Issue: Administrative Review of Hearing Officer's Decision in Case No. 10515, 10516; Ruling Date: May 18, 2015; Ruling No. 2015-4142; Agency: Department of Corrections; 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 Corrections
Ruling Number 2015-4142
May 18, 2015

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 10515/10516. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10515/10516, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employed Grievant as a Probation and Parole Officer II at one of its facilities. She began working for the Agency on June 25, 2004. No evidence of prior active disciplinary action was introduced during the hearing.
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> Grievant was responsible for writing pre-sentence investigation reports (PSI) regarding defendants convicted of felonies. As part of her training, Grievant was told that pre-sentence investigation reports were confidential documents.
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> Grievant often worked from her home. She signed a teleworking agreement in June 2011 providing the Agency with certain assurances including:
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> > Employee will apply approved safeguards to protect agency or state records from unauthorized disclosure or damage, and will comply with the privacy requirements set forth in the state law and the Department of Personnel and Training's Policies and Procedures Manual.
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> Grievant signed a Windows/VMS User Information Security Agreement on March 14, 2009. In this agreement, Grievant acknowledged that that she was

[1] Decision of Hearing Officer, Case No. 10515/10516 ("Hearing Decision"), April 13, 2015, at 2-5 (citations omitted).

granted access to automated systems including licensed software, hardware, and date of DOC. She also acknowledged:

> That data contained in and accessed using the information systems and network of DOC, and their information systems at the Virginia Information Technologies Agencies (VITA) are the property of the Commonwealth of Virginia. This includes all systems and date used to conduct the business of the DOC, regardless of where the system or data resides. I shall not disclose, provide, or otherwise make available, in whole or in part, such information other than to other employees or consultants of the DOC to whom such disclose is authorized. Such disclosure shall be in confidence for purposes specifically related to the business of the DOC and the Commonwealth. ***
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> I understand and agree that all computer resources and equipment are the property of DOC and shall be used for official business only. I understand that DOC reserves the right to monitor, access, and disclose any communications using its system and, there, I have no expectation of privacy. I understand that it is my responsibility to protect the data and systems from damage or destruction. I agree to comply with DHRM Policy 1.75 – Use of the Internet and Electronic Communications Systems. ***
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> I acknowledge that I have read and will comply with DOC Information Technology Security Operating Procedure 310.2. Use of the computer resources and equipment with knowledge of this procedure will be deemed consent to this procedure. This agreement shall be interpreted in accordance with the laws of the Commonwealth of Virginia.

Grievant was scheduled to begin medical leave for an injury to her hand. Grievant was an especially hard working employee and the Chief believed that Grievant might work from home while she was supposed to be recovering. The Agency's practice was to disable DOC email accounts when an employee was on short term disability and not supposed to work. The Chief decided that Grievant's DOC account should be disabled while she was on leave.

On September 30, 2014, the Deputy Chief sent Grievant an email stating:

> I found out since you are going on medical leave your computer will be disabled starting tomorrow until your return on 10/16. If your return to work is extended then it will be turned back on once [you] return to work.

Grievant replied:

> What do you mean by "disabled"? I understand that I will not do any work while out, especially since I can only "peck" at the keys. However, I need my computer for e-mail communications with [the Third Party Administrator], my daughter, the college, etc. I do not have another computer at my house since my son moved out and took the one in the house. Accessing my e-mail via my cell phone is very difficult. I can use the computer without excessing the network, which is no problem.

The Chief became concerned about Grievant's use of her computer upon learning of Grievant's concern about access to her DOC issued computer. She asked the Information Security Officer to examine the computer issued to Grievant. The Information Security Officer reviewed the documents contained on the hard drive of the computer assigned to Grievant. The hard drive held shopping receipts and correspondence with merchants regarding personal shopping. The hard drive also contained emails between Grievant and an attorney regarding a divorce property settlement agreement and pleadings for a "pro se" plaintiff. Grievant wrote the attorney with questions "regarding the divorce I am handling for [pro se client's name]." Grievant used the Agency's email to send pictures of her family and friends. Grievant used the Agency's email to send personal emails to her family.

On September 18, 2014, Grievant sent an email to an acquaintance, Mr. P regarding a pre-sentence investigation report she was drafting regarding Mr. C. She began the email, "I wrote this in the PSI for [Mr. C]. Of course, [another employee] instructed me to take out what I said. I knew he would make me. What an ass." She then inserted into the email the text she had written for the presentence investigation report for Mr. C. The information included the number of Mr. C's prior convictions, current sentence. The information included a discussion about Mr. C submitting a letter to a Deputy in a local jail after the Deputy made a derogatory comment about Mr. C's sentence. Grievant stated, "His 'justification' for the offense is compelling and perhaps sheds some light on what sometimes occurs behind the scenes in a correctional setting. Whether it be the truth or fabrication on the subject's part, the inhuman treatment of inmates has unfortunately been a concern in the correctional setting for as long as the criminal justice system has existed. In this case, subject chose to address his issue in writing as opposed to using verbal or physical means. This in itself is perhaps a good thing." Grievant explained the applicable sentencing guidelines for Mr. C.

In the final pre-sentence investigation report for Mr. C, Grievant removed several of her comments about Mr. C's justification.

On October 21, 2014, the grievant was issued a Group II Written Notice with a five-workday suspension for unauthorized use of state property or records[2] and a Group III Written Notice with termination for "dissemination of [] confidential offender information . . . ."[3] The grievant timely grieved both disciplinary actions[4] and a hearing was held on February 9, 2015.[5] In a decision dated April 13, 2015, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant engaged in unauthorized use of state property and upheld the Group II Written Notice and accompanying suspension.[6] However, the hearing officer concluded that the agency had not demonstrated the grievant's actions in disseminating information about an offender rose to the level of a Group III offense and reduced the discipline to a Group II Written Notice for failure to follow policy.[7] The hearing officer upheld the grievant's termination based on her accumulation of discipline.[8] 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."[9] 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 either party; the sole remedy is that the hearing officer correct the noncompliance.[10]

Inconsistency with Agency Policy

In her request for administrative review, the grievant asserts that the hearing officer's decision is inconsistent with agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[11] The grievant has requested such a review. Accordingly, the grievant's policy claims will not be discussed further in this ruling.

Hearing Officer's Consideration of Evidence

The grievant further argues that the hearing officer's findings of fact, based on the weight and credibility that he accorded to evidence presented at the hearing, are not supported by the evidence. Hearing officers are authorized to make "findings of fact as to the material issues in

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[2] Agency Exhibit 1A.
[3] Agency Exhibit 1B.
[4] Agency Exhibits 2A, 2B.
[5] *See* Hearing Decision at 1.
[6] *Id.* at 5-6.
[7] *Id.* at 6-7.
[8] *Id.* at 8; *see* DHRM Policy 1.60, *Standards of Conduct*, § (B)(2)(b) (stating that the issuance of "[a] second active Group II Notice normally should result in termination").
[9] Va. Code §§ 2.2-1202.1(2), (3), (5).
[10] *See Grievance Procedure Manual* § 6.4(3).
[11] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

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 upon 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 this case, the hearing officer assessed the evidence related to the Group III Written Notice for dissemination of offender information[16] and determined that "[t]he words [the grievant] used to describe the subject and the information contained in" the PSI "were confidential information that could not be disseminated to an unauthorized third party."[17] He further stated that "Mr. P had no right to see the information about the subject . . . ."[18] The hearing officer concluded that the grievant had engaged in conduct sufficient to justify the issuance of a Group II Written Notice for failure to follow agency policy.[19] In her request for administrative review, the grievant argues that the hearing officer erred in relying on agency Operating Procedure ("OP") 050.1, *Offender Records Management*. The grievant asserts that there is evidence in the record to show that OP 930.1, *Investigations*, and a facility policy both stated that a PSI is not confidential until the offender for whom it is prepared is sentenced. She claims that the hearing officer failed to make findings of fact on a material issue in this case, i.e., whether the information in the PSI that she sent to Mr. P was confidential, and requests that the case be remanded to the hearing officer for further consideration of the evidence in the record relating to OP 930.1 and the facility policy.

The grievant is correct that, at the time the Written Notice was issued, OP 930.1 and the facility policy provided that a PSI is a confidential document "following the Sentencing

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[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.
[16] Although the hearing officer reduced the discipline to a Group II Written Notice, *see* Hearing Decision at 6-8, we will generally refer to the disciplinary action as a Group III Written Notice throughout this ruling to distinguish it from the Group II Written Notice for unauthorized use of state property.
[17] Hearing Decision at 6.
[18] *Id.*
[19] *Id.* at 6-7. The hearing officer found that the agency had not presented evidence to show that "the severity of the offense" supported enhancing the discipline to the level of a Group III Written Notice. *Id.* at 7; *see* DHRM Policy 1.60, *Standards of Conduct*, Attachment A ("[I]n certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. . . . Should any such elevated disciplinary action be challenged through the grievance procedure, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above.")

Hearing,"[20] and that the hearing officer did not discuss this evidence in the decision. However, there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each piece of evidence that is presented at a hearing. Thus, mere silence as to any particular piece of evidence does not necessarily constitute a basis for remand in this case. Further, it is squarely within the hearing officer's discretion to determine the weight to be given to the evidence presented by the parties. Here, there is ample evidence in the hearing record regarding the context and meaning of OP 930.1 and the facility policy, and specifically their interpretation in conjunction with other agency policies that generally prohibit the release of information about offenders.

For example, the agency presented evidence to show that all information about offenders may only be used for official purposes, including offender information from a draft PSI.[21] Both OP 050.1 and OP 130.1, *Rules of Conduct Governing Employee Relationships with Offenders,* were part of the agency's exhibits and state that information about the criminal record, offenses, personal history, or private affairs of offenders "is for official use only" and that employees "shall not access or discuss such information except as required in the performance of official duties."[22] Indeed, the grievant was charged on the Written Notice with violating this provision of OP 130.1, not the confidentiality provisions of OP 930.1 or the facility policy cited by the grievant in her request for administrative review.[23]

Furthermore, there is evidence in the record to show a distinction between the provisions of OP 130.1 and OP 050.1 that restrict the release of all offender information to official purposes only and the statements in OP 930.1 and the facility policy that a PSI becomes "a confidential document" after the sentencing hearing. Two witnesses testified that, after the sentencing hearing for which it is prepared, a PSI is sealed by the court and may only be released by a court order.[24] According to the testimony of these witnesses, the confidentiality language in OP 930.1 and the facility policy refer to the sealing of the court record and concomitant limitations on the release of a completed PSI containing offender information.[25] As discussed above, however, OP 050.1 and OP 130.1 outline the general confidentiality parameters of agency records, such as a draft PSI that contains information about an offender. In short, there is evidence in the record to

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[20] Grievant's Exhibit H at 5; Agency Exhibit 9D at 4.
[21] *E.g.*, Hearing Recording at 1:10:00-1:10:24 (testimony of Deputy Chief), 2:23:17-2:24:14 (testimony of Chief).
[22] Agency Exhibit 9B at 2; *see* Agency Exhibit 9A at 3.
[23] Agency Exhibit 1B. To the extent the hearing officer's reliance on OP 050.1 could raise a question as to whether the grievant was afforded due process under the grievance procedure, we find that she had proper notice of the charge against her as set forth on the Written Notice and in the agency's notice of intent to issue disciplinary action. *See* Agency Exhibits 1B, 7A, 7B. In addition, both OP 050.1 and OP 130.1 were included in the agency's exhibit binder and provided to the grievant before the hearing, and the language relating to the use of offender information in both policies is nearly identical. Thus, it cannot be said that the grievant lacked knowledge of the misconduct charged on the Written Notice or the agency's theory as to why her actions constituted misconduct. Accordingly, we cannot conclude that any failure on the agency's part to cite OP 050.1 on the Written Notice, or the hearing officer's reliance on it in making his decision, deprived the grievant of due process as a matter of the grievance procedure.
[24] Hearing Recording at 1:04:41-1:04:51 (testimony of Deputy Chief), 2:24:38-2:25:18 (testimony of Chief).
[25] *Id.* at 1:04:01-1:04:51 (testimony of Deputy Chief), 2:28:55-2:29:42, 2:31:49-2:32:16 (testimony of Chief). The Chief testified that she believed the language in the facility policy cited by the grievant was admittedly confusing and revised the facility policy to more clearly express this point. Hearing Recording at 2:28:25-2:29:53 (testimony of Chief); *see* Agency Exhibit 9C at 6.

support the hearing officer's conclusion that the grievant disclosed offender information to Mr. P in violation of agency policy.

While the hearing officer did not discuss OP 930.1 or the facility policy in the hearing decision, we cannot conclude this demonstrates he erred in considering the evidence or making findings of facts as to the material issues in the case such that remanding the decision would be warranted here. Rather, it would appear that the hearing officer did not discuss these policies because he concluded they were not persuasive in determining whether the grievant's actions in disclosing offender information from a draft PSI was a violation of agency policy. Although the grievant may disagree, determinations of credibility as to disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. 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. Because the hearing officer's findings in this case are based upon 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. Accordingly, we decline to disturb the hearing decision on this basis.

Mitigation

The grievant also challenges the hearing officer's decision not to mitigate the agency's disciplinary action. She argues that the hearing officer failed to consider whether she had notice of the agency policies prohibiting the dissemination of offender information and her prior satisfactory work performance. The grievant further asserts that the agency did not consider mitigating factors prior to issuing the discipline.

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]."[26] The *Rules for Conducting Grievance Hearings* (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."[27] 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.[28]

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[26] Va. Code § 2.2-3005(C)(6).
[27] *Rules for Conducting Grievance Hearings* § VI(A).
[28] *Id*. § VI(B).

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.[29] EDR will review a hearing officer's mitigation determination for abuse of discretion,[30] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

<u>Lack of Notice</u>

The grievant claims that the hearing officer failed to consider whether she had notice of the agency policies prohibiting dissemination of information about offenders in making his mitigation decision. In assessing mitigating factors pursuant to the *Rules*, the hearing officer may consider whether the employee "had notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with the rule."[31] The *Rules* further state that:

> [A]n employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee. Proper notice of the rule and/or its interpretation by the agency may also be found when the rule and/or interpretation have been communicated by word of mouth or by past practice. Notice may not be required when the misconduct is so severe, or is contrary to applicable professional standards, such that a reasonable employee should know that such behavior would not be acceptable.[32]

While the grievant is correct that the hearing officer did not address the question of whether the grievant had notice of the policies addressing the release of offender information in his mitigation analysis, EDR has been unable to identify anything in the hearing record to show that she raised such an argument to support mitigation of the discipline at the hearing. As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[33] A hearing officer cannot reasonably be expected to deduce and consider all of the possible

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[29] 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).

[30] "'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.*

[31] *Rules for Conducting Grievance Hearings* § VI(B)(2).

[32] *Id*. § VI(B)(2) n.26.

[33] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B)(2).

arguments that could be attributed to the evidence presented at a hearing, absent some indication as to the grievant's theories as to why the disciplinary action should be reduced, rescinded, or mitigated. Accordingly, we find that remanding the hearing decision for additional consideration of the evidence, if any, related to whether the grievant had notice of agency policy would be inappropriate in this case because she had the opportunity to raise any arguments about this point at the hearing and apparently chose not to do so.

Furthermore, even assuming that the hearing officer should have assessed the evidence presented by the grievant to support her new assertion that she did not have proper notice of the policies that set forth the agency's rules about the confidentiality offender information in support of mitigation, we are not persuaded that the evidence in the record demonstrates the hearing officer erred by not mitigating on this basis. For example, the Chief testified at the hearing that employees are notified that agency policy prohibits the release of offender information,[34] and several witnesses stated that they do not discuss offenders or case information outside of work.[35] That the hearing officer did not address the question of whether the grievant had notice of the policies in question does not necessarily indicate that he abused this discretion with respect to his consideration of mitigating factors. Rather, it would appear that the hearing officer did not discuss the evidence in the record on this issue because he did not find it to be credible and/or persuasive to show that grievant did not have notice of agency policies that prohibit the release of offender information. Based on EDR's review of the record, it appears that the evidence presented at the hearing was sufficient to support the hearing officer's decision not to mitigate the discipline and that his determination was otherwise not arbitrary or capricious. Accordingly, we will not disturb the hearing decision on this basis.

Prior Satisfactory Work Performance

In addition, the grievant asserts that the hearing officer should have mitigated the disciplinary action based on her otherwise satisfactory previous work performance. This argument is unpersuasive. While it cannot be said that prior satisfactory work performance is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which this factor could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[36] The weight of an employee's past satisfactory performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant that otherwise satisfactory performance becomes. In this case, the grievant's prior satisfactory performance is not so extraordinary that it would clearly justify mitigation of a Group II Written Notice for conduct that was determined by the hearing officer to support the issuance of such a disciplinary action. Based upon a review of the hearing record, there is nothing to indicate that the hearing officer's mitigation determination was in any way

[34] Hearing Recording at 2:34:26-2:34:56 (testimony of Chief).
[35] *Id.* at 3:39:21-3:39:33 (testimony of Witness R), 3:42:03-3:42:20 (testimony of Witness L), 3:50:11-3:50:24 (testimony of Witness G).
[36] *See* EDR Ruling No. 2014-3820; EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903.

unreasonable or not based on the evidence in the record. Accordingly, EDR will not disturb the hearing officer's decision on this basis.

Agency's Consideration of Mitigating Factors

The grievant appears to further argue that the hearing officer should have either mitigated or rescinded the disciplinary action because the agency did not consider any mitigating factors before issuing the Written Notice. This argument fails. First, we note that it appears from the evidence in the record that the agency did, in fact, consider mitigating circumstances prior to issuing the discipline.[37] Regardless of whether or not the agency considered any mitigating factors, however, the *Rules* state that "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] EDR is unaware of any requirement under law or policy that mandates an agency to assess mitigating circumstances before disciplining an employee. While such consideration would be a best practice, there is no mandatory requirement. Consequently, this is not a basis on which an agency's disciplinary action would be shown to exceed the limits of reasonableness. We decline to disturb the decision on this basis.

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.[39] 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.[40] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[41]

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Director
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[37] The Written Notice indicates that mitigating factors were considered, *see* Agency Exhibit 1B, and Manager L testified that she evaluated whether the grievant's length of employment and prior satisfactory work performance supported mitigation of the Group III Written Notice. Hearing Recording at 2:35:13-2:35:26 (testimony of Chief). The grievant is correct that the agency apparently failed to provide the grievant with an attachment to the Written Notice that purportedly discussed the mitigating factors that were considered, *see* Agency Exhibit 1B, but this does not by itself demonstrate that the agency's mitigation analysis was deficient or nonexistent.
[38] *Rules for Conducting Grievance Hearings* § VI(B).
[39] *Grievance Procedure Manual* § 7.2(d).
[40] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[41] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).