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ADMINISTRATIVE REVIEW

In the matter of the Office of the State Inspector General
Ruling Number 2022-5317
November 18, 2021

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11687. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11687, as found by the hearing officer, are as follows:[1]

> The Grievant was hired by [the Office of the State Inspector General ("the agency")] in January 2020.
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> [The agency], on behalf of the citizens of the Commonwealth, serves as a catalyst for positive change by facilitating good stewardship of resources; deterring fraud, waste, abuse and corruption; advocating efficiency and effectiveness; and promoting integrity and ethical conduct.
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> The Grievant was hired as one of the individuals responsible for administering the State Fraud, Waste and Abuse Hotline.
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> In this position her core work responsibilities included:
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> - Prepar[ing] complaint summaries to document allegations; notat[ing] sufficient details, as illustrated in the State Fraud, Waste, and Abuse Hotline Policies and Procedures Manual.
> - Document[ing] citizen concerns or complaints in accurate and thorough summaries. Summaries are clear, concise and written in language that is easy to understand.

[1] Decision of Hearing Officer, Case No. 11687 ("Hearing Decision"), October 4, 2021, at 3-11 (paragraph enumeration and internal citations omitted).

- Complet[ing] Hotline case write-ups within two business days of receipt.
- "Screen[ing] out" applicable Hotline calls, concerns or complaints in accordance with established Hotline procedures.
- Follow[ing] up with Hotline callers as required to obtain additional details, when requested by auditors/investigators.
- Input[ting] new Hotline case records into the database as needed.

In her [Employee Work Profile ("EWP")], signed by the Grievant on November 16, 2020, the Grievant agreed to comply with [the agency]'s Code of Ethics and to "[demonstrate] a commitment to being a trustworthy steward of assigned resources[, act] with integrity and truthfulness in the performance of duties[, use her] role solely for the public good versus private gain[, and abide] by all applicable laws, regulations, and policies."

On the signature page of her EWP, the Grievant acknowledged a Confidentiality Statement:

> I acknowledge and understand that I may have access to confidential information regarding employees and/or customers. In addition, I acknowledge and understand that I may have access to proprietary or other confidential . . . business information belonging to the [agency]. Therefore, except as required by law, I agree that I will not:
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> - Access data that is unrelated to my job duties at [the agency].
> - Disclose to any other person, or allow any other person access to, any information related to [the agency] that is proprietary or confidential and/or pertains to employees and/or customers. Disclosure of information includes, but is not limited to, verbal discussions, fax transmissions, electronic mail messages, voice mail communication, written documentation, "loaning" computer access codes, and/or another transmission or sharing of data.
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> I understand that [the agency] and its employees and/or customers, staff or others may suffer irreparable harm by disclosure of proprietary or confidential information and that [the agency] may seek legal remedies available to it should such disclosure occur. Further I understand that violations of this agreement may result in disciplinary action, up to and including my termination of employment.

The Agency is less than 10 years old. Accordingly, [the agency] stresses to its employees the indispensable values of integrity, trust, honesty and confidentiality. These values are paramount as [the agency] seeks to engender trust and confidence in the public and in the other executive agencies within the Commonwealth over which it has oversight.

[Agency] Policy 1001.1 provides concerning Confidentiality and Security:

Confidentiality
All Hotline investigations and inclusive documents require strict adherence to confidentiality standards.

- Hotline cases should not be discussed except by the [internal audit director], [agency]-authorized personnel or others included on a "need-to-know" basis.
- Hotline Investigative/Complaint Report sheets shall not be shared, except among individuals conducting the investigation.
- The State Inspector General or designee is authorized to distribute or release Hotline reports.
- All documents, working papers, notes and reports dealing with an investigation shall be marked "Confidential State Fraud, Waste and Abuse Hotline Document."
- Interviews and investigation information should not be shared, discussed, or given to anyone who does not have a legitimate need for access.
- Strict confidentiality must be maintained throughout the entire Hotline investigation.

Physical Security
All Hotline documents must be maintained in a secured environment. All custodians of Hotline documents, such as [internal audit directors] and [agency] staff shall maintain all information supporting Hotline investigations in a secured location. All such information, documentation, etc. is the property of [the agency] and shall be identified as such. [The agency] may request that supporting information and documentation accompany formal reports.

Written Communications

- Hotline reports and other sensitive documents should be transmitted electronically between [the agency] and state agencies that possess digital encryption capabilities, or agree upon password protected documents.
- Commonwealth inter-agency mail should never be used to send Hotline information/documents. Fax communications and correspondence via the United States Postal Services (USPS) are

> permitted under certain circumstances only after prior discussion with [the agency].

The Grievant received substantial training concerning her confidentiality and security obligations to the Agency and, in any event, admitted that she understood those responsibilities because of her past employment and background.

In February 2021, Grievant disclosed highly confidential [agency] investigative materials to a third party, who in turn provided the confidential materials to the news media.

Grievant conceded she was ultimately responsible for the improper disclosure of confidential [agency] investigative materials to the news media, and that her conduct violated [agency] and Commonwealth policies.

On or about February 23, 2021, the materials were widely publicized by the news media. This prohibited disclosure damaged the reputation of [the agency] and continues to materially, adversely impact the Agency's ability to conduct confidential investigations.

On February 24, 2021, [agency] leadership discussed the need for an internal administrative investigation into the significant information security issues raised by the unauthorized dissemination of confidential investigative Agency documents.

At this time, management had no idea who was responsible for the leaks.

Shortly thereafter, [the agency] referred the investigation to the Virginia State Police ("VSP") because the Agency could not identify a suspect or person of interest in relation to the disclosure to the news media and because the perpetrator could conceivably be in management.

On March 3, 2021, Grievant's attorney at that time . . . transmitted correspondence to leadership in the General Assembly, which, in relevant part, alleged that [the attorney] represented an unidentified employee of the Commonwealth who sought to invoke protections under the Virginia Fraud and Abuse Whistle Blower Protection Act ("WBPA") . . . .

[The grievant's attorney]'s correspondence included various internal drafts and investigative materials from the Agency that are highly confidential and concerned completed and ongoing [agency] investigations.

Neither the letter transmitted by [the grievant's attorney] nor the evidence presented at the Grievance Hearing identify any alleged "wrongdoing" or "abuse" within the scope of the WBPA. . . .

> On or about March 5, 2021, [the agency] reviewed the materials transmitted to the General Assembly and gathered evidence suggesting that Grievant had improperly disseminated the confidential information obtained by [her attorney].
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> [Agency] representatives convincingly testified that (1) Grievant's communication to the General Assembly did not include any allegation of whistle blower "wrongdoing" or "abuse" under the WBPA and (2) the disclosure of numerous confidential draft investigative documents was unnecessary and in violation of [agency] and Commonwealth policy.
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> Having identified Grievant as a possible suspect in the disclosure of confidential investigative materials to the news media that occurred only one week earlier, [the agency] resumed its administrative investigation to identify whether Grievant violated policy by disseminating confidential [agency] investigative materials and information.
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> In the course of its administrative investigation, [the agency] confirmed that Grievant violated Agency policy by transmitting highly sensitive investigative materials, including medical information and other personal identifying information . . . from the [Virginia] Department of Corrections . . . to her personal email account on at least 25 occasions.
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> The Grievant's personal [email] account was not a secure environment.
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> * * *
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> . . . [T]he Grievant stipulated: (a) the emails and attachments [sent to her personal email account] were authentic; (b) they were sent to her personal email account by Grievant; and (c) they contained information which would be considered confidential from the perspective of [the agency].

On March 22, 2021, the agency issued to the grievant eight Group II Written Notices, with termination, for transmitting confidential information from her agency email account to her personal email account.[2] The grievant timely grieved these disciplinary actions, and a hearing occurred on September 15, and 16, 2021.[3] In a decision dated October 4, 2021, the hearing officer upheld the agency's disciplinary actions as warranted and appropriate under the circumstances.[4] The hearing officer found that the evidence did not support a retaliatory motive for the agency's

[2] Agency Ex. 2; *see* Hearing Decision at 8.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 10, 13, 16.

disciplinary actions,[5] and he concluded that no mitigating circumstances supported reducing or rescinding the discipline.[6]

The grievant now seeks administrative review of the hearing decision by 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."[7] 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.[8] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[9] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant maintains that the termination of her employment violated the WBPA, and that the hearing officer erred in concluding otherwise.[10] She further argues that the agency took an arbitrary and unreasonable approach to the discipline it issued, such that the hearing officer should have mitigated the penalty for the grievant's offenses to a single Group II Written Notice.[11]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[12] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[13] 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.[14] Thus, in disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[15] 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.

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[5] *Id.* at 16.
[6] *Id.* at 13-15; *see generally Rules for Conducting Grievance Hearings* § VI(B)(2).
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[10] Request for Administrative Review at 1-2.
[11] *Id.*at 2-3.
[12] Va. Code § 2.2-3005.1(C).
[13] *Grievance Procedure Manual* § 5.9.
[14] *Rules for Conducting Grievance Hearings* § VI(B).
[15] *Grievance Procedure Manual* § 5.8.

Whistle Blower Protection Act

The WBPA defines a "whistle blower" as "an employee who witnesses or has evidence of wrongdoing or abuse and who makes . . . a good faith report of . . . the wrongdoing or abuse to one of the employee's superiors, an agent of the employer, or an appropriate authority."[16] The grievant argues that "the Hearing Officer erred when he concluded that the grievant was not a 'whistleblower' under" the WBPA.[17] She maintains that the agency chose to terminate her employment "as a result of" her activity protected by the Act,[18] and thus the termination was not consistent with law and policy.

In his decision, the hearing officer found that, "[i]n February 2021, Grievant disclosed highly confidential [agency] investigative materials to a third party, who in turn provided the confidential materials to the news media."[19] He determined that, on or about February 24, agency management began to investigate these disclosures, ultimately referring the matter to state police, without knowing who the source of the disclosures was.[20] On March 3, the grievant's attorney communicated with members of the General Assembly on her behalf, invoking whistle blower protection for disclosures therein.[21] Soon thereafter, the agency identified the grievant as a suspect in the media leaks and discovered that she had also transmitted "highly sensitive investigative materials" to her personal email account on 25 occasions between May 2020 and January 2021.[22] The agency issued the Written Notices related to these transmissions on March 22, 2021. Based on this timeline of events and other evidence, the hearing officer concluded that the grievant's "purported whistle blower report [of March 3] was not made in 'good faith' because it was intended to protect her from discipline for her earlier policy violations."[23]

The timeline, which the grievant does not appear to dispute, finds support in the record, including the grievant's testimony. At the hearing, the grievant testified that she did not comply with the confidentiality obligations of her position with the agency when she sent agency documents to her personal email account as cited on the eight Written Notices.[24] She further testified that she had provided agency information to a third party, who then provided the information to members of the news media in February 2021.[25] The grievant has not asserted that the third party was an "appropriate authority" for whistle-blower purposes or that this disclosure is otherwise entitled to protection under the WBPA. Beyond asserting her good faith in making

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[16] Va. Code § 2.2-3010.
[17] Request for Administrative Review at 1.
[18] *Id.* at 2; *see* Va. Code §§ 2.2-3009 through 2.2-3014.
[19] Hearing Decision at 6. The hearing officer noted the grievant's acknowledgment that her disclosure violated state and agency policies and that she bore responsibility for the subsequent disclosure to the media. *Id.*
[20] *Id.* at 6-7.
[21] *Id.* at 7.
[22] Id. at 8; *see* Agency Exs. 2, 18.
[23] Hearing Decision at 10-11; *see* Grievant's Ex. 14; *see generally* Va. Code § 2.2-3010. The hearing officer also determined that the March 3 correspondence to members of the General Assembly did not "identify any alleged 'wrongdoing' or 'abuse' within the scope of the WBPA." Hearing Decision at 7.
[24] Hearing Recording Pt. VI at 24:30-25:05, 32:40-33:10, 37:15-39:33; *see id.* at 46:35-47:55, 48:50-50:50.
[25] *Id.* at 1:23:30-1:24:48.

her March 3 report to the General Assembly, the grievant's request for administrative review does not explain how the hearing officer's reasoning to the contrary was in error, and our own review of the record suggests no reason to disturb his analysis on this point.[26]

Moreover, the hearing officer reasoned, the evidence did not establish a causal link between any protected activity and the agency's disciplinary actions: "the Agency's alarm bells regarding security and the concomitant investigation preceded" the March 3 correspondence purported to trigger whistle-blower protection.[27] The grievant disagrees, pointing out that the March 3 correspondence made her a suspect as to the media disclosures, a development which ultimately led the agency to discover and penalize the separate misconduct charged in the eight Written Notices.[28] Essentially, the grievant's whistle-blower argument is that the agency chose to terminate her employment in retaliation for her disclosures to the General Assembly.[29] EDR has long analyzed retaliation claims under a burden-shifting framework that requires a grievant to demonstrate by a preponderance of the evidence that an agency's actions were a pretext for retaliation.[30] As retaliation is an affirmative defense, the grievant carries the ultimate burden to establish the claim of retaliation.[31] Here, the hearing officer reasoned that the discipline at issue resulted from an investigation into information security breaches that preceded the March 3 correspondence – not from a motive to retaliate against the grievant for that correspondence.[32] While the grievant maintains that her employment would not have been terminated had her March 3 correspondence not revealed her as a suspect for the earlier disclosures, we cannot say the hearing officer was required to infer pretext from this chain of events.[33] Ultimately, 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

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[26] In her request for administrative review, the grievant cites a Pennsylvania federal court opinion for the proposition that inappropriate disclosures, *e.g.* to the media, do not necessarily extinguish whistle-blower protections for concurrent appropriate disclosures. *See* Request for Administrative Review at 1-2; Dennison v. Pa. Dep't of Corrs., 268 F. Supp. 2d 387 (M.D. Pa. 2003). However, even if we were to accept the cited authority as instructive, the court's conclusion in that case was that the matter should proceed to consideration by the factfinder (a jury in that case). Here, by contrast, the hearing officer as factfinder has already made determinations, as set forth in the hearing decision, and our review on appeal is limited to whether those determinations complied with the grievance procedure. *See Grievance Procedure Manual* § 7.2.

[27] Hearing Decision at 16.

[28] Request for Administrative Review at 2

[29] *Id.*

[30] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017); *see generally Rules for Conducting Grievance Hearings* § VI(B)(1). Federal courts have found it appropriate to apply the same burden-shifting framework to retaliation asserted specifically under Virginia's WBPA. *Carmack v. Virginia*, Case No. 1:18cv31, 2019 U.S. Dist. LEXIS 148046, at *52-54 (W.D. Va. Aug. 29, 2019), *aff'd*, 837 Fed. App'x 178, 183 (4th Cir. 2020) ("Given the amenability of the [WBPA] to the application of the *McDonnell Douglas* framework, the regularity with which courts apply this framework in assessing the causation element in cases involving state whistleblower statutes and/or provisions, and finding no reason to depart from this approach, the court will apply this framework in the present matter.").

[31] *Rules for Conducting Grievance Hearings* § VI(B)(1).

[32] Hearing Decision at 16.

[33] *See* Netter, 908 F.3d at 938. Upon our independent review of the record as to the hearing officer's consideration of evidence of potential pretext for retaliation, we find no basis to disturb his decision on these grounds.

are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[34]

In sum, and in light of the grievant's burden to prove her affirmative defenses, we conclude that the hearing officer's findings as to the WBPA and to retaliation in general were grounded in record evidence and were not otherwise unreasonable. Accordingly, EDR will not disturb the hearing decision on these grounds.

Mitigation

The grievant further argues that the hearing officer should have mitigated the agency's chosen penalty of eight Group II Written Notices. She contends that the 25 instances of her cited misconduct were "arbitrarily divided" by month of occurrence with "no rhyme or reason, or consistency as to the weight – or lack of weight – to be given to the offenses."[35]

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]."[36] The *Rules for Conducting Grievance Hearings* ("*Rules*") provide that "a hearing officer is not a 'super-personnel officer'"; therefore, "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."[37] More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[38]

Because reasonable persons may disagree over whether and to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is high.[39] Where the hearing officer does not sustain all of the agency's charges and finds that mitigation is warranted, he or she "may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any

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[34] *See*, *e.g.*, EDR Ruling No. 2020-4976.
[35] Request for Administrative Review at 2-3.
[36] Va. Code § 2.2-3005(C)(6). As with all defenses, the grievant carries the burden to prove mitigating factors by a preponderance of the evidence. *Rules for Conducting Grievance Hearings* § VI(B)(2).
[37] *Rules for Conducting Grievance Hearings* § VI(A).
[38] *Id.* § VI(B).
[39] The federal Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can serve 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). The Board's similar standard prohibits interference with management's judgment unless, under the particular facts, the discipline imposed is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Serv., 819 F.2d 1113, 1116 (Fed. Cir. 1987) (citations and internal quotation marks omitted). On the other hand, the Board may mitigate discipline where "the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness." Batten v. U.S. Postal Serv., 101 M.S.P.R. 222, 227 (M.S.P.B. 2006), *aff'd*, 208 Fed. App'x 868 (Fed. Cir. 2006).

time during the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."[40] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[41] and will reverse the determination only for clear error.

In this case, the hearing officer found no basis to mitigate the agency's chosen penalty, reasoning that, "as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer."[42] The grievant disagrees, maintaining that the agency's approach to her 25 instances of misconduct was an arbitrary use of its discretion and that the instances should have been "treated as one, continuous, Group II offense."[43]

The hearing officer's conclusions find support in the record evidence. Multiple members of agency management who took responsibility for the decision to issue discipline in this case testified that the agency did so in close consultation with the agency's human resources client manager at DHRM.[44] One manager explained that the agency chose to group the instances of misconduct by month as an alternative to issuing one Written Notice for each offense instance – *i.e.* 25 Written Notices.[45] The agency's DHRM client manager confirmed that, as he was advising the agency on how to handle discipline for the 25 instances of misconduct, he suggested grouping the offenses by month as a form of mitigation – an approach he characterized as an "accepted practice" used in the past for disciplinary matters involving multiple instances of an offense over time.[46] This testimony is contrary to the grievant's position that eight Written Notices was an arbitrary number. Moreover, while the grievant appears to argue that the maximum reasonable penalty would have been a single Group II Written Notice, we identify no facts or policy in the record that might have required that result. Accordingly, we cannot say that the hearing officer erred by not mitigating the agency's chosen penalty, which DHRM's human resources client manager testified was consistent with state policy.

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.[47] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit

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[40] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[41] "'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.*
[42] Hearing Decision at 15.
[43] Request for Administrative Review at 3.
[44] *See*, *e.g.*, Hearing Recording Pt. II at 1:21:50-1:35:45 (Deputy Inspector General's testimony); *id.* Pt. IV at 1:38:20-1:39:10, 2:07:20-2:07:50 (agency head's testimony).
[45] *Id.* Pt. II at 1:29:40-1:30:50 (Deputy Inspector General's testimony).
[46] *Id.* Pt. V at 57:10-1:00:15, 1:16:05-1:16:52 (DHRM client manager's testimony).
[47] *Grievance Procedure Manual* § 7.2(d).

court in the jurisdiction in which the grievance arose.[48] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[49]

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