Issue: Administrative Review of Hearing Officer's decision in Case No. 9554; Ruling Date: August 31, 2011; Ruling No. 2011-2988; Agency: Department of Behavioral Health and Developmental Services; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Behavioral Health and Developmental Services
Ruling Number 2011-2988
August 31, 2011

The Department of Behavioral Health and Developmental Services (the agency) has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9554. For the reasons set forth below, this decision is remanded to the hearing officer for further consideration.

FACTS

The procedural facts of this case, as set forth in the hearing decision in Case Number 9554 are as follows:

> On November 24, 2010, Grievant was issued a Group III Written Notice of disciplinary action with termination. The Agency described the nature of the offense and evidence as "[p]hysical abuse of resident in Cottage 3A was investigated and substantiated."
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> On December 18, 2010, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the third resolution step was not satisfactory to the Grievant and she requested a hearing. The Department of Employment Dispute Resolution appointed the Hearing Officer on March 28, 2011. A pre-hearing conference was held by telephone on March 31, 2011. Subsequently, the Hearing Officer issued a Scheduling Order, which is hereby incorporated by reference. The Hearing Officer scheduled the hearing for April 15, 2011, the first date available between the parties and the Hearing Officer. During the hearing, the Hearing Officer admitted Agency Exhibits one through ten and the Hearing Officer exhibits one through five. The grievant offered no exhibits.[1]

The hearing officer's findings of fact and related determinations, as set forth in the hearing decision, are as follows:

> 1. The Grievant was on duty on November 10, 2010, from 1:15 p.m. to 10:45 p.m. She worked in Cottage 3A of the Southeastern Virginia Training Center ("Agency") as a floor supervisor where her duties included helping to provide

[1] Decision of Hearing Officer, Case No. 9554, issued May 2, 2011 ("Hearing Decision") at 1. Some footnotes and references to exhibits from the Hearing Decision have been omitted here.

care for residents. One of those residents was Ms. B. (Testimony of Grievant; Agency Exh. 1).

2. Ms. B cannot verbalize in a coherent manner; however, she can be vocal by making loud noises and screaming. She can also be combative. She also attempts to communicate by making gestures and facial expressions. Ms. B can accurately express by gesture that she is sorry. A common practice of Ms. B is to seek attention. (Testimony of LC, PM, and Grievant; A Exh. 1).

3. Approximately 5:30 pm on November 10, 2010, emergency paramedics entered the cottage to provide medical care to a resident identified as resident #00694 who had injured herself. While in the dining room providing that care, another resident, Ms. B, entered by wheel chair. (A Exh. 1; Testimony of Grievant).

4. Ms. B made great efforts to attract attention to herself in the dining room by becoming loud and combative, screaming, and pointing to various areas of her body as if she was experiencing pain. Her actions interfered with staff attending to resident #00694's emergency. To assist in managing Ms. B's behavior, the Grievant tried to redirect Ms. B's behavior and remove Ms. B from the emergency. Ms. B then rolled over the Grievant's feet with her wheelchair. The Grievant rolled the wheelchair off her feet. Continuing her attempts to attract attention, Ms. B rolled into the Grievant with her wheel chair in an effort to reach the nurses attending to the emergency. Then Grievant took control of Ms B's wheelchair and pushed her into the living/day room area of the cottage. (A Exh. 1; Testimony of Grievant; Testimony of PM).

5. The next day, PM reported to the director of the agency that she followed the Grievant and Ms. B into the living/day room and witnessed the Grievant make a fist and hit Ms. B in the back of her head. PM also reported that after Grievant left, Ms. B signed that Ms. B was sorry. (Testimony of PM; A Exh. 1/5 -6).

6. The Grievant was the floor supervisor and PM's immediate supervisor during the 1:15 p.m. to 10:45 p.m. shift on November 10, 2010. The Grievant and PM had known Ms. B for five years as of November 10, 2010. (Testimony of Grievant and PM).

7. Upon receiving PM's allegation of physical abuse, the Agency initiated an investigation on November 12, 2010, under Departmental Instruction 201, *Reporting and Investigating Abuse and Neglect of Clients.* Investigator LC was assigned as the investigator. (A Exh. 1).

8. During the investigation and subsequent to its conclusion, the Grievant has denied she physically abused Ms. B. Investigator LC concluded in his investigation that the allegation of physical abuse was substantiated by a gesture made by Ms. B. (Testimony of LC). Investigator LC reports in his investigation the following:

> When this investigator entered cottage 3A to speak to [Grievant] , Ms. [B] was sitting on the sofa directly behind her when she leaned to her left side, pointed her finger at [Grievant], made a fist and simulated hitting herself in the back of the head.

9. The investigation produced no physical evidence of the alleged abuse and there were no physical signs of injury resulting from the alleged abuse. (A Exh. 1/1)

10. At the time of the alleged abuse, superiors of the Grievant - Team Leader CB and the Shift Supervisor AB - were available for PM to report any abuse. (Testimony of Grievant; A Exh. 1).

11. Investigator LC was not a caregiver of Ms. B; however, he has known Ms. B for 14 years and sees her regularly. (Testimony of LC).

12. *Prima facie,* PM, the Grievant, nor Investigator LC have formal training in sign language.

13. The Agency, *prima facie,* did not provide or enter into evidence Departmental Instruction 201, *Reporting and Investigating Abuse and Neglect of Clients.*

14. The Agency, *prima facie,* did not provide or enter into evidence the Agency's definition of abuse.

15. The Grievant does not get along with staff, particularly her subordinates, on the 1:15 p.m. to 10:45 p.m. shift. (Testimony of Grievant).

16. Sometime in the past, the Grievant had been promoted to floor supervisor. (Testimony of Grievant).

17. Physical Abuse of a resident of the Agency must be reported immediately. (Testimony of Grievant; Testimony of PM).

18. *Prima facie,* the Agency did not provide documentation of its policy on reporting abuse.

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I. Analysis of the Issues

A. Did the Grievant abuse a resident?

1. Did the Grievant engage in the behavior described in the Written Notice?

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the

circumstances. *Grievance Procedure Manual,* Section 5.8. The *Rules for Conducting Grievance Hearings,* Section IV(C) defines preponderance of the evidence as "more likely than not."

To determine if the Agency has met its burden, the Hearing Officer examines the evidence presented, to include witness testimony, to decide if the Agency has shown that the Grievant engaged in the behavior described in the Written Notice.

Clearly, unambiguously, emphatically, and consistent with her prior statement, the Grievant testified. She presented her version of what occurred on November 10, 2010. She denied as in her written statement hitting Ms. B with her fist. Further, the Hearing Officer notes that the evidence shows the Grievant volunteered to undergo a lie detector test. While the results of this testing may not have been permissible in the investigation or the grievance proceedings, Grievant's offering to undergo this testing substantiates her position that she did nothing wrong and therefore was fearless. Having observed the demeanor of this witness, the Hearing Officer finds the Grievant's testimony credible.

Even more, the Hearing Officer notes that the Grievant's testimony contradicts the Agency's assertion that the only interpretation of Ms. B's gesture on November 12, 2010, was that the Grievant hit Ms. B. The evidence shows that the Grievant had known Ms. B for five years and had provided care for Ms. B during that time. And, further, that through her experience with Ms. B, the Grievant had learned that Ms. B's signing/gesturing was not always accurate. For example, the Grievant testified that Ms. B has been known to express "yes" when she meant "no" and vice versa. This testimony was not disputed. Also, Ms. B easily adopts and expresses the view or feelings of others. For example, Grievant noted that if Ms. B observes someone is mad, she is prone to adopt and express that sentiment. In the instant case, the evidence shows that PM perceived or reported that on November 10, 2010, the Grievant punched Ms. B on the back of Ms. B's head with her fist. Further, the evidence shows that PM was one of Ms. B's caretakers and from November 10, 2010, to November 12, 2010 - the date Investigator LC reported Ms. B made the gesture - PM would have reasonably had contact with Ms. B. Thus, the Hearing Officer finds the perception or sentiment of another could have swayed Ms. B to make the November 12, 2010 gesture reported by Investigator CL.

Having considered all the evidence and found the Grievant's testimony credible, the Hearing Officer finds that Ms. B's gesture on November 12, 2010, may have more than one interpretation and that no one interpretation is more credible than the other. Or, further, Ms. B's gesture on November 12, 2010, may have been the adoption of a sentiment of someone else. Accordingly, the Hearing Officer finds the gesture reported by Investigator LC does not substantiate that the Grievant physically abused Ms. B two days before.[2]

[2] The Hearing Officer makes this finding, as discussed here and later in this decision, after considering investigator LC's testimony that he has known Ms. B for 14 years, that Ms. B in the past has demonstrated an ability to make

In her deliberations, the Hearing Officer also considered testimony regarding Ms. B's "attention seeking" characteristic. The Grievant as well as the Agency witnesses testified that Ms. B seeks attention. The Hearing Officer notes that the evidence shows that Ms. B sought attention when emergency workers attempted to address another resident's injury just prior to the alleged physical abuse on November 10, 2010. Her attention seeking behavior included yelling and screaming to the point that she became combative and disrupted emergency workers. The Grievant testified that if the Grievant had hit Ms. B as alleged, to get attention, Ms. B would have caused a similar commotion. The Hearing Officer finds the Grievant's assessment persuasive in that the assessment is consistent with other evidence showing Ms. B's attempts to acquire attention.[3]

In addition, the evidence shows that PM was needlessly slow to report the alleged physical abuse. The Hearing Officer finds as discussed below that this delay corroborates the Grievant's position.

The Grievant, who was a floor supervisor on the date of the alleged offense, also testified that policy requires staff to immediately report abuse. The Grievant contends that if PM had witnessed the Grievant punch Ms. B in the back of her head, PM should have reported the abuse without delay to the Grievant's supervisors on duty. The evidence shows that at the time of the alleged abuse, two of the Grievant's supervisors were on duty - Team Leader CB and Shift Supervisor AB. Further, at least five hours remained of the shift. Yet, according to PM's testimony she could not report the abuse until the next day. PM testified that policy requires staff to report abuse to the director. The Hearing Officer notes that the Agency offered no evidence to support PM's interpretation of the Agency's abuse reporting policy. The Hearing Officer finds that a reasonable person would conclude that when there is physical abuse as described by PM, it would be deemed an emergency situation and immediate reporting and efforts to prevent further abuse would be required. Further, since the team leader and shift supervisor were on duty at the time of the alleged physical abuse, PM could have immediately made a report of what she witnessed. Thus, the Hearing Officer gives great weight to the Grievant's testimony that if abuse had occurred, PM was required to report it immediately during her shift, especially considering five hours remained of it. The Hearing Officer finds that PM's failure to report the alleged abuse immediately during the shift corroborates the Grievant's position. The Hearing Officer also notes that when Investigator LC interviewed both of the Grievant's superiors, they reported witnessing no abuse by the Grievant.[4] [5]

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gestures and show him she has fallen, and that he could not interpret the gesture in any way other than Ms. B expressing that the Grievant punched Ms. B in the back of the head.

[3] While PM reported that after the alleged physical abuse, Ms. B signed she was sorry. The Hearing Officer does not find this signing was an attempt to get attention. The evidence shows that Ms. B is able to sign she is sorry for her misbehavior. The Hearing Officer notes Ms. B had just misbehaved when the staff was addressing an emergency with another resident and her signing that she was sorry could reasonably be explained as Ms. B expressing sorrow for her very recent combative and disruptive behavior.

[4] Having made this notation, the Hearing Officer is mindful of the Agency's contention that neither supervisor was in a position to see the abuse due to the make up of the cottage.

As referenced previously herein, the Hearing Officer also observed the demeanor of the Agency's witnesses and considered their testimony. Investigator LC testified that he has known Ms. B for 14 years and sees her regularly. He also testified that Ms. B was aware of his role inferring that Ms. B knew he investigated allegations of resident abuse. Further Investigator LC testified that he had never seen Ms. B make the type of gesture she made on November 12, 2010. Investigator LC then concluded that the only way to interpret the gesture was that the Grievant had hit Ms. B in the back of Ms. B's head with her fist.

The Hearing Officer acknowledges the investigator's subjective conclusion, but finds the gesture could have other interpretations. In making this finding, the Hearing
Officer considered all the evidence, to include but not limited the following:

(i) the undisputed testimony that Ms. B seeks attention;

(ii) the fact that Investigation LC has no formal training or expertise in sign language/communication by gesturing;

(iii) the fact that although Investigator LC has known Ms. B for 14 years and sees her daily, the evidence does not show that he (1) is involved in Ms. B's day to day care and (2) has acquired the degree of familiarity with Ms. B that allows him to accurately interpret her signing and gestures;

(iv) Investigator's LC report that states in pertinent part that Ms. B has a diagnosis of "sever[e] intellectual disability" and notes that '[Ms. B's] expressive language is limited to a few gestures, signs and changes in facial expressions, which she uses **"in an attempt**" to communicate;

(v) two days had passed from the time of the alleged offense and Ms. B making the gesture;

(vi) inaccurate communication by Ms. B per testimony of the Grievant;

(vii) no signs of physical injury of Ms. B; and

(viii) LC's disputed testimony that the Grievant asked Ms. B "what are you doing?" when Ms. B made the gesture

[5] The Agency contends there would be no reason for PM to report abuse if it did not occur. The Hearing Officer does note that the Grievant testified that she did not get along with the workers under her, to include PM, on the 1:15 p.m. to 10:45 p.m. shift. Grievant also stated that at least on one occasion, PM became mad at the Grievant and told the Grievant to mind her own business. In addition, the Hearing Officer notes that the Grievant testified that her subordinates on the shift, including PM, have ridiculed the Grievant. Further, the Grievant testified that she reported this problem to her supervisor, but no action was taken. Having observed the demeanor of the Grievant, the Hearing Officer finds this testimony credible.

The Hearing Officer has also considered the testimony of PM, to include PM's contention that she was only a few feet away when she observed the alleged abuse. The Hearing Officer does not find it convincing for several reasons. First PM delayed reporting the alleged physical abuse. The evidence shows that five hours remained in the shift at the time PM contends the abuse occurred. What is more, PM could have reported the alleged abuse to one or both of the Grievant's supervisors who were on duty. PM did not. Second, PM's statement notes that the Grievant informed PM that Shift Supervisor AB saw the Grievant hit Ms. B. The evidence shows that Shift Supervisor AB stated he did not observe the Grievant abuse Ms. B[6] and the Grievant in her statement and in testimony denied hitting Ms. B. Moreover, no signs of physical abuse of Ms. B existed.

Considering the above, the Hearing Officer finds that the Agency cannot meet its burden and show by a preponderance of the evidence that the Grievant engaged in the conduct described in the Written Notice.

2. Did the alleged behavior constitute misconduct?

The Agency contends the Grievant violated Departmental Policy 201 regarding abuse of residents. Yet, the Agency failed to provide or introduce into evidence the policy that was in effect on November 10, 2010, the date of the alleged offense. What is more, the Agency failed to provide or introduce into evidence its definition of abuse or the necessary elements to prove the offense. Without this critical evidence, the Hearing Officer is unable to determine if the Grievant, assuming she engaged in the conduct alleged, violated agency policy.

The Hearing Officer also notes that the abuse offense for which the Agency contends in its Written Notice that the Greivant [sic] engaged in is inconsistent with other evidence presented for the Agency. That additional evidence states in part that the Agency suspects the Grievant of neglect.[7] This inconsistency fails to enhance or affirm the Agency's position.

B. Was the Agency's discipline warranted and appropriate?

The Hearing Officer has found the Agency cannot meet its burden for the reasons noted here. Neither is the Agency able to show the Grievant violated Agency policy. Thus, the Agency's discipline is unwarranted and inappropriate.[8]

DETERMINATION/DECISION

Accordingly, the Hearing Officer reverses the disciplinary action challenged by the Grievant.[9]

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[6] As noted previously, the Hearing Officer does note the Agency contends that the shift supervisor was not in a position to see the abuse.

[7] The Agency's letter to the Grievant dated November 12, 2010, commences by stating that an allegation of resident abuse has been brought against the Grievant. However, later in the same paragraph, the Agency states the Grievant is suspected of neglect, not abuse. (A Exh. 4).

[8] The Hearing Officer again notes that she has considered the testimony of all the witnesses and all other evidence to include the Agency's exhibits one through ten.

The agency sought reconsideration by the hearing officer, and, in a June 1, 2011 decision, the hearing officer upheld her original Hearing Decision.

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."[10] 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.[11]

Challenge to Hearing Officer's Findings of Fact and Conclusions

The agency challenges the hearing officer's fact findings and essentially argues that the hearing officer should have accepted the testimony of its witnesses as more believable than that of the grievant. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[12] and to determine the grievance based "on the material issues and grounds in the record for those findings."[13] 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.[14] 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.[15] 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 agency argues that absent some clearly articulated basis for impeaching a witness' testimony, a witness' testimony is inherently more credible that that of the accused because the accused employee's job is at stake. We decline to adopt such a broad rule. The determination of credibility of witness testimony in left entirely to the hearing officer who should consider, among many things, motive. But we will not instruct hearing officers to adopt a blanket rule that holds, all things being equal, the testimony of the accused should always be viewed as less credible than other witnesses merely because the accused faces potential job loss. All things are never truly equal. Here, for example, the agency characterizes the grievant's contention that she did not get along with the witness "as disingenuous" and "self-serving." But,

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[9] Hearing decision at 2-9.
[10] Va. Code § 2.2-1001(2), (3), and (5).
[11] *See Grievance Procedure Manual* § 6.4(3).
[12] Va. Code § 2.2-3005.1(C).
[13] *Grievance Procedure Manual* § 5.9.
[14] *Rules for Conducting Grievance Hearings* § VI(B).
[15] *Grievance Procedure Manual* § 5.8.

if the hearing officer were to find, as she did here, that such testimony was credible, then the testimony of the witness could also be labeled as "self-serving."

It is the job of the hearing officer, as she expressly states she did here, to observe the demeanor of a witness. In doing so, the hearing officer found the grievant's testimony to be credible. Demeanor is only one factor that a hearing officer should consider in trying to discern the facts. As noted above, motive is also a factor, as is plausibility of testimony. Corroborative testimony and past record may also come into play in any given case. Ultimately, it is the hearing officer who must consider these factors and make a judgment call on which version of the facts is more believable. This Department has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer. This Department declines to depart from that long-standing precedent.

New Evidence

In the agency's request for administrative review, the agency seeks to have a document—one that was not proffered as evidence at hearing—to be now entered into the record as supporting evidence. The hearing officer declined to accept the document in her Reconsideration Decision. We find no error with the hearing officer's ruling on this matter.

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[16] 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.[17] However, the mere 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 outcome if the case were retried, or is such that would require the judgment to be amended.[18]

Here, the evidence that the agency seeks to have considered does not appear to be "newly discovered." The Reconsideration Decision notes that:

> The Agency does not claim that Policy DI 201 is newly discovered evidence. It represents that the "facility's representative" inadvertently neglected to include it in the Agency's exhibit package. Thus, clearly this evidence was in

[16] *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).
[17] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).
[18] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

> existence prior to and at the time of the hearing. The Hearing Officer, therefore will not consider it.
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> Moreover, the Hearing Officer is cognizant of the Agency's claim that she should take judicial notice of the policy under §8.01-386 and §8.01-388 of the Code of Virginia (as amended). The Hearing Officer declines to do so as noted here. Under §5.8(2) of the *Grievance Procedural Manual*, in disciplinary actions and dismissals, the Agency has the burden of proof at the hearing. It must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances. The tasks of reviewing exhibits and timely submitting those the Agency believes are necessary to meet its burden/prove its case are the responsibility of the Agency. The Agency has asserted that the Grievant abused a patient and violated its policy DI 201. It reported conducting an investigation pursuant to the policy. Yet, the Agency failed to cause that policy to be admitted as evidence at the hearing. The Hearing Officer is the impartial adjudicator in a grievance hearing. Therefore, it would be improper for her to, as argued by the Agency, "take judicial notice" of its policy to in effect supply evidence that the Agency was obliged to provide at the hearing. Accordingly, for this reason also, the Hearing Officer will not consider policy DI201.[19]

It does not appear that the evidence would likely require a change in outcome in this case. The hearing officer expressly addressed this point in her Reconsideration Decision explaining that:

> Further, the Hearing Officer notes that after reviewing all the evidence and the demeanor of the witnesses she found the Agency failed to show that the Grievant hit Ms. B on the back of her head with the Grievant's fist. Thus, even if policy DI 201 was admitted as evidence, the Hearing Officer would not alter her determination that the Agency failed to meet its burden.[20]

Consequently, there is no basis to re-open or remand the hearing in this case for consideration of this additional evidence.

Consideration of Grievant's Statement that She Would Be Willing to Take a Polygraph Test

The agency asserts that it was error for the hearing officer to consider the grievant's statement that she was willing to submit to a polygraph test. The agency asserts that this evidence should have been excluded. The agency asserts that persons will frequently offer to take a test but when offered, will retract the offer or submit to the test and feign disbelief when results establish deception.

The Code of Virginia prohibits as evidence at grievance hearings the analysis of polygraph examinations. According to Va. Code § 8.01-418.2:

> The analysis of any polygraph test charts produced during any polygraph examination administered to a party or witness shall not be admissible in any

[19] Reconsideration Decision at 2-3.
[20] *Id.* at 3, note 1.

> proceeding conducted pursuant to Chapter 10 (§ 2.2-1000 et seq.) of Title 2.2 or conducted by any county, city or town over the objection of any party except as to disciplinary or other actions taken against a polygrapher.

A second Code provision, Va. Code § 40.1-51.4:4 (D), states:

> The analysis of any polygraph test charts produced during any polygraph examination administered to a party or witness shall not be submitted, referenced, referred to, offered or presented in any manner in any proceeding conducted pursuant to Chapter 10 (§ 2.2-1000 et seq.) of Title 2.2 or conducted by any county, city or town except as to disciplinary or other actions taken against a polygrapher.[21]

These are essentially the only two limitations on the admissibility of evidence at grievance hearings in the Virginia Code, with the exception of Code Section 2.2-3005 (C)(5) which excludes "irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttals, or cross-examinations." Clearly, both provisions prohibit the "analysis" of polygraph tests. But Virginia law is well-settled in terms of the admissibility of polygraph analyses and any reference to either one's refusal to take a polygraph or the desire to take one. In Fowlkes v. Commonwealth of Va., 52 Va. App. 241, 248-249, 663 S.E.2d 98, 101-102 (2008), the Virginia Court of Appeals held that:

> "Because a polygraph examination has no proper evidentiary use, neither the results of a polygraph, nor '[e]vidence of a person's willingness or unwillingness to submit to a polygraph' is admissible in court." Bennett, 29 Va. App. at 271, 511 S.E.2d at 444 (quoting Gray v. Graham, 231 Va. 1, 10, 341 S.E.2d 153, 157 (1986)) (other citation omitted). "Furthermore, evidence concerning a polygraph is not admissible to establish the guilt or innocence of an accused or to impeach a witness' credibility." Id. (citing Robinson v. Commonwealth, 231 Va. 142, 155-56, 341 S.E.2d 159, 167 (1986)).
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> > In a long line of cases, spanning almost thirty years, [the Supreme Court of Virginia has] made clear that polygraph examinations are so thoroughly unreliable as to be of no proper evidentiary use whether they favor the accused, implicate the accused, or are agreed to by both parties. The point of these cases is that the lie-detector or polygraph has an aura of authority while being wholly unreliable.
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> Robinson, 231 Va. at 156, 341 S.E.2d at 167 (citations omitted). "The mention of polygraphs in the presence of the jury impermissibly suggests that there is a scientific way to find the truth where in reality, in our system of justice, the jury decides what is true and what is not." Id.

[21] Note that this section does not include the same "over the objection of a party" language contained in Va. Code § 8.01-418.2. Thus, the prohibition against the submission reference or offer of any analysis of a polygraph is not dependent on a party objecting to such evidence.

The position of the Court of Appeals of Virginia follows what appears to be the majority view. An American Law Reports article explains that:

> It has generally been held improper to admit evidence that an accused had been willing or unwilling to take a lie detector test; comments making such disclosure have also been held improper at a trial. Although it is sometimes contended that such a disclosure is relevant as tending to establish consciousness of guilt or an attitude of innocence, the courts have held that such evidence is not akin to evidence of flight and, generally, is not relevant. It has been suggested that the likelihood of self-serving motivation behind an accused's expression of willingness to take a lie detector test destroys any value to a disclosure at his trial of the expressed willingness, especially since an accused may be aware that the results of such a test are generally inadmissible. The refusal to approve evidence or comment as to the accused's offer or refusal to take the test has frequently been based, in part at least, on the well-established rule that the results of such tests are inadmissible.[22]

As the ALR report alludes, courts have overwhelmingly concluded that willingness or unwillingness to take a polygraph test is inadmissible as evidence.[23] A number of courts cite to one of the rationales advanced by the agency. For instance, in Commonwealth v. Martinez, 437 Mass. 84, 88, 769 N.E.2d 273, 278-79 (2002), the Supreme Judicial Court of Massachusetts explained that:

> [A] witness's offer to submit to a polygraph examination as evidence of consciousness of innocence is not admissible. Such an offer is a self-serving act undertaken with no possibility of any risk. If the offer is accepted and the test given, the results cannot be used in evidence whether favorable or unfavorable. In

[22] 95 A.L.R.2d 819 at 2.

[23] "In a long line of cases anchored by the often quoted opinion of the Minnesota Supreme Court in State v. Kolander, 236 Minn. 209, 52 N.W.2d 458, 465 (1952), it is universally held that evidence of the defendant's willingness or unwillingness to submit to a lie detector examination is inadmissible." Kosmas v. State, 560 A.2d 1137, 1140 (Md. 1989); *See* Rothgeb v. U.S., 789 F.2d 647 (8th Cir. 1986); Garmon v. Lumpkin County, Ga., 878 F.2d 1406 (11th Cir. 1989); Leonard v. State, 655 P.2d 766 (Alaska Ct. App. 1982); Rollins v. State, 208 S.W.3d 215 (Ark. 2005); State v. Britson, 636 P.2d 628 (Ariz. 1981); People v. Hinton, 126 P.3d 981 (Cal. 2006); Lemons v. State, 322 S.E.2d 521 (Ga. App. 1984); Minneman v. State, 441 N.E.2d 673 (Ind. 1982); State v. Zaehringer, 280 N.W.2d 416 (Iowa 1979); State v. McCarty, 578 P.2d 274 (Kan. 1978); Stallings v. Com., 556 S.W.2d 4 (Ky. 1977); State v. Forrest, 356 So. 2d 945 (La. 1978); Com. v. Martinez, 769 N.E.2d 273 (Mass. 2002); State v. Lavoie, 1 A.3d 408 (Me. 2010); State v. Dressel, 765 N.W.2d 419 (Minn. Ct. App. 2009); State v. Stewart, 265 S.W.3d 309 (Mo. Ct. App. S.D. 2008), reh'g and/or transfer denied, (Sept. 17, 2008) and transfer denied, (Oct. 28, 2008); State v. Ober, 493 A.2d 493 (N.H. 1985); State v Driver 183 A2d 655(N.J. 1962); State v. Williams, 316 S.E.2d 322 (N.C. App. 1984); State v. Hegel, 222 N.E.2d 666, 668 (Ohio Ct. App. 1964); Hall v. State, 570 P.2d 955, 960 (Okla. Crim. App. 1977) overruled on other grounds by Neal v. State, 837 P.2d 919 (Okla. Crim. App. 1992); Com. v. Ball, 385 A.2d 568 (Pa. Super. 1978); State v. Pressley, 349 S.E.2d 403 (S.C. 1986); State v. Damron, 151 S.W.3d 510 (Tenn. 2004); State v. Rowe, 468 P.2d 1000 (Wash. 1970); Hemauer v. State, 218 N.W.2d 342 (Wis. 1974); Sullivan v. State, 247 P.3d 879 (Wyo. 2011). *But see* State v. Pfaff, 676 N.W.2d 562 (Wis. Ct. App. 2004)(an offer to take a polygraph test is relevant to the state of mind of the person making the offer-so long as the person making the offer believes that the test or analysis is possible, accurate, and admissible).

> these circumstances, the sincerity of the offer can easily be feigned, making any inference of innocence wholly unreliable.[24]

Others courts, as the Virginia Court of Appeals appeared to in Fowlkes, focus on unreliability of the test to exclude not only the test, but any mention of a test and offers or refusals to submit to one. As one court explained:

> polygraph test results, testimony concerning such results, and testimony concerning a defendant's willingness or refusal to submit to a polygraph test are inadmissible. This general rule stems from relevancy and reliability concerns . . . . evidence which is not relevant is not admissible. Because polygraph evidence is not considered reliable, it is irrelevant. Therefore, polygraph evidence, which includes polygraph test results, testimony concerning such results, and testimony concerning a defendant's willingness or refusal to submit to a polygraph test, is not admissible.[25]

Yet another court explained its reluctance to allow such evidence as follows:

> The suspect may refuse to take the test, not because he fears that it will reveal consciousness of guilt, but because it may record as a lie what is in fact the truth. A guilty suspect, on the other hand, may be willing to hazard the test in the hope that it will erroneously record innocence, knowing that even if it does not the results cannot be used as evidence against him.[26]

While not binding on the grievance procedure, we find the reasoning articulated above to be very persuasive, and conclude that the willingness or unwillingness of an individual to take a polygraph test cannot, under the grievance procedure, be considered by a hearing officer as probative of witness credibility, nor probative of whether a charge against an individual is supported. The lack of probative value and risk of prejudice and confusion of the issues associated with a test of questionable reliability does not warrant consideration of the analysis of such tests nor references to a willingness (or unwillingness) to submit to one. Accordingly, this decision is remanded to the hearing officer to reconsider this matter without consideration of the grievant's willingness to take a polygraph.

The Order to Vacate a Finding of Physical Abuse

The agency asserts that the hearing officer erred by ordering "the Agency to vacate the finding of physical abuse." The agency asserts that the hearing officer does not have the authority to order that it vacate its finding of physical abuse.

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[24] Martinez, 437 Mass. at 84, 769 N.E.2d at 278-79 citing Ramaker v. State, 345 Ark. 225, 234, 46 S.W.3d 519 (2001); State v. Chang, 46 Haw. 22, 33, 374 P.2d 5 (1962), overruled on other grounds, State v. Okumura, 78 Haw. 383, 408, 894 P.2d 80 (1995); Commonwealth v. Saunders, 386 Pa. 149, 156-157, 125 A.2d 442 (1956); State v. Rowe, 77 Wn. 2d 955, 958, 468 P.2d 1000 (1970).

[25] State v. Damron, 151 S.W.3d 510, 515-16(Tenn. 2004)(internal quotation marks and citations omitted). The U.S. Supreme Court appears to share the Damron court's concerns regarding reliability noting that "there is simply no consensus that polygraph evidence is reliable." United States v. Scheffer, 523 U.S. 303, 309 (1998).

[26] Kosmas v. State, 316 Md. 587, 593-94, 560 A 2d 1137, 1141 (1989).

The issue here turns on the role of the grievance procedure as it relates to the administration of state government and hearing officer's authority under the grievance process. The agency states that "[g]rievance hearing officers simply lack the authority to intervene in the operations of state government, especially as they relate to the legal mandates of the agency." This statement is largely true. However, hearing officers clearly have authority to intervene in the operations of state government *as to those operations that are personnel operations*, such as state grievance hearings.[27] Here, the agency apparently conducted an abuse investigation and, as a result, concluded that the grievant had abused a client. Based on this finding, the agency disciplined the grievant, an act that the grievant challenged through the grievance process. Thus, as a personnel matter under the grievance procedure, it was not only appropriate but necessary for the hearing officer to reach a determination of whether abuse occurred, given that hearing officers clearly have authority to modify discipline if warranted by their findings.[28]

While it is not clear that the hearing officer in this case intended to order the agency to modify its written investigatory findings, we are compelled to clarify that under the grievance procedure, hearing officers do not have the authority to so order, just as a hearing officer has no authority to order an agency to revise or amend any other reports, summaries, emails, or other documents that contain the original agency finding of abuse. Further, such modification is simply unnecessary. The hearing decision itself vacates *for all personnel purposes* the finding of abuse. By finding that the grievant did not engage in abuse, the agency is foreclosed from taking any employment action against the grievant on the basis that she committed abuse. Thus, if on remand the hearing officer affirms her original finding of no abuse, the reconsidered decision can--*for personnel purposes only*--vacate the finding of abuse and rescind the associated Written Notice. In conclusion, if upon reconsideration the hearing officer upholds her original decision, she shall make it clear that she is not ordering the agency to modify or append any existing document, other than to rescind the Written Notice that was the subject of the grievant hearing itself, in conformance with the Standards of Conduct and consistent with agency practice.

APPEAL RIGHTS AND OTHER INFORMATION

The hearing decision is remanded to the hearing officer to reconsider this case without considering the grievant's statement regarding her willingness to submit to a polygraph examination. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[29] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[30]

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[27] "[U]nder *Code § 2.2-3000 et seq*., the State Grievance Procedure, an administrative officer serves as the fact finder." Comm. of Va. v. Needham 55 Va. App. 316, 326, 685 S.E.2d 857, 862 (2009). *See also* Virginia Dep't of State Police v. Barton, 39 Va. App. at 439, 445, 573 S.E.2d 319, 322 (2002) ("These statutes clearly provide the hearing officer is to act as fact finder . . . .").

[28] Va. Code § 2.2-3005.1.

[29] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056. Any such appeal must be made within 15 calendar days of the date of the reconsidered decision.

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

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.[31] 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.[32] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[33]

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Claudia T. Farr
Director

[31] *Grievance Procedure Manual* § 7.2(d).
[32] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[33] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).