Issue: Administrative Review of Hearing Officer's Decision in Case No. 9529, 9530; Ruling Date: June 29, 2011; Ruling No. 2011-3010; Agency: Department of Correctional Education; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Correctional Education
Ruling Number 2011-3010
June 29, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9529/9530. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The relevant facts as set forth in Case Number 9529/9530 are as follows:[1]

> The Department of Correctional Education employs Grievant as a Guidance Counselor at one of its schools. The purpose of her position is to:
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> > Provide overall coordination and support of student services in the areas of academic, personal/social, and career counseling, or selection, class scheduling, testing, orientation, and students scholastic records. Practice professional ethics with students and student records.
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> Grievant is Exempt under the Fair Labor Standards Act. In accordance with Grievant's Employee Work Profile she is expected to:
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> - Constantly follow established procedures for attendance and punctuality.
> - Inform supervisor of all absences and schedule changes in a timely manner and in compliance with procedure.
> - Timesheets and leave slips are completed in an accurate and timely manner.
> - Arrives to work at scheduled time and remains until scheduled departure time unless otherwise discussed with supervisor.
> - Inform supervisor of absences and submits timesheet/leave slips in a timely manner.
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> Grievant works at a school located within a juvenile correctional Facility under the exclusive control of the Department of Juvenile Justice. The

[1] Decision of Hearing Officer, Case No. 9529/9530, issued May 20, 2011 ("Hearing Decision") at 2-7. Footnotes from the Hearing Decision have been omitted here.

Department of Correctional Education must operate its school in accordance with the restrictions imposed by the Department of Juvenile Justice. One of those restrictions includes the requirement that Agency employees working at the school must comply with DJJ security procedures in order to enter the Facility and then enter the school.

A security fence surrounds the DJJ Facility. DJJ has a security post with a Juvenile Correctional Officer located at an entryway of the fence. DCE keeps a log book at the security post and requires its employees to record their names and times of entry into and departure from the Facility. The Agency does not consider its employees to be at work simply because they have signed in at the DJJ gate. Agency employees must then pass through DJJ security procedures such as metal detecting machines that are designed to prevent individuals from bringing contraband into the Facility. It can take between three to ten minutes to pass from the DJJ gate and enter the main school building.

The Agency considers its employees to be at work at the time they reach the school building inside the DJJ gate. Once employees enter the school building, they must sign a login sheet and record the time they arrived. There is a clock within view of the log sheet inside the school. The log sheet can be viewed by students and other staff. The Principal periodically reviews the log sheet and highlights the names of employees who were tardy.

On March 4, 2009, the Principal sent Grievant and other employees at the school an email stating:

> Employees must be at the workstation (inside the building) by 7:45 a.m. This will give you the opportunity to get ready for your class or the day and have students in the building by 8 a.m. as required by the MOA between DCE and DJJ and not be entering the building with students. As you know, your time has been docked if you have not been in the building by 7:45 a.m.
> It is important that you be ready for students when they enter the building.

In November 2010, the Principal installed a time clock in the main school building in order to establish with [sic] employees began working. Under the School's procedures:

- Each employee will have a separate timecard with last name and pay period on the card. Each time card allows for a 15 day period and allows for clocking in and out twice per day.
- Upon entry into the building, each employee will clock in using the assigned card. As has been directed by local policy, the time of work begins when the staff member is at the assigned workstation. In this case, inside the building is the assigned workstation.

- At lunch, each employee is expected to clock out when going to lunch and clock in again after lunch is complete. A 45 minute window will be allowed for staff members for lunch. This allows for staff members to attend meetings, complete work in the classroom, or prepare for the next class without taking a defined time for lunch, i.e. 11–11:45. However, as a general rule, all lunches must be completed before students arrive for afternoon classes.
- All teachers will again clock out at the end of the day prior to leaving.

The Principal did not forward his local operating procedures for the time clock to the Deputy Superintendent for review prior to implementing the time clock procedure. As a result of Grievant's December 17, 2010 grievance, the Agency ended use of the time clock effective January 21, 2011. The Agency implemented a tardy procedure effective January 25, 2011 in accordance with Local Policies and Procedures Policy Number 1 – 16 as follows:

Work Hours: 7:45 a.m. to 4:15 p.m., 30 minutes for lunch

Staff of [the school] should strive to be on time on a daily basis and be ready to have students began reporting to classrooms at 7:50 a.m. School is scheduled to begin at 8 a.m. daily with the morning announcements. The following tardy policy will be affected January 25, 2011.

- Staff shall sign in at the office based on the clock above the sign in sheet. No other time will be used. Names of staff members not present at 7:45 will be highlighted.
- Delays at the [DJJ] gate will not be an excuse for being late to your workstation. You should anticipate the possibilities of delays and plan accordingly.
- Staff will be allowed 3 tardies during a pay period. On the 4th tardy, staff members will receive a Needs Improvement notice.
- Failure to meet the conditions of the Needs Improvement Plan will result in a violation of the Standards of Conduct and staff may receive a Group Notice.
- All staff shall sign in and out for lunch whether leaving the building or eating in the building. All staff must take a 30 minute lunch break.
- Tardies from lunch will count against total tardies for the pay period.
- An eight hour work day is required, if not, a salary timesheet and leave slip must be submitted.
- Time will not be made up at the end of the day.
  Exceptions:
  - Tardies during inclement weather conditions (snow and/or ice) will not count against the tardies to receive a Needs Improvement Plan. (Conditions: Area schools are delayed or closed)
  - Traffic Accidents: Staff will be allowed 2 tardies during the pay period for traffic accidents. Delays must be reported to the Principal or the Assistant Principal.

The Principal determined whether employees were tardy by granting employees an additional five minutes beyond the start time of their shifts. For example, if an employee's shift was to begin at 7:45 a.m., the employee would be considered on time if the employee arrived at the school by 7:50 a.m. If the employee arrived at the school at 7:51 a.m. the Principal would record the employee as being six minutes late. The Principal would "dock" the time of an employee who was tardy by the amount of time the employee was tardy. The Principal would force the employee to use available leave balances to cover the amount of time the employee was tardy. For example, if an employee was tardy by one half hour, the Principal would require the employee to use a half hour of available leave such as annual leave.

The Principal would not permit Exempt employees to use additional hours worked in an eight hour day or additional hours worked in a 40 hour work week to substitute for the time an employee was tardy. For example, if Grievant was one hour late for work but worked one hour past the end of her scheduled shift, the Principal would not permit Grievant to use the one hour of extra time worked to offset her one hour of being late. If Grievant was late by one hour on a Monday but worked an additional hour beyond the end of her shift on Friday, the Principal would not permit Grievant to use the additional hour worked on Friday to cover the hour Grievant was late on Monday.

On February 16, 2011, Grievant sent the Principal an email stating, in part:

> We have had this discussion before. However I am respectfully requesting that you enter the exact, actual, and correct number of hours that I work rather than round the time down to a flat "estimate" of 8 hours. Even though I am an exempt employee and my overtime is not paid, I still maintain that under reporting my total hours worked is falsification of my time sheet. Is this a practice you use for both exempt and nonexempt employees or is this practice reserved only for exempt employees? I have shared with you before that I feel uncomfortable signing a time sheet to certify that it is accurate when I know it is not. You round up tardies and you round down over time. This creates a false report of my time and creates a skewed picture of my attendance. For example, I left work yesterday at 4:30. My time sheet should read 8.25 hours, not 8.

On February 16, 2011, the Principal said [sic] Grievant an email stating:

> A great deal of time is being spent on this time issue and I am aware of your concerns. As I have explained, the Commonwealth of Virginia does not recognize more than 8 hours of work per day. The 8 hours reported is a reflection of the workday although I am very much aware of the extra time that you spend working. I have

requested from HR an audit of your time in order to answer your questions.

On February 16, 2011, Grievant sent the Principal an email stating:

Thank you. That is all I have ever asked is an audit. Thank you.

On March 15, 2011, Ms. R, acting on behalf of DHRM, sent Grievant an email stating:

We met with [Human Resource Director] regarding your complaints and are satisfied that the Department of Correctional Education (DCE) is taking pro-active steps to address your concerns. In addition to auditing your leave records, we are aware that the DCE Human Resources staff has broadened their review and plan to audit records of other employees at [Grievant's school] as well as other DCE schools.

It is important to note that all exempt employees in state government are required to fulfill their 40 hour work week. This is an obligation we will fulfill to the taxpayers of the Commonwealth of Virginia. The Fair Labor Standards Act provides this accommodation for public employees which allows for the loss of work hours to be replaced with paid or unpaid leave for public-sector employees working in exempt-level positions. I am attaching an exempt form Title 29 CFR 541.710 which provides the salary deduction exemptions for public-sector employees. As a state employee, you are required to either work a 40 hour work week or as an alternative supplement any time lost with available leave balances or have your pay docked for the respective wages equivalent to the lost time. Your exempt status as a teacher is not jeopardized by the actions taken by management to use your leave balances in order to supplement lost time due to tardiness.

In addition, your reference to working and earning overtime in your position is not relevant for exempt-level employees. The Department of Correctional Education is not obligated under the Fair Labor Standards Act to provide compensation for additional time worked in excess of 40 hours in a given work week to employees in exempt level positions. As a professional, there may be occasions when your work may require additional time. That is a standard expectation for many individuals both in the private sector and public sector who work in professional exempt positions.

As you've discussed with several consultants and DHRM, the agency is responsible for determining an acceptable arrival/departure standard, meaning it is up to DCE to identify

> when an employee is considered to be tardy at the DJJ schools. Given the requirements of the correctional facilities' policies and procedures, DCE must take into account the need for teachers to be in their classrooms prior to the arrival of the students. From DHRM's perspective, we find that it is a reasonable expectation provided there is some allowance for an occasional unpredictable circumstance on the grounds at the gate area. However, we do not support the contention that employees' arrivals to the outer or inner gates should be considered as the start of the workday for teachers unless a teacher is required to perform functional responsibilities upon entering the gate. At this point, no information has been provided that indicates DCE teachers are performing any duties or functions until they reach their relevant classrooms which is when your workday begins.
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> * * *
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> On December 17, 2010, Grievant filed a grievance against the Agency alleging the misapplication or unfair application policy. On January 4, 2011, Grievant filed a grievance against the Agency alleging the misapplication or unfair application of policy. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On February 11, 2011, the EDR Director issued Ruling No. 2011-2900, 2011-2901 consolidating the two grievances for a single hearing. On March 2, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 23, 2011, a hearing was held at the Agency's office.[2]

In a May 20, 2011 hearing decision, the hearing officer denied the grievant's request for relief, with the exception that the agency restore the grievant's leave taken beginning November 17, 2010 for being tardy and reduce her salary to account for the time she was tardy.[3] The agency was also ordered to enforce its break policy at the school in a uniform manner.[4] The grievant now seeks administrative review from 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 … 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 does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

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[2] *Id*. at 1.
[3] *Id.* at 12.
[4] *Id*.
[5] Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3).

New Evidence

In her request for administrative review, the grievant seeks to have the hearing reopened in order to present a document from the State Employee Hotline. More specifically, the grievant seeks to introduce the document to contradict the agency's contention that the login sheet located inside the school building is the proper reporting tool for determining employee tardiness. In addition, the grievant alleges that the document will show that the agency's representative knowingly misled the hearing officer.

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[7] 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.[8] 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.[9]

Here, the evidence that the grievant seeks to have considered does not appear to be "newly discovered." Specifically, the grievant appears to have become aware of the State Hotline investigation before the hearing decision was issued. She became aware of the investigation at hearing, when the agency cross-examined the grievant's second witness. As such, the related document at issue cannot be considered "newly discovered."[10] The time to question a witness or request a delay in the hearing to obtain a necessary document is at hearing, not after the hearing decision is rendered. The grievant has provided no evidence that she requested a delay at hearing, nor does the hearing record reflect that she was not afforded an opportunity to secure witness testimony regarding this investigation report at hearing. Thus, we decline to disturb the decision on this basis.

Moreover, it does not appear that the evidence would likely require a change in outcome in this case. The grievant interprets the additional document to state that the appropriate login sheet for purposes of assessing employee tardiness is located at the facility gate, and not the

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[7] *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).

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

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

[10] *See* Hearing Recording at 34:53 through 35:25 (testimony of grievant's supervisor). During cross-examination, the grievant's supervisor was asked whether the issue with smoke breaks had been dealt with during a State Employee Hotline investigation. The grievant's supervisor testified that he did not recall.

login sheet located in the school building. Upon this Department's review of the document, however, it appears this report only addresses how the agency handles smoke breaks; it does not address employee tardiness policies. Nor does this additional document appear to contradict the agency's testimony at hearing regarding how the agency handles employee smoke breaks,[11] or show that the agency representative allegedly misled the hearing officer. Consequently, there is no basis to re-open or remand the hearing in this case for consideration of this additional evidence.

Inconsistency with Agency Policy

The grievant's request for administrative review alleges that the hearing officer's decision is inconsistent with the Department of Human Resource Management (DHRM) and agency policies. DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[12] Accordingly, if she has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise these issues in a request for administrative review to the Director of the Department of Human Resource Management, 101 North 14th St., 12th Floor, Richmond, VA 23219.

Perjury

The grievant asserts that the agency representative "knowingly misled the Hearing Officer by presenting falsified documentation along with prompting other agency employees that served as witnesses, [names and titles of two agency witnesses], into committing perjury." This Department has consistently denied party requests for a rehearing or reopening on the basis of alleged perjury at hearing.[13] In denying such requests, we have found Virginia court opinions to be persuasive. Even where there is a claim of perjury and some supporting evidence, Virginia courts have consistently denied rehearing requests arising after a final judgment.[14] Those courts reasoned that the original trial (or hearing) was the party's opportunity to cross-examine and impeach witnesses, and to ferret out and expose any false information presented to the fact-finder. Those courts also opined that to allow re-hearings on the basis of perjury claims after a final judgment could prolong the adjudicative process indefinitely, and thus hinder a needed finality to litigation. The grievant availed herself of the opportunity to expose any false testimony through cross-examination. Accordingly, we decline to disturb the decision on this basis.

Additional Issues Allegedly Not Addressed in Hearing Decision

In her request for administrative review, the grievant alleges that the hearing officer did not address the following six questions, which are individually discussed below:

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[11] *See* Hearing Recording at 21:17 through 22:42 (testimony of grievant's supervisor). The grievant's supervisor testified that the fenced area of the facility is a smoke-free area and employee smokers are required to step outside the facility gate to smoke. He stated that when employees step outside the gate to smoke, they are not required to sign-in or sign-out because they are still considered to be "at work."

[12] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).

[13] *See e.g.*, EDR Ruling No. 2006-1383.

[14] *See, e.g.*, Peet v. Peet, 16 Va. App. 323 (1993); Jones v. Willard, 224 Va. 602 (1983).

a. "Is the Agency compliant regarding timekeeping for both exempt and non-exempt employees, specifically as it pertains to the issues of over-time, compensation time, and straight time pay for exempt employees?"

In his hearing decision, the hearing officer addressed the relevant agency timekeeping practices and policies for exempt employees because the grievant is an exempt agency employee under the Fair Labor Standards Act.[15] He found that the "Agency considers an [exempt] employee to be at work when he or she is at the school building inside the DJJ facility" and held that "[a]n employee is not yet at work when the employee reaches the outer security gate under the control of the DJJ employees."[16] The grievant argued that this timekeeping practice was inconsistent with agency policy, but the hearing officer found that she did not present any policy which prohibited that practice or supported her contention.[17]

According to DHRM Policy 1.25, "the Agency has the authority to establish the beginning and end of Grievant's shift" and has the "discretion to apply additional time worked beyond the end of an employee's shift to offset the time an employee was tardy."[18] The grievant argued that if she worked more than eight hours in a day, she should receive credit.[19] However, the hearing officer ruled that the agency was not obligated to credit her for that additional time, and likewise, the grievant did not present "any policy requiring the Agency to adopt this approach."[20]

The question of whether the agency was compliant with timekeeping practices for non-exempt employees was not before the hearing officer in this particular case. Therefore, this Department has no reason to remand the decision for clarification on this specific question.

b. "By failing to accurately document hours worked over forty during a work week by an exempt employee, is the agency violating their right to require straight time pay or compensation time as outlined within the DHRM guidelines, which provides the option for exempt employees to request straight time pay or compensation time with proper documentation?"

The hearing officer found that "[t]he agency had the authority to set a time at which Grievant's eight hour shift began and establish her shift as eight hours per day. If Grievant failed to arrive in her workstation on or before her work shift, she was tardy. … When Grievant failed to complete an eight hour shift as required by the Agency, the Agency was authorized to reduce her compensation."[21] Furthermore, the hearing officer held "[t]he Agency had the authority to reduce Grievant's compensation for the time she missed from working her schedule shift because she was late to work."[22] Instead of reducing the grievant's compensation, the agency compelled her to use annual or other leave to cover for the time she was tardy.[23] However, the hearing officer found that "DHRM policy does not

[15] Hearing Decision at 2.
[16] *Id*. at 9.
[17] *Id*.
[18] *Id*. at 10-11.
[19] *Id*. at 10.
[20] *Id*.
[21] *Id*.
[22] *Id*. at 11.
[23] *Id*.

authorize the Agency to reduce leave balances against [the grievant's] will" and the "Agency cannot compel an employee to accept that choice."[24] Hence, the hearing officer ordered the agency to restore the grievant's leave taken and reduce her salary to reflect her absence from work.[25]

To the extent that the grievant believes the hearing officer's decision does not comport with DHRM policy and guidelines, DHRM has the sole authority to make that final determination.[26] Accordingly, if she has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise these issues in a request for administrative review to the Director of the Department of Human Resource Management, 101 North 14th St., 12th Floor, Richmond, VA 23219.

c. "Can a supervisor arbitrarily fail to report actual hours worked for an exempt employee even if the additional hours worked may or may not be compensated?"

The hearing officer found that "[w]hen Grievant worked more than eight hours in a day, the Principal considered the additional hours to be irrelevant because the Agency would not compensate Grievant for the additional hours she chose to work."[27] Furthermore, the hearing officer ruled that there was no basis to interfere with the Principal's practice because the grievant did not present "any policy that would require the Principal to write down every hour an employee worked beyond eight hours in a day.[28]

d. "Does the agency allow employees that smoke preferential treatment regarding break time, 'docking,' 'at work,' and sign-in/sign-out procedures?"

The hearing officer found that the "Grievant presented sufficient evidence to show that some employees were taking longer breaks without sanction from the Agency. Although the Principal denied knowing about this behavior, sufficient evidence was presented to show that the Principal should have known of employees taking extended breaks."[29] The hearing officer ordered the agency to "consistently apply its practice governing employee breaks."[30]

e. "Does the Hearing Officer have the authorization to override DHRM's policy as dictated within the Statement of Public Accountability, which strictly prohibits the deduction or docking of exempt employees pay for periods of absences less than one day?"

No, the hearing officer does not have the authority to override DHRM policy. The hearing decision must be consistent with DHRM and agency policy. DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[31] Accordingly, if she has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise these issues in a request for administrative review to the

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[24] *Id*.
[25] *Id* at 11-12.
[26] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).
[27] Hearing Decision at 10.
[28] *Id.*
[29] *Id*. at 12.
[30] *Id*.
[31] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).

Director of the Department of Human Resource Management, 101 North 14th St., 12th Floor, Richmond, VA 23219.

f. "Do the agency and Hearing Officer have an obligation to correct timekeeping errors from the date the offense occurred (August 2008), even if it is outside the Grievance 30 day timeline?"

No, in matters not involving discipline, the hearing officer's authority to order a remedy is limited to the 30 calendar day statutory period preceding the initiation of the grievance.[32] Hence, the hearing officer properly ordered the agency to "restore Grievant's leave balances and reduce her salary for the time period beginning November 17, 2010" in his hearing decision.[33]

Accordingly, because it appears the hearing officer addressed each of these six questions in his hearing decision, this Department has no reason to remand the decision for further consideration.

CONCLUSION AND 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] 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.[35] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[36]

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Claudia T. Farr
Director

[32] *See Rules for Conducting Grievance Hearings*, § VI (A).
[33] Hearing Decision at 11-12.
[34] *Grievance Procedure Manual* § 7.2(d).
[35] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[36] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).