

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9805, 9816;  
Ruling Date: July 27, 2012; Ruling No. 2012-3364; Agency: Department of  
Behavioral Health and Developmental Services; Outcome: Remanded to AHO.



***COMMONWEALTH of VIRGINIA***  
***Department of Human Resources Management***  
***Office of Employment Dispute Resolution***

**ADMINISTRATIVE REVIEW**

In the matter of Department of Behavioral Health and Developmental Services  
Ruling Number 2012-3364  
July 27, 2012

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 9805 / 9816. For the reasons set forth below, EDR remands the decision for further consideration by the hearing officer consistent with this ruling.

**FACTS**

The relevant facts as set forth in Case Number 9805 / 9816 are as follows:<sup>1</sup>

The Department of Behavioral Health and Developmental Services employed Grievant as a Registered Nurse II at one of its Facilities.

Grievant had prior active disciplinary action. On January 21, 2011, Grievant received a Group I Written Notice of disciplinary action. On June 1, 2011, Grievant received a Group I Written Notice of disciplinary action for the accumulation of unplanned leave. On January 30, 2012, Grievant received a Group I Written Notice of disciplinary action for excessive tardiness. Grievant was tardy for work on December 12, 2011, December 13, 2011, December 15, 2011, December 16, 2011, December 27, 2011, and December 28, 2011.

Grievant's regular work shift began at 7 a.m. Grievant was expected to report to work and sign in at precisely 7 a.m. On February 7, 2012, Grievant reported to work tardy at 7:12 a.m. As part of the disciplinary process, the Supervisor met with Grievant a few days after February 7, 2012 and before February 20, 2012. Grievant told the Supervisor that she would not be late again. The Supervisor could have removed Grievant from employment based on the accumulation of disciplinary action. The Supervisor issued Grievant a Group II Written Notice dated February 22, 2012 but did not remove Grievant from employment based on her assurances that she would not report to work late again. On February 20, 2012, Grievant reported to work tardy at 7:08 a.m. The Agency chose to issue Grievant a Group III Written Notice of disciplinary action with removal dated February 29, 2012.

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<sup>1</sup> Decision of Hearing Officer, Case No. 9805 / 9816 ("Hearing Decision"), May 16, 2012, at 2-3.

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On February 22, 2012, Grievant was issued a Group II Written Notice of disciplinary action for excessive tardiness. On February 29, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for excessive tardiness.

On March 5, 2012, Grievant timely filed two grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On April 18, 2012, the EDR Director issued Ruling No. 2012-3321, 2012-3322 consolidating the two grievances for a single hearing. Also on April 18, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 15, 2012, a hearing was held at the Agency's office.<sup>2</sup>

In his May 16, 2012 hearing decision, the hearing officer upheld the February 22, 2012 issuance of the Group II Written Notice of disciplinary action, but reduced the February 29, 2012 issuance of the Group III Written Notice to a Group II Written Notice.<sup>3</sup> The hearing officer further upheld the grievant's removal based upon the accumulation of disciplinary action.<sup>4</sup> The grievant now seeks administrative review from EDR.

### DISCUSSION

By statute, EDR 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."<sup>5</sup> If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.<sup>6</sup>

#### *Witness Issue & Adverse Inference*

The grievant claims that several agency employees, at least one of whom was a former supervisor, did not attend the hearing even though ordered to appear by the hearing officer as witnesses. Pursuant to the *Rules for Conducting Grievance Hearings*, it is the agency's responsibility to require the attendance of agency employees who, as in this case, are ordered by the hearing officer to attend the hearing as witnesses.<sup>7</sup> To that end, consistent with the *Rules for Conducting Grievance Hearings*,<sup>8</sup> the hearing officer's witness orders were sent to both the agency's representative and the grievant, in addition to the witnesses.

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<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.* at 6.

<sup>4</sup> *Id.*

<sup>5</sup> Va. Code § 2.2-1202.1(2), (3), and (5).

<sup>6</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>7</sup> *Rules for Conducting Grievance Hearings* § III.E ("The agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness.").

<sup>8</sup> *Id.* ("Orders should be issued in the name of the hearing officer and mailed by the hearing officer to the appropriate individual(s), with a copy to each party.").

In this case, pursuant to the grievant's request, the hearing officer ordered ten witnesses to attend the hearing. Of these ten witnesses, nine were current agency employees and thus the orders were issued to each at the agency's address. The grievant indicated in her opening statement that "most" of her witnesses were not present for the hearing.<sup>9</sup> A review of the hearing record indicates that only six of the ten witnesses ordered to appear actually testified at the hearing, and the four absent witnesses were all agency employees. As the agency presented no evidence to the contrary, it appears that the agency failed to require the employees to attend the hearing. Moreover, there is no record evidence of extenuating circumstances preventing the agency employees from attending. Therefore, because it was the agency's responsibility to have their employees appear for the hearing as witnesses, the hearing officer had the authority to draw an adverse inference against the agency if warranted by the circumstances.<sup>10</sup>

It appears the hearing officer did not draw such an adverse inference, as there is no discussion about it in the hearing decision. It is the duty of the hearing officer to inquire into matters such as the absence of subpoenaed witnesses, in order that he may subsequently consider whether and to what extent an adverse inference is appropriate. In this instance, the hearing officer did not inquire of the agency representative as to the whereabouts of the absent witnesses or whether they could be reached by telephone. Furthermore, at no time during the hearing did the hearing officer question the grievant about the nature of the witnesses' intended testimony for purposes of a proffer.<sup>11</sup> Therefore, we are unable to determine whether the outcome of the decision would have been affected by the testimony of those witnesses absent from the hearing.

Accordingly, EDR remands the decision for further consideration by the hearing officer, with instruction to conduct a telephone conference with the grievant and the agency representative for the limited purpose of establishing the expected content of the testimony from each of the witnesses who failed to appear for the hearing. The hearing officer shall then determine whether the proffered testimony should be taken as true based upon the drawing of an adverse inference against the agency, and if so, consider to what extent the outcome of this case would be affected by that testimony. To this end, at the telephone conference, the agency shall have the opportunity to respond as to the underlying reason for the unavailability of its four employees who were subpoenaed to attend the May 15, 2012 hearing but did not appear.

### *New Evidence*

The grievant's request for administrative review states "I have pulled together information regarding my [medical condition] and the medications I have been put on... I am requesting that the hearing officer reconsider the additional evidence..." Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review

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<sup>9</sup> Hearing Record at 1:30 through 1:38 (opening statement of grievant).

<sup>10</sup> *Rules for Conducting Grievance Hearings* § V.B ("Although a hearing officer does not have subpoena power, he has the authority to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as the hearing officer or the EDR Director had ordered.").

<sup>11</sup> During the hearing the grievant indicated uncertainty as to how to put on necessary evidence without having her anticipated witnesses present. See Hearing Record at 40:33 through 40:43 (testimony of grievant's supervisor) and 1:14:29 through 1:14:42 (closing statement of grievant).

unless they are “newly discovered evidence.”<sup>12</sup> Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.<sup>13</sup> The party claiming evidence was “newly discovered” must show that

(1) the evidence was newly discovered since the judgment was entered; (2) due diligence...to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.<sup>14</sup>

Here, the grievant has provided no information to support a contention that the additional records should be considered newly discovered evidence under this standard. It appears the grievant had the ability to obtain this evidence prior to the hearing. The grievant had the opportunity at the hearing to submit this evidence in support of her position and chose not to do so. Consequently, there is no basis to reopen or remand the hearing for consideration of this additional evidence.

#### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, the matter is remanded to the hearing officer to determine whether an adverse inference against the agency should be drawn, and, if so, to what extent the outcome of this case may be affected by the testimony of the absent witnesses. 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.<sup>15</sup> 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.<sup>16</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>17</sup>



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<sup>12</sup> Cf. *Mundy v. Commonwealth*, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff’d on reh’g*, 399 S.E.2d 29 (Va. Ct. App. 1990) (en banc) (explaining “newly discovered evidence” rule in state court adjudications); *see also, e.g.*, EDR Ruling No. 2007-1490 (explaining “newly discovered evidence” standard in context of grievance procedure).

<sup>13</sup> *See Boryan v. United States*, 884 F.2d 767, 771 (4<sup>th</sup> Cir. 1989).

<sup>14</sup> *Id.* (emphasis added) (quoting *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11<sup>th</sup> Cir. 1987)).

<sup>15</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>16</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>17</sup> *Id.*; *see also Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).