarding discrimination was during his closing argument when the grievant stated, "I believe I was discriminated against," and stated that he had been called a

[12] *Rules for Conducting Grievance Hearings* § VI(B).
[13] *Grievance Procedure Manual* § 5.8.
[14] *Rules for Conducting Grievance Hearings* § VI(B).
[15] *See* Hearing Recording at 11:40 through 19:23 (testimony of female co-worker).
[16] *See* Hearing Recording at 55:40 through 56:18 (testimony of Grievant's supervisor).
[17] *See* Hearing Recording at 56:20 through 57:57.

"terrorist" on many occasions. In light of the foregoing and in particular, the limited evidence presented by the grievant at hearing regarding his discrimination claim, this Department concludes that the hearing officer's failure to specifically address the grievant's claim of discrimination in the hearing decision was harmless error, if error at all. More importantly, as noted above, there is evidence to support the hearing officer's findings that the grievant sent the inappropriate messages using the Medihost system and as such, it does not appear that the grievant's termination was based on discriminatory animus.

*Due Process*

The grievant also asserts that during the pre-hearing conference, the hearing officer failed to notify the parties that harassment of the recipient of the Medihost messages would be at issue during the hearing. More specifically, the grievant claims that during the pre-hearing conference, the hearing officer stated that they would be discussing at hearing whether or not the grievant sent the Medihost messages. The grievant asserts that the hearing officer "did not say we will be discussing harassment at all. He did not even mention it." As such, the grievant asserts that when the hearing officer concluded in the hearing decision that the recipient of the Medihost messages was harassed, it was a "complete shock" to the grievant.

In essence, the grievant's argument that he was not notified that harassment was at issue in the hearing is one of due process. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[18] is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[19] 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 charge."[20] Our rulings on administrative review have held the same, concluding that only the charges set out in the termination notice may be considered by

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[18] 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, 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).

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

[20] *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."

a hearing officer.[21] In addition, the *Rules* provide that "Any issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing."[22] Under the grievance procedure, charges not set forth on the termination 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 Formal Performance Improvement Counseling Form with termination states the following:

> [Grievant] sent multiple inappropriate messages to a female nurse in the department on days when they worked together. This has been occurring off and on over the last 6 months but over the last 10 days has escalated from comments such as "you're sweet" and "you're cute" to "I am attracted to you and don't know what to do about it" and "In heaven we shall hang out." This is when the female nurse became frightened and notified management. [Grievant's] wife then contacted the female nurse, stating that [Grievant] told her they were having an affair with times and places they met together outside work, none of which is true. The female nurse is feeling threatened and unsafe at work. In June of 2008, [Grievant] was again counseled for making inappropriate comments regarding sexual orientation.

In this case, while the exact term "harassment" was not specifically mentioned on the Formal Performance Improvement Counseling Form, it is difficult to comprehend how the grievant was not on notice of the agency's accusation that he had engaged in harassing, troublesome behavior toward the female nurse. More specifically, the Formal Performance Improvement Counseling Form identifies specific inappropriate messages received by the female nurse and takes note of the inappropriate messages. In other words, the Formal Performance Improvement Counseling Form makes it clear that the grievant is not only being terminated for his wrongful personal use of the Medihost messaging system, but also for the specific phrases he used toward a female nurse and the fear she felt as a result.[23]

As such, while the Formal Performance Improvement Counseling Form did not specifically use the word "harassing" or "harassment," the Form fully informs the grievant of the inappropriate, frightening, upsetting behavior (in other words, harassing behavior) he was being charged with. Moreover, the grievant admits that during the pre-hearing conference, the hearing

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

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

[23] We note that a due process problem can arise if at hearing, the agency attempts to put on evidence of misconduct that was not mentioned or included in the original charges. *See e.g.*, EDR Ruling #2007-1409. This is not such a case. As discussed in detail above, the conduct for which the grievant was terminated was clearly articulated in the Formal Performance Improvement Counseling Form and those charges did not change during the course of the hearing.

officer read the Formal Performance Improvement Counseling Form to the parties. Accordingly, this Department concludes that through his reading of these documents, the hearing officer did, it appears, identify the inappropriate, harassing behavior as a hearing issue during the pre-hearing conference. We cannot conclude that the grievant's due process rights were violated simply because the word "harassing" or "harassment" was not used in the Formal Performance Improvement Counseling Form. However, as noted above because due process is a legal concept, the grievant is free to raise this issue with the circuit court in the jurisdiction where the grievance arose once the hearing decision becomes final.

*Alleged Noncompliance by the Agency*

The grievant also alleges that the agency failed to comply with the grievance procedure during the process. In particular, the grievant objects to the agency's alleged failure to comply with the time requirements in Section 8.2 of the *Grievance Procedure Manual* for providing documents and alleges that he was not allowed to have a person present with him at the second step meeting in violation of Section 3.2 of the *Grievance Procedure Manual*.

The grievance procedure requires both parties to address procedural noncompliance through a specific process.[24] That process assures that the parties first communicate with each other about the purported noncompliance and resolve any compliance problems voluntarily without this Department's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance. If the agency fails to correct alleged noncompliance, the grievant may request a ruling from this Department.[25]

In addition, the grievance procedure requires that all claims of party noncompliance be raised immediately.[26] Thus, if Party A proceeds with the grievance after becoming aware of Party B's procedural violation, Party A may waive the right to challenge the noncompliance at a later time.[27] Finally, this Department has long held that it is incumbent upon each employee to know his responsibilities under the grievance procedure. Neither a lack of knowledge about the grievance procedure or its requirements, nor reliance upon general statements made by agency management or human resources will relieve the grievant of the obligation to raise a noncompliance issue immediately, as provided in the grievance procedure, upon becoming aware of a possible procedural violation.

Here, with regard to the grievant's claim that he was not allowed to have someone present with him at the second step meeting, this Department concludes that although the grievant was aware of a possible procedural error at this step, he advanced to the hearing, without raising the issue of noncompliance to the Director of this Department until after he had

[24] *See Grievance Procedure Manual* § 6.
[25] *See Grievance Procedure Manual* § 6.3.
[26] *Id*.
[27] *Id*.

received the hearing officer's decision. As such, the grievant waived his right to challenge the agency's alleged noncompliance at the second step of the grievance process.

With regard to the grievant's claim that the agency failed to timely provide him documents in accordance with Section 8.2 of the *Grievance Procedure Manual*, this Department again concludes that to the extent the grievant requested the documents during the management resolution steps of the grievance process and they were not timely received, the grievant should have raised that issue with this Department at that time. Further, because the hearing in this matter has concluded, the proper way to address an issue of alleged noncompliance for failure to produce documents is through the drawing of adverse inferences by the hearing officer. Here, however, the grievant has not alleged that the agency failed to provide the documents requested. Rather, according to the grievant's request for administrative review, the grievant appears to admit that the documents requested were ultimately received on July 23, 2010, well in advance of the August 3, 2010 hearing. Accordingly, this Department cannot conclude that the agency or hearing officer has failed to comply with the grievance process with regard to this issue.

*Failure to Consider Mitigating Circumstances*

The grievant also appears to argue that the hearing officer erred by not considering evidence of inconsistent discipline. In the hearing decision, the hearing officer states the following:

> *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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency. The Hearing Officer has considered all of the delineated items in mitigation as set forth in this paragraph as well as any and all other possible sources of mitigation which were raised by the Grievant at the hearing and the Hearing Officer finds that no further mitigation is required in this matter.

Based on the foregoing, it appears that the hearing officer did consider whether the grievant was disciplined more harshly than other similarly situated employees. Further, this

Department will review a hearing officer's mitigation determinations only for an abuse of discretion.[28] Therefore, EDR will reverse only upon clear evidence that the hearing officer failed to follow the "exceeds the limits of reasonableness" standard or that the determination was otherwise unreasonable. Based upon a review of the record, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or not based on the actual evidence in the record. As such, this Department will not disturb the hearing officer's decision.[29]

*Newly Discovered Evidence*

Finally, in his request for administrative review to this Department, the grievant has set forth significant information regarding alleged discriminatory and retaliatory acts by management as well as provided specific examples of inconsistent discipline. As an initial note, to the extent the grievant is asking this Department to assess this additional information, this Department has no authority to do so at this stage of the grievance process.[30] Moreover, because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[31] 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.[32] 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

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[28] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith … but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts … or against the reasonable and probable deductions to be drawn from the facts." *Id.*

[29] Further, in his request for administrative review, the grievant lists two examples of individuals who inappropriately used the Medihost messaging system but were not terminated for their actions. However, evidence regarding these two individuals was not presented at hearing. Rather, the only evidence offered at hearing regarding inconsistent discipline related to co-workers seen hitting one another and cursing at each other. *See* Hearing Recording 1:27:15 through 1:27:26. These employees are not similarly situated in that their misconduct was of an entirely different nature from that of the grievant. Although the hearing officer should have specifically addressed the potential factor of inconsistent discipline, as it was expressly raised by the grievant, any failure to do so would have been harmless error given the dissimilarity of the conduct in these two situations. Further, as discussed in more detail below, the two examples of inconsistent discipline cited by the grievant in his request for administrative review do not appear to be newly discovered after the hearing and thus cannot be considered.

[30] *See Grievance Procedure Manual* § 7.2(a)(3).

[31] *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).

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

> outcome if the case were retried, or is such that would require the judgment to be amended.[33]

Here, the grievant has provided no information to support a contention that the evidence referenced in his administrative review should be considered newly discovered evidence under this standard. Specifically, the grievant was presumably aware of the evidence prior to the hearing but simply did not submit the evidence at hearing. Consequently, there is no basis to re-open or remand the hearing for consideration of this evidence.

## APPEAL RIGHTS

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.[34] Because all timely requests for administrative review have been decided,[35] the hearing decision is now a final decision. 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.[36] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[37]

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Claudia T. Farr
Director

[33] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[34] *Grievance Procedure Manual* § 7.2(d).
[35] DHRM responded to the grievant's request for administrative review on September 23, 2010.
[36] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[37] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).