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**APPEAL REVIEW RULING**

In the matter of the Department of Corrections  
Ruling Number 2019-4930  
May 15, 2019

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<sup>1</sup> to appeal the final hearing decision in Case Number 11307 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.”<sup>2</sup> 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.<sup>3</sup>

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.

The grievant argues that even if the legal question(s) at issue (a search of the grievant’s personal cell phone and admissibility of newly discovered evidence) were determined improperly by the hearing officer, the resulting evidence is not sufficient to support the grievant’s termination, as found in the hearing decision.<sup>4</sup> While the grievant makes a reasonable point, one that would 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

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<sup>1</sup> The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

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

<sup>3</sup> See, e.g., EDR Ruling No. 2010-2663; EDR Ruling No. 2010-2556; EDR Ruling No. 2008-1866; EDR Ruling No. 2007-1534.

<sup>4</sup> See Decision of Hearing Officer, Case No. 11307, Feb. 28, 2019, at 6-7.

kept out of work without back pay for further time,<sup>5</sup> and, potentially, incurs legal expenses.<sup>6</sup> However, the grievant will be due such additional back pay if his reinstatement remains at the end of the legal appeal process. 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.

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.<sup>7</sup> 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.



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Director  
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<sup>5</sup> 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).

<sup>6</sup> Reasonable attorneys' fees and costs may be awarded to the grievant by the court if he prevails. Va. Code § 2.2-3006(E).

<sup>7</sup> For a determination of when a hearing decision is "final," see *Grievance Procedure Manual* §§ 7.2(d), 7.2(e).