Issue: Administrative Review of Hearing Officer's Decision in Case No. 9410; Ruling Date: November 29, 2010; Ruling No. 2011-2819; Agency: Department of Labor and Industry; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Labor and Industry
Ruling Number 2011-2819
November 29, 2010

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9410. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision in this case.

FACTS

On April 27, 2010, the grievant was issued a Group I Written Notice of disciplinary action for her behavior on April 5, 2010 during a meeting with her supervisor and another employee.[1] The salient facts as set forth in the hearing decision for Case No. 9410 are as follows:

> On April 5, 2010, Grievant was talking to another employee at the bottom of stairs in the Agency's office building. Ms. W was carrying a box down the stairs and wanted to pass Grievant. Ms. W said "excuse me" and attempted to pass Grievant. Grievant attempted to move but did not move in accordance with Ms. W's expectations and Ms. W became angry. Ms. W said, "simple, stupid, ignorant dumb-ass, and God don't like ugly, ignore her." Grievant heard Ms. W's comment and was offended. She spoke with another employee regarding what to do. That employee suggested speaking with the Supervisor. Grievant spoke with the Supervisor and told her of Ms. W's comment. Ms. W sought the advice of her supervisor who suggested the Supervisor meet with both Grievant and Ms. W to resolve the matter.
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> The Supervisor met with Grievant and Ms. W. The Supervisor stood at the corner of the table in the room. Grievant was seated at the table to the Supervisor's left and was against the wall of the room. Behind Grievant and to her right was the office door. Ms. W sat at the table to the Supervisor's right. The Supervisor began the meeting by saying there appeared to be conflict and she wanted to get it out in the open. The Supervisor asked Grievant to repeat the

[1] Decision of Hearing Officer, Case No. 9410, issued October 13, 2010 ("Hearing Decision") at 1.

> statement Ms. W made to Grievant. Grievant repeated the statement and the Supervisor asked Ms. W if she made those remarks. Ms. W admitted to making the statement. The Supervisor said, "oh my goodness [Ms. W], that is not acceptable." The Supervisor then told Ms. W she should apologize to Grievant. Ms. W refused to do so. Ms. W responded by questioning how Grievant knew the comments were about Grievant. Ms. W then explained how Grievant failed to move as she passed through the walkway and that it was not the first time Grievant had acted indifferent towards Ms. W. Ms. W then described some of the prior incidents as she perceived them. Grievant began to express her feelings about what Ms. W said but Ms. W kept interrupting Grievant. The Supervisor asked Ms. W to calm down but Ms. W kept getting louder. Ms. W stood up and started walking towards the Supervisor to either go out the door or approach Grievant. Ms. W was pointing her finger at Grievant and saying Grievant was a trouble maker who brought drama with her everywhere she went. The Supervisor asked Ms. W to calm down and said people can change and that Ms. W needed to let go of the past. Ms. W said people can change but Grievant had not changed. Grievant was offended by Ms. W's remarks and stood up to defend herself by disputing the comments. Ms. W calmed down and sat down briefly. Ms. W then stood up again and said she "this was petty drama" and that she could not stand drama. The Supervisor placed herself in front of Ms. W because Ms. W was loud and again pointing her finger at Grievant. Grievant said that Ms. W was a liar and was immature. Ms. W responded by pounding her fist on the table and yelled at Grievant that she had three children and was a very mature person. Ms. W. stood up and again walked towards the Supervisor and the Supervisor attempted to get in Ms. W's way. Grievant was talking to Ms. W and pointing her finger at Ms. W. Ms. W yelled that she wanted to take her two hours of leave right then and left the room. The Supervisor observed that Grievant was upset and apologized to Grievant for Ms. W's behavior. The Supervisor then left the room.[2]

Based on the foregoing findings of fact, the hearing officer made the following conclusions:

> Disruptive behavior is a Group I offense. Grievant engaged in disruptive behavior by calling Ms. W a liar and immature, pointing her finger at Ms. W, and standing up to make her point. Referring to Ms. W as a liar and as immature had the effect of angering Ms. W. Pointing her finger at Ms. W was disrespectful to Ms. W. Standing up to make her point served to heighten the risk of a physical confrontation. Grievant's actions served to exacerbate the conflict. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.
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> Grievant argued that Ms. W was the aggressor and escalated the conflict. It is clear that Ms. W's engaged in inappropriate behavior and was actively

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

> participating in the conflict. Ms. W was the aggressor with respect to several aspects of the conflict. Ms. W received disciplinary action. Ms. W's behavior helps to explain why Grievant behaved as she did, but the behavior of Ms. W did not excuse Grievant's response. Ms. W's behavior was provocative, but was not so provocative as to render Grievant unable to collect her thoughts and respond in a calm professional manner without name calling and without an aggressive physical demeanor.
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> Grievant argued that when the Supervisor observed inappropriate behavior by Ms. W, the Supervisor should have exercised the appropriate judgment to adjourn the meeting. In hindsight, it is clear that the Supervisor made several poor supervisory decisions. For example, conducting a fact finding meeting with both employees present (instead of meeting with Ms. W separately and asking her if she made the offensive statements earlier in the day) was not an optimal method of resolving the dispute. When Ms. W became disruptive initially, the Supervisor could have adjourned the meeting. The Agency has discretion as to how to resolve disputes among its employees. In this case, the Agency did not exercise that discretion unreasonably.
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> *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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.[3]

The grievant now seeks an administrative review of the hearing officer's decision by this Department.

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 …

[3] *Id.* at 4-5. Footnotes from the hearing decision have been omitted here.

on all matters related to procedural compliance with the grievance procedure."[4] 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.[5]

Findings of Fact

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Hearing officers are authorized to make "findings of fact as to the material issues in the case"[6] and to determine the grievance based "on the material issues and grounds in the record for those findings."[7] 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.[8] 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.[9] 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.

The grievant essentially 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.[10] This Department cannot find that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence, i.e., witness testimony, and the material issues in the case.

Mitigation: Inconsistent Discipline

In her request for administrative review, the grievant states that Ms. W's receipt of a Group II Written Notice and the fact that no discipline was taken against the supervisor is unfair. The grievant's assertion can be fairly read as one of inconsistent discipline. Section VI(B)(1) of the *Rules for Conducting Grievance Hearings ("Rules")* provides that an example of mitigating circumstances includes "Inconsistent Application," which is defined as discipline "inconsistent

[4] Va. Code § 2.2-1001(2), (3), and (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] Va. Code § 2.2-3005.1(C).
[7] *Grievance Procedure Manual* § 5.9.
[8] *Rules for Conducting Grievance Hearings* § VI(B).
[9] *Grievance Procedure Manual* § 5.8.
[10] *Rules for Conducting Grievance Hearings* § VI(B).

with how other similarly situated employees have been treated." As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors.[11]

In this case, the hearing officer found no mitigating circumstances warranting a reduction of the disciplinary action. A review of the hearing record indicates that the grievant did not appear to present her argument of inconsistent discipline to the hearing officer at hearing. Accordingly, the hearing officer cannot be found to have erred in failing to specifically mention in his hearing decision any allegedly inconsistent discipline.[12]

New Evidence

In her request for administrative review, the grievant seeks to have the hearing reopened and/or the hearing decision reconsidered and states: "I would like to include additional information pertaining to the case." A reopening of the hearing and/or a reconsideration of the hearing decision as well as the ability to present additional information requires that the evidence to be presented be "newly discovered."[13] Newly discovered evidence is evidence that was in existence at the time of the trial, but was not known (or discovered) by the aggrieved party until after the trial ended.[14] While not dispositive for purposes of the grievance procedure, this definition of newly discovered evidence is nevertheless instructive here.

In her request for administrative review, the grievant has not cited to any information that would constitute "newly discovered evidence." In particular, the grievant appears to merely provide additional facts regarding why she behaved the way she did on April 5, 2010, as well as other facts regarding what happened on that day. Such information and evidence does not meet the definition of "newly discovered evidence" as it was clearly known to the grievant at the time of the hearing.

In addition, the grievant offers evidence regarding Ms. W's repeated "volatile" behavior and management's knowledge of this behavior, but apparent failure to address the issue. This information does not appear to be "newly discovered." More specifically, at hearing, the grievant's representative attempted to introduce evidence of Ms. W's similar past alleged misconduct, but the hearing officer determined that the information would not be allowed since there was no question that Ms. W's behavior was inappropriate on the day in question and any similar past misconduct would add little to his assessment of whether to uphold the disciplinary

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[11] *See e.g.*, EDR Rulings 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also* Bigham 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).

[12] *See e.g.* EDR Ruling #2010-2473.

[13] *See Rules for Conducting Grievance Hearings*, § VII (A)(1).

[14] Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989) (granting relief based upon newly discovered evidence, requires the party to show: "(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.") (quoting Taylor v. Texgas Corp., 831 F. 2d 255, 259 (11th Cir. 1987)).

action against the grievant.[15] Accordingly, the information offered by the grievant in her request for administrative review regarding Ms. W's past similar conduct was apparently known to the grievant at the time of the hearing and as such, cannot be considered "newly discovered." Moreover, we find no error in the hearing officer's failure to allow such information to be introduced at hearing.

Because the facts and information offered by the grievant in her request for administrative review were apparently known to the grievant at the time of the hearing, such information, under the rules set forth above, would not be considered newly discovered evidence warranting a reopening of the hearing or a reconsideration of the hearing decision.

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.[16] 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.[17] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[18]

Claudia T. Farr
Director

[15] Hearing Recording at 53:08 through 53:55.
[16] *Grievance Procedure Manual* § 7.2(d).
[17] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[18] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).