JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2024-5689
April 26, 2024

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 12056. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 12056, as found by the hearing officer, are as follows:[1]

> Prior to his dismissal, Grievant was a Corrections Officer at a Department of Corrections Facility [(the "agency" or "facility")].
>
> As a Corrections Officer, Grievant was required to be certified in firearms use and to maintain that certification through mandatory annual training and re-qualification. Grievant was last certified for firearms use on October 27, 2022. In order to remain certified and qualified for his job as a Corrections Officer, Grievant had to complete annual firearms training before October 27, 2023.
>
> During December 2022, the Facility advised its security personnel, like Grievant, of their mandatory training dates for calendar year 2023 so that the information would be available to personnel as they plan vacations and annual leave for the upcoming year.
>
> Grievant's annual mandatory firearms training was scheduled to occur on October 11, 2023. Grievant did not attend the mandatory firearms training on October 11, 2023.

[1] Decision of Hearing Officer, Case No. 12056 ("Hearing Decision"), Mar. 28, 2024, at 2-4 (citations omitted).

As a Corrections Officer at the Facility, Grievant was required to call the watch commander or an officer in charge at least two hours before the start of his shift if he would not be able to report for duty. Superintendent, Major and Sergeant testified that the standard "call-out" procedure for the Facility required employees, like Grievant, to call the Facility at least two hours prior to the start of their shift. Employees were required to call-out by telephone so that the call could be logged in the logbook. The person taking the call would document in the logbook information such as the reason the employee provided for calling out and the date and time the employee called. Major confirmed that the Facility's "call-out" procedures were reviewed with Grievant when he was issued a prior written notice in August 2023 and Sergeant testified that he had reviewed the "call-out" procedure with Grievant on more than one occasion.

Grievant called out of work on Monday, October 16, 2023.

The mother of Grievant's child also worked for the Agency at the Facility. On October 17, 2023, the mother of Grievant's child provided the Agency with a note from their child's doctor which stated: "[d]ue to a family illness or injury, please excuse parents of [Child] from work on 10/17/2023 until illness resolves."

After receiving the doctor's note regarding Grievant's child's illness from the mother of Grievant's child, Major advised her that she could not communicate with the Agency on behalf of Grievant regarding Grievant's employment matters, such as leave, and that Grievant would need to communicate directly with Major or other appropriate personnel if he also was requesting to use leave. Major also contacted Grievant via email advising Grievant that the Agency needed "an official return to work date" for him. Grievant never responded to Major's email and never provided the Agency with an official return to work date. Grievant did not communicate with anyone else at the Facility to request leave for October 17, 2023, or any day thereafter. Grievant also never received approval to use leave or miss work on October 17, 2023, or any date thereafter from Major, Superintendent or anyone else with authority to grant such approval.

Grievant was expected to report for work on October 30, 2023, October 31, 2023, November 1, 2023, and November 2, 2023. Grievant did not report to work on those dates. Grievant did not have approval to take leave on those dates. Grievant did not contact an on-duty watch commander or anyone else at the Facility to "call-out," request leave, or otherwise explain his absence from work on those dates.

During the hearing, evidence was introduced showing that Grievant had received a Group III Written Notice of disciplinary action with suspension on August 14, 2023, for failing to report for duty in excess of three days without proper notice or authorization.

On November 21, 2023, the agency issued to the grievant a Group III Written Notice with termination, charging him with failing to report to work without notice, follow instruction or

policy, or report for mandatory training, as well as for unsatisfactory attendance and being absent in excess of 3 days without authorization.[2] The grievant timely grieved the disciplinary action, and a hearing was held on March 7, 2024.[3] In a decision dated March 28, 2024, the hearing officer determined that the agency presented sufficient evidence to support its disciplinary action.[4] The hearing officer further found that "no mitigating circumstances exist to reduce the disciplinary action."[5] The grievant now appeals the decision to EDR.

DISCUSSION

By statute, EDR has 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."[6] 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 hearing officer correct the noncompliance.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Findings of Fact

In his request for administrative review, the grievant states that he "missed range," and that his "significant other was scheduled on the same day and neither of [them were] called [the] day of or prior to because [his] home address [is] … a few hours away." He adds that he sent his own doctor's note, rather than just the note from his child's mother, and called his supervisor to tell him what was going on, referring to a COVID-19 agency policy that "at that time was ten days." Finally, he notes that he could not have given a return-to-work date due to the unique situation of COVID-19. Essentially, the grievant challenges the hearing officer's factual findings regarding the authorization (or lack thereof) the grievant received prior to missing the training and the missed days of work.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[10] 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.[11] Thus, in disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the

[2] Agency Exs. at 1-2; *see* Hearing Decision at 1.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 5-6.
[5] *Id.* at 6.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] Va. Code § 2.2-3005.1(C).
[10] *Grievance Procedure Manual* § 5.9.
[11] *Rules for Conducting Grievance Hearings* § VI(B).

evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[12] 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 on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In her decision, the hearing officer found that, based on testimony from agency representatives in the grievant's chain of command, the grievant "was expected to report for work on October 30, 2023, October 31, 2023, November 1, 2023, and November 2, 2023," that "he did not have approval to take leave on those dates," and that he "did not contact an on-duty watch commander or anyone else at the Facility to 'call-out,' request leave, or otherwise explain his absence from work on those dates."[13] The hearing officer also found that he "did not report for his mandatory firearms training on October 11, 2023."[14] Finally, the hearing officer determined that based on the relevant agency policy provisions and agency testimony, the grievant's absences and failure to attend the firearms training constituted misconduct that rose to the level of Group III discipline with termination.[15]

To the extent the grievant challenges the hearing officer's finding that he did not properly follow agency attendance policy prior to missing the training and the identified days, EDR likewise finds no grounds to disturb the hearing decision on this basis. On appeal, the grievant argues that he did in fact let his supervisor know of his situation that prevented him from attending work and argued that he was unable to provide a return-to-work date due to the uncertain situation of COVID-19. However, it should be noted that the grievant did not attend the hearing and did not submit any evidence by the date of the hearing. For that reason, the hearing officer only had the agency's evidence and testimony to consider. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR 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.[16] Here, the record only contains evidence that supports the version of facts proffered by the agency. The record evidence shows that the grievant was on notice to complete mandatory firearms training by October 27, 2023, that he did not attend the training on October 11, 2023, that he was absent from work on October 30 through November 2, 2023, and that he had no justification for those absences. The hearing officer's findings of fact based on this evidence are consistent with EDR's independent review of the record and hearing recording,[17] and accordingly EDR has no basis to disturb the hearing officer's finding that the grievant engaged in the misconduct found by the agency.

[12] *Grievance Procedure Manual* § 5.8.
[13] Hearing Decision at 4.
[14] *Id*. at 5.
[15] *Id*. at 5-6.
[16] *See, e.g.*, EDR Ruling No. 2020-4976.
[17] *See, e.g.*, Hearing Recording at 11:25-12:40, 16:30-19:10, 1:01:30-1:02:50 (Agency witness testimony); Agency Exs. at 11, 23, 25, 27, 29.

Newly Discovered Evidence

Finally, it appears that the grievant submitted some form of evidence to EDR after the hearing date, including a video purportedly showing proof of the grievant's firearms certification. However, the evidence will not be considered because it was not newly discovered.

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[18] 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.[19] However, the fact that a party discovered the evidence after the hearing 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.[20]

Here, there is nothing indicated by the grievant to suggest that the evidence was newly discovered since the hearing, and even if it was, it could not be considered likely to produce a new outcome. For these reasons, the evidence submitted by the grievant after the hearing is not considered in this ruling.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[21] 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.[22] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[23]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

---

[18] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).
[19] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[20] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[21] *Grievance Procedure Manual* § 7.2(d).
[22] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[23] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).