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APPEAL REVIEW RULING

In the matter of the Department of Corrections
Ruling Number 2023-5565
June 14, 2023

Pursuant to Section 2.2-3006(B) of the Code of Virginia, the Department of Corrections (the “agency”) seeks approval from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management to appeal the final hearing decision in Case Number 11874 on the basis that it is contradictory to law. The Court of Appeals of Virginia has held that in judicially challenging a hearing officer's decision as contradictory to law, a party must identify a “constitutional provision, statute, regulation or judicial decision which the [hearing] decision contradicts.”¹ EDR rulings typically grant agency requests for permission to appeal when the agency has demonstrated at least one potential basis for contending that the hearing decision is contradictory to law, and when there is no evidence that the agency’s appeal is based on any improper purpose such as to harass or cause delay.²

EDR finds that at least one of the objections raised by the agency is arguably based on law. There is also no evidence of any intent to harass or cause delay on the part of the agency. The court can make the ultimate determination as to whether any of the stated objections meet the statutory “contradictory to law” grounds for judicial appeal.

While the grievant makes reasonable points in opposition to the agency’s request for permission to appeal, which will presumably be raised in the circuit court proceeding, it is not EDR’s practice to prevent an agency from seeking a legal appeal where there is at least an arguable question of law raised. This appellate period is obviously impactful on the grievant in that he is kept out of work without back pay for further time,³ and potentially incurs legal expenses. However, the grievant will be due such additional back pay if his reinstatement remains at the end of the legal appeal process. The grievant can also seek to have his attorneys’ fees paid by the agency.⁴ Accordingly, while we are sympathetic to the grievant’s position, there is not a basis under EDR’s precedent to deny the agency’s request on this record.

¹ See *Barton v. Va. Dept. of State Police*, 39 Va. App. 439, 446, 573 S.E.2d 319, 323 (2002).

² See, e.g., EDR Ruling No. 2019-4930; EDR Ruling No. 2008-1866; EDR Ruling No. 2007-1534.

³ Relief ordered by a hearing officer need not be implemented by an agency until the conclusion of judicial appeals. See *Grievance Procedure Manual* § 7.2(e); see also Va. Code § 2.2-3006(C).

⁴ Reasonable attorneys’ fees and costs may be awarded to the grievant by the court if he prevails. Va. Code § 2.2-3006(E).

Accordingly, the agency's request to appeal is granted. The agency may now file a notice of appeal with the circuit court in the jurisdiction in which the grievance arose. Any such notice must be filed within 30 calendar days of the date the hearing decision became final.⁵ Approval to proceed with the circuit court appeal in no way reflects the substantive merits of the appeal or addresses the jurisdiction of the circuit court.

Christopher M. Grab
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⁵ For a determination of when a hearing decision is "final," see *Grievance Procedure Manual* §§ 7.2(d), 7.2(e).