

Issue: Permission to Appeal Hearing Decision in Case No. 10094 to Circuit Court;
Ruling Date: September 18, 2013; Ruling No. 2014-3714; Agency: Department of
State Police; Outcome: Request is premature.



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

APPEAL REVIEW RULING

In the matter of the Department of State Police
Ruling Number 2014-3714
September 18, 2013

Pursuant to Va. Code § 2.2-3006(B), the Department of State Police (the agency), by counsel, seeks approval from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) to appeal the final hearing decision in Case No. 10094 on the basis that it is contradictory to law. “Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law.”¹ A hearing decision becomes final when either the 15 calendar-day period for filing requests for administrative review has expired and neither party has filed such a request, or all timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.²

In this case, however, the hearing decision is not yet final. For example, the 15-day period for either party to request administrative review of the hearing officer’s decision has not yet lapsed.³ In the past, EDR has considered an agency’s request for permission to appeal to the circuit court as premature when the request is received prior to a hearing decision becoming final.⁴ However, in the interest of administrative efficiency, we will address the agency’s request at this time.

The Virginia Court of Appeals 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.”⁵ 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.⁶

EDR cannot conclusively state that the objections raised by the agency are based on applicable or controlling law. However, we are reluctant to deny the agency the opportunity to

¹ *Grievance Procedure Manual* § 7.3(a).

² *Grievance Procedure Manual* § 7.2(d); *see also* *Grievance Procedure Manual* § 7.2(e).

³ *Grievance Procedure Manual* § 7.2(a).


⁴ *E.g.*, EDR Ruling No. 2008-2039.

⁵ *See* *Barton v. Va. Dep’t of State Police*, 39 Va. App. 439, 446; 573 S.E.2d 319, 323 (2002).

⁶ *See, e.g.*, EDR Ruling Nos. 2010-2556; 2010-2663, 2008-1866; 2007-1534.

present its arguments to the circuit court, and believe the better course of action is to identify the issues but nonetheless allow the agency to pursue its appeal, as we find no evidence of any intent to harass or cause delay on the part of the agency.⁷ 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.

Accordingly, the agency’s request to appeal is granted. When the case becomes ripe for judicial appeal (i.e., after the hearing decision is final⁸), the agency may file a notice of appeal with the circuit court in the jurisdiction in which the grievance arose, if it ultimately chooses to do so. Any such notice must be filed within 30 calendar days of the date the hearing decision becomes final.⁹ 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. Further, granting permission to appeal at this early date by no means deprives either party from seeking appropriate administrative review of the hearing decision¹⁰ prior to any judicial appeal.



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⁷ See EDR Ruling No. 2012-3287.

⁸ See Va. Code § 2.2-3006(B).

⁹ See *Grievance Procedure Manual* §§ 7.2(d), 7.3(a).

¹⁰ *Grievance Procedure Manual* § 7.2(a).