Issue: Administrative Review of Hearing Officer's Decision in Case No. 10823; Ruling Date: August 30, 2016; Ruling No. 2017-4407; Agency: Department of Social Services; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Social Services
Ruling Number 2017-4407
August 30, 2016

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 10823. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 10823, as found by the hearing officer, are as follows:[1]

> The Agency employed the Grievant as a quality assurance manager, with several years tenure, without any record of prior discipline. Performance evaluations, before 2015, showed extraordinary contributor.
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> The current Written Notices charged the Grievant with engaging in conflict of interest and unethical behaviors concerning outside employment. The first Written Notice charged:
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> > You used your role as Virginia's SNAP Quality Assurance Manager to consult with and assist other states in implementing [a consulting firm's] methods for quality control review to lower their own error rates. Not only did you use information obtained through your position for your own personal financial gain, but you also used it to assist other states compete with Virginia for the finite amount of federal high performance bonus money. Your unauthorized outside employment with [a consulting firm] constituted unethical conduct and a violation of law as it created a serious conflict of interest with your professional obligations to the Commonwealth and was a violation of subsection 1, 4 and 5 of Virginia Code § 2.2-3103.
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> The second Written Notice charged:

[1] Decision of Hearing Officer, Case No. 10823 ("Hearing Decision"), July 22, 2016, at 4-7 (citations omitted).

> You established a consulting business without completing the Outside Employment form that is required of all Commonwealth of Virginia employees. Additionally, you under stated [sic] your earnings from that business on your 2013 and 2014 SOEI documents.

The Agency witnesses testified consistently with the Written Notices. The investigator from the Office of the Inspector General (OIG) testified that, through his joint federal investigation, he investigated the extent of the Grievant's association with [a consulting firm], the Grievant's failure to accurately report his economic interest with [a consulting firm], and the Grievant's failure to notify and obtain approval of his outside self-employment. The investigator testified that he discovered payments from [a consulting firm] exceeding the Grievant's self-reporting on his Statements of Economic Interests (SOEI) for 2013 and 2014. The investigator asked the Agency to keep the matter confidential during the investigation, and the investigation remains open as of the date of the grievance hearing.

The Grievant's immediate supervisor, the director of benefit programs, testified that he was unaware of the Grievant's self-employment with [a consulting firm] until June 2015, when he learned, because of the OIG's investigation, that the Grievant had been on a trip to Alaska for [a consulting firm]. When he learned about this, he was told that the OIG was involved in an active investigation and that these matters should be kept confidential so as not to jeopardize the ongoing investigation. While the OIG investigator did not direct or suggest the Agency not pursue discipline against the Grievant, the director felt he should await the course of the investigation. The director provided negative feedback in the Grievant's annual performance evaluation in September 2015. The director testified that with the knowledge he had at the time, he felt it would be inappropriate to omit the issue from the performance evaluation.

The director also testified that Virginia competed with the sister states for bonus money available from the Department of Agriculture for its SNAP program, awarded on performance criteria. The top seven or eight states shared the pool of bonus money. Prior to 2013, the Agency contracted with [a consulting firm] to develop methods to increase performance so as to qualify for the bonus pool. He testified that the Grievant's unapproved, outside employment with [a consulting firm] helped competing states improve their performance, which was against Virginia's interest for the limited bonus pool money. The director considered that conduct to be a glaring conflict of interest with the Grievant's position with the Agency. While the director considered the Agency's processes to be unique and rather proprietary, he conceded, however, that the information available to the Grievant for sharing through [a consulting firm] with other states is not confidential. It is available, public information. The director testified that employees' SOEI's are filed with another agency, and not shared with his Agency.

The director testified that once civil investigative demands were served on both the Agency and the Grievant, personally, the Agency retained outside counsel to investigate, and, as a result of counsel's investigation the Agency elected to pursue discipline, even though the OIG investigation still remains open. The director was unaware of the extent of Grievant's information sharing through his outside employment, and, thus, he was unable to screen or approve any of it. The director testified that the Grievant's conduct, in secretly engaging in this self-employment involving his specialized knowledge (gained through his Agency position and experience) was a violation of trust. This breach of trust rendered any demotion or transfer within the Agency an unavailable alternative to termination.

The Agency's employee relations coordinator testified that she was involved in the disciplinary process, and was involved in meetings with management and legal counsel. She testified that it was her recommendation, after learning the available facts, that Group III discipline and termination was appropriate.

A subordinate employee, JH, testified that the Grievant asked her in 2014 to cover for him while he was away for his work with [a consulting firm], and that he asked her not to tell anybody. She did not tell anybody at work, but she was concerned about the conflict of interest and felt intimidated.

The Grievant, through his grievance statements, asserted that his outside employment was no different than his receipt of "honoraria," which is only prohibited for high-level officials in a position to make sensitive decisions. Also, the Grievant testified that he was specifically allowed to present in a peer-to-peer information sharing at a conference in Texas in 2013. The Grievant testified that he disclosed his self-employment compensation in his 2013 and 2014 Statements of Economic Interest, but he did not specifically notify his Agency or his supervisor or obtain approval for his outside employment. The Grievant told the director about his outside employment activities after he was aware of the OIG investigation. He consulted with [a consulting firm] on events approximately 11 times in 2014 and 2015, receiving pay and travel expenses. The Grievant conceded that he used his experience and information from his Agency position for his presentations with [a consulting firm] to other states. He also testified that the information he gained from such events helped him with his own Agency duties.

The Grievant testified that he did not consider his outside consulting with [a consulting firm] to be outside employment or self-employment. He was not an employee of [a consulting firm]. He also testified that he disclosed his outside business on his SOEI's by describing his estimated taxable income, not his gross revenues. The Grievant admitted he asked his subordinate employee, JH, to keep his activities with [a consulting firm] secret, but he testified that he only wanted to maintain his privacy and did not intimidate her or have any furtive intent.

On or about April 15, 2016, the grievant was issued three Group III Written Notices with termination. The first Written Notice charged the grievant with engaging in "unauthorized

outside employment" that "constituted unethical conduct and a violation of law."[2] The second Written Notice charged the grievant with "establish[ing] a consulting business without completing the Outside Employment form that is required of[ ]all Commonwealth of Virginia employees" and underreporting his "earnings from that business on [his] 2013 and 2014 [Statement of Economic Interest] documents."[3] The third Written Notice was withdrawn prior to the hearing.[4] The grievant timely grieved the disciplinary actions[5] and a hearing was held on July 20, 2016.[6] In a decision dated July 22, 2016, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant had "secretly engag[ed] in [] unapproved outside employment" that "lacked integrity, raised an inference of conflict of interest . . ., and was not approved as required" by the agency, and upheld the issuance of a single Group III Written Notice and the grievant's termination.[7] The grievant now appeals the hearing decision to 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."[8] 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.[9]

Due Process

In his request for administrative review the grievant claims that the disciplinary action had "nowhere near the level of detail necessary to properly inform [him] of the charges" and that, as a result, the hearing officer's decision to uphold the Written Notice constitutes a deprivation of due process. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[10] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[11] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.

Prior to certain disciplinary actions, the United States Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond

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[2] Agency Exhibit 2 at 1.
[3] Agency Exhibit 3 at 1.
[4] *See* Hearing Decision at 1. As the third Written Notice was not before the hearing officer for adjudication, it will not be discussed further in this ruling.
[5] Agency Exhibit 1 at 1.
[6] *See* Hearing Decision at 1.
[7] *Id.* at 1, 7-8, 10.
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] *E.g.*, Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Huntley v. N.C. State Bd. Of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974).
[11] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

to the charges, appropriate to the nature of the case.[12] Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[13]

On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[14] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[15]

> In this case, the description of the offense in the first Written Notice states:
> Engaging in Conflict of Interest and Unethical Behavior: You used your role as Virginia's SNAP Quality Assurance Manager to consult with and assist other states in implementing [a consulting firm's] methods for quality control review to lower their own error rates. Not only did you use information obtained through your position for your own personal financial gain, but you also used it to assist other sates compete with Virginia for the finite amount of federal high performance bonus money. Your unauthorized outside employment with [a consulting firm] constituted unethical conduct and a violation of law as it created a serious conflict of interest with your professional obligations to the Commonwealth and was a violation of subsection 1, 4 and 5 of Virginia Code § 2.2-3103.[16]

The description of the offense in the second Written Notice states:

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[12] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). State policy requires that

> [p]rior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations, employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60, *Standards of Conduct*, § E(1). Significantly, the Commonwealth's Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."

[13] *Loudermill*, 470 U.S. at 546.

[14] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[15] See Va. Code § 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

[16] Agency Exhibit 2 at 1.

> Engaging in Unethical Conduct by Withholding Information and/or Submitting Inaccurate Information: You established a consulting business without completing the Outside Employment form that is required of all Commonwealth of Virginia employees. Additionally, you under stated [sic] your earnings from that business on your 2013 and 2014 SOEI documents.[17]

The grievant alleges that the hearing officer "upheld [the grievant's] termination based on concepts, concerns, and policies that were nowhere contained in the . . . Written Notices" because he "expressly and solely relied on the [agency's] Code of Ethics and certain specific standards contained in the DHRM Standards of Conduct even though neither of the . . . notices mention those policies." In support of this position, the grievant argues that the Written Notices "contain specific contextual limitations that necessarily restrict the meaning of 'unethical' conduct for their purposes," and that the hearing officer's decision disregarded those limitations.

Section VI(B) of the *Rules for Conducting Grievance Hearings* (the "*Rules*") provides that in every instance, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."[18] EDR's rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.[19] In addition, the *Rules* provide that "[a]ny challenged management action or omission not qualified" cannot be remedied through a hearing."[20] Under the grievance procedure, charges not set forth on the Written Notice cannot be deemed to have been qualified, and thus are not before a hearing officer.

Having reviewed the hearing record, EDR finds that the grievant had adequate notice of the charges against him and that the charges were sufficiently set forth on the Written Notice forms. The Written Notices explicitly state that the grievant's actions constituted "Unethical Behavior" and "Unethical Conduct" and, while they do so in the context of the grievant's alleged violation of the State and Local Government Conflict of Interests Act (the "Act")[21] and alleged failure to submit accurate Statement of Economic Interest forms documenting his income from outside employment, the hearing officer determined that these allegations were substantially related to a failure to comply with state and agency policy such that the issuance of the disciplinary action was justified.[22] Indeed, a plain reading of the charges as set forth on the Written Notices indicates that the agency issued the discipline because the grievant participated in unauthorized outside employment that constituted a conflict of interest under the Act, failed to properly report information on his Statement of Economic Interest documents, and engaged in unethical conduct. That the hearing officer considered the evidence and determined that the agency had only presented sufficient evidence to support part of these allegations does not render the issuance of the Written Notices improper.[23] Because EDR finds that the grievant received

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[17] Agency Exhibit 3 at 1.
[18] *Rules for Conducting Grievance Hearings* § VI(B) (citing O'Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002)(holding that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.")).
[19] *See, e.g.*, EDR Rulings Nos. 2007-1409; EDR Ruling No. 2006-1193; EDR Ruling No. 2006-1140.
[20] *Rules for Conducting Grievance Hearings* § I.
[21] Va. Code § 2.2-3100 *et seq.*
[22] *See* Hearing Decision at 7-8.
[23] *See id.*

adequate notice of the charges against him, the hearing decision will not be disturbed on this basis.

Mitigation

The grievant also challenges the hearing officer's decision not to mitigate the agency's disciplinary action. He argues that "the Agency gave *no consideration* to whether the 8 ½ month delay in issuing [the] discipline" and that its decision not to mitigate "is entitled to no deference whatsoever."

By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[24] The *Rules* provide that "a hearing officer is not a 'super-personnel officer'" and that "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[25] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[26]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on the issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[27] EDR will review a hearing officer's mitigation determination for abuse of discretion,[28] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

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[24] Va. Code § 2.2-3005(C)(6).
[25] *Rules for Conducting Grievance Hearings* § VI(A).
[26] *Id.* § VI(B).
[27] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).
[28] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts." *Id.*

The grievant appears to claim that, because the agency did not consider whether mitigation was warranted due to the length of time between the alleged misconduct and the issuance of the Written Notices, the hearing officer was required "to reduce the discipline . . . to something less than termination . . . ." In cases where the agency does not consider a particular mitigating factor or, indeed, any mitigating factors, the hearing officer shows no deference to the agency's mitigation analysis because there is no such analysis to which he may defer.[29] Regardless of whether or not the agency considered the delay in the issuance of the discipline as a mitigating factor, "the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness."[30]

Furthermore, and especially in cases involving a termination, mitigation should be utilized only in the exceptional circumstance. Arguably, when an agency presents sufficient evidence to support the issuance of a Group III Written Notice, dismissal is inherently a reasonable outcome.[31] It is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline. However, EDR also acknowledges that certain circumstances may require this result.[32]

In this instance, the hearing officer clearly assessed the evidence in the record relating to mitigation and determined that "the timing of the Written Notice did not . . . present a mitigating factor sufficient to allow a hearing officer to reduce the discipline."[33] A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[34] Even considering those arguments advanced by the grievant in his request for administrative review, EDR is unable to find that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. EDR agrees with the hearing officer's assessment that the delay in this case does not support a determination that the disciplinary action should be reduced or rescinded.[35] The hearing officer found no prejudice to the grievant as a result of the delay.[36] As such, EDR will not disturb the hearing officer's decision on this basis.

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[29] *See* EDR Ruling Nos. 2008-1749, 2008-1759.
[30] *Rules for Conducting Grievance Hearings* § VI(B).
[31] Comparable case law from the Merit Systems Protection Board provides that "whether an imposed penalty is appropriate for the sustained charge(s) [is a] relevant consideration[] but not outcome determinative . . . ." Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, 664 n.4 (2010).
[32] The Merit Systems Protection Board views mitigation as potentially appropriate when an agency has "knowingly and intentionally treat[ed] similarly-situated employees differently." Parker v. Dep't of the Navy, 50 M.S.P.R. 343, 354 (1991) (citations omitted); *see* Berkey v. United States Postal Serv., 38 M.S.P.R. 55, 59 (1988) (citations omitted).
[33] Hearing Decision at 8.
[34] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).
[35] In short, it appears that the agency was awaiting a separate state government agency to complete its investigation into the matter. *See* Hearing Recording, Track 1 at 2:23:17-2:24:12, Track 2 at 1:00:52-1:01:02 (testimony of Director). After waiting for months and without a resolution forthcoming, the agency determined that it needed to move forward. *See id.*, Track 1 at 3:15:58-3:16:51 (testimony of Director). A delay in the issuance of disciplinary action appears entirely understandable under these facts, as do the hearing officer's associated determinations.
[36] Hearing Decision at 9.

Witness Testimony and Production of Documents

Finally, the grievant claims that the hearing officer's decision should be remanded and the hearing record re-opened for the admission of additional evidence. In support of this argument, the grievant states that an employee of the Office of the Attorney General ("OAG") and/or outside legal counsel for the agency "reviewed various documents as part of a government investigation and then sent the Agency a memo" relating to the conduct for which the grievant was ultimately disciplined. The grievant asserts that he was not provided with a copy of the memo or permitted to call the OAG employee to testify at the hearing, and thus was "improperly denied . . . the ability to cross-examine those persons who actually formulated the basis for the disciplinary charges against him."

EDR has reviewed nothing to demonstrate that the grievant suffered any material prejudice such that remanding the case for the taking of additional evidence is warranted here. There is evidence in the record to show that the agency's decision to issue the discipline was prompted in part by information from the OAG employee and/or outside counsel that the grievant had violated the Act, but that the decision to issue discipline was not made by the OAG employee or outside counsel.[37] In other words, EDR's review of the evidence in the record indicates that agency management made the ultimate decision to issue the Written Notices, including the level of discipline that was justified in this case. Though the agency was originally prompted to address the grievant's conduct because of information received from one or both of these outside entities, the agency's decision with regard to discipline was its own and based on its own evidence. The agency did not attempt to rely on information from these outside entities to support its case at the hearing. Consequently, any potential evidence from the OAG employee or outside counsel appears irrelevant as it had no bearing on the agency's basis for and decision to issue the disciplinary actions, and the grievant has not demonstrated otherwise. That the agency's decision to discipline the grievant was prompted by an investigation conducted by an outside entity does not, by itself, render all information in that outside entity's possession relevant to the grievance.

Furthermore, the grievant had the opportunity to present his arguments as to why his outside employment did not violate the Act, call witnesses and question them about their knowledge of those issues, and also cross-examine any witnesses called by the agency about that topic. The grievant exercised these rights and, indeed, apparently persuaded the hearing officer that his conduct did not constitute a violation of the Act, which was apparently the initial allegation discussed by the OAG employee and/or outside counsel.[38] The hearing officer did not uphold the Written Notices because the grievant's outside employment was a violation of the Act, but instead found that "[t]he Grievant's conduct in secretly engaging in the unapproved outside employment, so closely related to his Agency's business, lacked integrity, raised an inference of conflict of interest . . . , and was not approved as required by the Standards of Conduct and the Agency's handbook."[39] The hearing officer also determined that "the Grievant engaged in outside employment without notification or approval, as required by the Agency and the Standards of Conduct," that he "kept the business secret from his Agency," and that "the

[37] Hearing Recording at Track 2, 47:05-48:22 (testimony of Director).
[38] Hearing Decision at 7.
[39] *Id.*

nature of the outside employment, being so dependent on his Agency duties and specialization, justifie[d] a Group III Written Notice."[40]

From EDR's review of the hearing record, there is nothing to indicate that the memo or testimony from the OAG employee would have had an impact on the hearing officer's decision because the basis on which the Written Notices were upheld was not related to the agency's charge that the grievant had violated the Act. Considering the totality of the evidence presented by the grievant at the hearing, EDR has no reason to conclude that the grievant's ability to mount a defense to the charges against him was jeopardized because he was unable to question the OAG employee or introduce a copy of the memo into the hearing record. Accordingly, we decline to remand the matter for further proceedings on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's remand 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.[41] 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.[42] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[43]

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[40] *Id.* at 8.
[41] *Grievance Procedure Manual* § 7.2(d).
[42] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[43] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).