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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Corrections
Ruling Number 2020-4966
September 27, 2019

The grievant has requested that the Office of Employment Dispute Resolution ("EDR")[1] at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11346. For the reasons set forth below, EDR remands the case to the hearing officer for further consideration and clarification.

FACTS

The relevant facts in Case Number 11346, as found by the hearing officer, are as follows:[2]

> The Department of Corrections employed Grievant as a Unit Manager at one of its facilities. He was promoted to Major prior to his removal. He had been employed by the Agency for approximately 11 years. No evidence of prior active disciplinary action was introduced during the hearing.
>
> The Lieutenant reported to Grievant.
>
> The Lieutenant was assigned a computer which was located in his office. The Lieutenant had a unique password and login identification to access the Agency's intranet and Internet. When the Lieutenant logged into his computer account, he had access to VACORIS and the Internet. Anyone using his account would have the same access he had.
>
> The Inmate began working as a clerk for the Lieutenant in October or November 2016. The Inmate's job consisted of filing applications, writing memoranda, and picking up supplies. He typed memoranda and other nonsecurity

[1] 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.
[2] Decision of Hearing Officer, Case No. 11346 ("Hearing Decision"), July 22, 2019, at 2-3.

documents using Word software. The Inmate had training in information technology.

The Lieutenant typically watched the Inmate when the Inmate was using the Lieutenant's computer and computer account to type memoranda. The Lieutenant usually stood beside the Inmate or was within close proximity to the Inmate. On some occasions, the Lieutenant was forced to leave his office to attend to urgent matters. The Lieutenant would regularly look back at the Inmate to ensure he was performing his duties properly.

At the Inmate's request, a friend of the Inmate uploaded pornography into an email account and gave the Inmate a[cc]ess to the account. While working for the Lieutenant, the Inmate would enter the email account and view the pornography when the Lieutenant was distracted from the computer. The Inmate printed the pornographic images and kept them in his cell.

On one occasion, Grievant walked into the Lieutenant's office and observed the Inmate working on the Lieutenant's Computer. The Inmate was typing a Word document. Grievant later pulled the Lieutenant aside and questioned the Lieutenant about what access the Inmate had because Grievant was concerned about internet access. The Lieutenant told Grievant that the Inmate only used Word with no internet access and direct supervision by the Lieutenant.

On another occasion, Grievant observed the Inmate at the Lieutenant's computer working on a new exception report sheet. Grievant questioned the Lieutenant about what access the Inmate had. The Lieutenant assured Grievant that the Lieutenant had direct supervision of the Inmate and no access to the internet was available at that time.

On both occasions, Grievant observed the Lieutenant standing directly over the Inmate's shoulder. Grievant told the Lieutenant not to allow internet access when the Lieutenant had the Inmate working on documents.

Another inmate learned that the Inmate had pornography in his cell and notified the Lieutenant. The Lieutenant reported the claim to Agency managers who began an investigation. The Agency found pornography in the Inmate's possession and the images matched some of the images loaded into the email account. Grievant was honest and cooperative throughout the investigation.

On March 15, 2019, the agency issued to the grievant a Group III Written Notice of disciplinary action with removal for "failure to report fraternization/computer misuse."[3] The offense description explained that, because the Inmate's use of the Lieutenant's computer violated

[3] Agency Ex.1, at 1.

the agency's operating procedures, the grievant's failure to "take any action" after seeing the Inmate use the laptop violated the grievant's own reporting obligations:

> Under OP 135.2, 'Supervisors shall ensure that all reports of violation of this operating procedure [OP 135.2] are forwarded to the Organizational Unit Head for investigation and notify the [Prison Rape Elimination Act] Analyst.' . . .
>
> [Y]our failure to take action allowed these egregious violations of procedure to continue. This is justification for not mitigating.[4]

The grievant timely grieved his removal, and a hearing was held on July 1, 2019.[5] In a decision dated July 22, 2019, the hearing officer determined that the grievant's conduct supported the agency's issuance of a Group III Written Notice with removal.[6] Nevertheless, the hearing officer offered the following observations:

> The Hearing Officer does not agree with the Agency's decision to remove Grievant. Grievant was expected to focus on series 400 and 800 policies which involve inmate and employee physical security. Grievant is deemed to have adequate notice of Operating Procedure 310.2 and 310.3 because those policies were on the Agency's intranet. However, he was poorly trained regarding information security policies such as Operating Procedures 310.2 and 310.3. If he had been properly trained, he would have complied with those policies. Grievant was a competent and capable employee working in a poorly staffed facility. The Agency could have corrected Grievant's behavior without removal. The Hearing Officer recommends the Agency make Grievant eligible for immediate rehire.[7]

The grievant now appeals the hearing decision to 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."[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] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[10] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

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[4] *Id.* at 2; *see* Agency Ex. 5 (OP 135.2, *Rules of Conduct Governing Employees Relationships with Offenders*).
[5] Hearing Decision at 1.
[6] *Id.* at 5.
[7] *Id.*
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

In his request for administrative review, the grievant argues that the hearing officer erred in upholding the agency's disciplinary action at the Group III level. The grievant further argues that the hearing officer erred in not reducing the penalty imposed on the grievant based on mitigating circumstances.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[11] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[12] 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.[13] 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.[14] 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.

Consideration of Misconduct Charged

The grievant contends that, in upholding the Group III Written Notice, the hearing officer inadequately considered whether the agency carried its burden to prove the discrete charges underlying the single Written Notice. Specifically, the grievant argues that the hearing officer failed to analyze the grievant's wrongdoing under each of the three policies specifically cited in the Written Notice and, thus, erroneously upheld the grievant's disciplinary action at the Group III level (*i.e.* discipline warranted by "acts and behavior of such a serious nature that a first occurrence normally should warrant removal").[15]

EDR's review indicates that the hearing officer's findings of fact regarding the grievant's relevant acts and omissions are based upon record evidence and therefore may not be disturbed.[16] However, in determining whether his behavior constituted misconduct under agency policies, the hearing officer analyzed the grievant's conduct only with respect to OP 310.2 and OP 310.3. The hearing officer concluded that the Inmate's use of the Lieutenant's computer violated these policies

[11] Va. Code § 2.2-3005.1(C).
[12] *Grievance Procedure Manual* § 5.9.
[13] *Rules for Conducting Grievance Hearings* § VI(B).
[14] *Grievance Procedure Manual* § 5.8.
[15] *See* Agency Ex. 4 (OP 135.1, *Standards of Conduct*).
[16] In relevant part, the hearing officer found that the Inmate regularly used the Lieutenant's internet-connected computer and that the grievant saw the Inmate do so on two occasions. *See* Hearing Decision at 2-3. Each time, the grievant questioned the Lieutenant to ensure that he was not permitting the Inmate to use the internet. *Id.* at 3. The hearing officer did not find that the grievant took any further action after verifying that the Inmate was not using the internet and was only assisting the Lieutenant in his job duties as his clerk. *See id.* The grievant has admitted to these facts, and they are not otherwise in dispute. *See, e.g.*, Agency Ex. 8; Hearing Recording at 1:32:15-1:34:40 (Grievant's testimony).

and the grievant, as the Lieutenant's supervisor, should have stopped the violations when he saw them.[17] Yet the Written Notice issued to the grievant cites him for failing to report "fraternization" in addition to computer misuse.[18] Indeed, the agency policy cited in the Written Notice to establish the violation for "failure to report" is OP 135.2, *Rules of Conduct Governing Employees Relationships with Offenders* (addressing fraternization).[19] While the hearing officer concluded that the grievant "was expected to know Agency policy" regarding inmates' use of technology,[20] the hearing officer made no findings of fact or conclusions of policy whatsoever addressing the role, if any, of fraternization or OP 135.2 in the agency's disciplinary action.

OP 135.2 defines "fraternization" as "[e]mployee association with offenders, their family members, or close friends of offenders, outside of employee job functions, that extends to unacceptable, unprofessional, and prohibited behavior; examples include non-work related visits between offenders and employees, non-work related relationships with family members or close friends of offenders, connections on social media, discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders."[21] In this case, the Written Notice issued to the grievant cited his failure to report the Inmate's use of the Lieutenant's computer, with the apparent permission of both the Lieutenant and the grievant, as an alleged failure to report fraternization.[22] However, the hearing officer has not included findings in the decision as to what fraternization the grievant failed to report, despite his conclusion that the agency "presented sufficient evidence to support the issuance of a Group III Written Notice" that charged the grievant, in part, with "failure to report fraternization."[23] Accordingly, the hearing decision must be remanded for the hearing officer to address whether the grievant's conduct violated OP 135.2 and, if so, whether this misconduct in conjunction with a violation of the agency's computer policies was sufficient to support a Written Notice at the level of a Group III offense.

Mitigation

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 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."[25] 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

[17] Hearing Decision at 4.
[18] Agency Ex. 1, at 1.
[19] *Id.* at 2.
[20] Hearing Decision at 4.
[21] Agency Ex. 5, at 1.
[22] Agency Ex. 1, at 2.
[23] Hearing Decision at 5.
[24] Va. Code § 2.2-3005(C)(6).
[25] *Rules for Conducting Grievance Hearings* § VI(A).

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.[26]

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.[27] 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 time during the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."[28] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[29] and will reverse the determination only for clear error.

In this case, the hearing officer observed that the grievant "was poorly trained regarding information security policies such as Operating Procedures 310.2 and 310.3."[30] The hearing officer further concluded that the grievant would have followed the requirements of these policies if properly trained and that the agency "could have corrected Grievant's behavior without removal."[31] Nevertheless, the hearing officer asserted that the grievant "is deemed to have adequate notice of Operating Procedure 310.2 and 310.3 because those policies were on the Agency's intranet."[32] Ultimately, the hearing officer concluded that "no mitigating circumstances exist[ed]" to reduce the disciplinary action in this case, but at the same time he recommended making the grievant "eligible for immediate rehire."[33]

On review of the hearing record, EDR finds support for the hearing officer's conclusion that, considering all the facts and circumstances, the grievant was "poorly trained" as to the prohibition on allowing inmates to use internet-connected equipment. The grievant testified as follows:

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[26] *Id.* § VI(B).

[27] 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).

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

[29] "'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.*

[30] Hearing Decision at 5.

[31] *Id.*

[32] *Id.*

[33] *Id.*

- The grievant had reviewed the computer policies, but not in depth.[34] He viewed VACORIS as a closed system, not as part of the internet.[35] His in-service training focused on the 400-series operating procedures related to physical security in the facility.[36]
- Because the facility was operating with dozens of certified correctional officer positions unfilled, the grievant and the Lieutenant frequently were performing subordinate officer duties such as preventing or responding to physical altercations between inmates. Thus, facility employees would have to attend to "their online internet training with inmates yelling at them through a slot and trying to open doors and maintain security. You can't digest what you need when you're doing that."[37] "We are constantly – if we're not in a meeting, we're breaking up an altercation, we're feeding and chow. We don't get to focus on our job in a way that lets you pick something apart and figure out whether you know it or not."[38]
- The grievant understood that, for security purposes, inmates generally should not be permitted to use the internet, though he did not glean this rule from OP 310.2 or 310.3. He did not remember ever learning that inmates should not use any equipment capable of accessing the internet and did not believe that this standard was clear from the policies.[39]
- When the grievant witnessed the Inmate using the Lieutenant's computer, the Inmate was engaged in work for the Lieutenant and was not using the internet. Based on these circumstances, the grievant was not aware that his behavior, or the Lieutenant's behavior that he witnessed, would have violated any of the policies cited on the Written Notice.[40]
- The grievant had no knowledge of fraternization between the Lieutenant and the Inmate.[41]

Despite finding that the grievant was "poorly trained" as to OP 310.2 and 310.3, the hearing officer concluded that no mitigating circumstances existed to reduce the agency's imposed penalty. Although lack of adequate notice may serve as a basis for mitigation under the *Rules*, the hearing officer asserted that a grievant "is deemed to have adequate knowledge of [the policies] because those policies were on the Agency's intranet."[42] But under the *Rules*, "an employee **may** be presumed to have notice of written rules if those rules had been distributed or made available to the employee."[43] While such a presumption may often, or even typically, be appropriate under the particular circumstances of the case, the *Rules*' permissive language also allows for situations in

[34] Hearing Recording at 1:34:45-1:35:00 (Grievant's testimony).
[35] *Id.* at 1:37:00-1:37:45.
[36] *Id.* at 1:35:00-1:36:10; 1:40:30-1:40:45.
[37] *Id.* at 1:52:35-1:53:28.
[38] *Id.* at 1:40:10-1:40:30.
[39] *Id.* at 1:54:55-1:58:05; 1:39:33-1:39:55.
[40] *Id.* at 1:31:40-1:34:40.
[41] *Id.* at 1:38:00-1:38:10.
[42] Hearing Decision at 5.
[43] *Rules for Conducting Grievance Hearings* § VI(B)(2) n.26 (emphasis added.)

which the presumption is inappropriate or rebutted by other evidence, as determined by the hearing officer.

By way of example in this case, even if the agency's prohibitions on inmate access to internet-connected equipment are stated in policies made available to employees, those prohibitions are contradicted by other policy provisions that do contemplate internet use by inmates, especially in a supervised work context. OP 310.3, *Offender Access to Information Technology*, one of the policies underlying the grievant's Group III Written Notice, has a stated purpose to "establish[] controls that provide offenders regulated access to state owned computers for use in re-entry, education, training, and work programs in [the agency]."[44] Section IV(A) of the policy provides in part:

> Information Technology (IT) systems resources are provided for use by employees and offenders in conjunction with the operation of and participation in authorized programs and activities. . . .
>
> Offenders shall only be permitted to use IT resources to perform approved job assignments, educational, instructional, research, and specific career and technical education duties as defined in this operating procedure.[45]

Under section IV(B) of OP 310.3, "[o]ffenders are strictly prohibited from **unauthorized** internet access. Offender internet access shall be strictly **controlled and monitored** at all times."[46] This subsection then limits inmate use of technology resources to "stand-alone computers and isolated offender use networks" and prohibits offenders' use of "computers assigned to a specific employee." Yet Section IV(C) directs staff supervisors of offenders, presumably including their assigned inmate clerks, to "[p]rovide clear instruction on the expectations regarding internet use, including how and when they can navigate and which sites they may access."[47]

The hearing decision in this case also references OP 310.2, *Information Technology Security*. This policy is 24 pages long and defines 40 terms.[48] It ascribes responsibilities to various actors, including the agency itself, the agency's Technology Services Unit, employees and "users," outside agencies, and other external entities and individuals. Many of the policy's provisions appear to be directed to members of the agency's Technology Services Unit.[49]

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[44] Agency Ex. 7, at 1.
[45] *Id.* at 2.
[46] *Id.* at 3 (emphasis added).
[47] *Id.* at 3-4.
[48] *See* Agency Ex. 6.
[49] The variety of topic headings included in OP 310.2 covers the following: policy applicability, the organizational structure of the agency's Technology Services Unit, that Unit's interaction with other units, terms of access to the agency's information technology resources, account validation, remote access, external access requests, software applications, the agency's network logon banner, official use, password security, workstation security, use of internet services, email, viruses, security incident reporting, criminal history information, telephones, photo storage, software and hardware authorization, wireless equipment security, encryption and data security, and security awareness training.

The Access category of OP 310.2 does not address offender access. The Usage category, which includes ten parts, lists "Official Use" as Part B; Part B has 12 subparts. Subpart 6 (on page 9 of 24) provides that a facility warden must ensure that offenders do not have access to the intra- or internet, except with approval from higher authorities.[50] Subpart 6 then sets forth six clarifications, including a reference to OP 310.3:

> Offenders are strictly prohibited from any access to [agency] Information Technology Resources[51] on the agency's network/systems or resources that can access the Internet. Information technology resources not on the agency's network/system or resources that do not have Internet access may be utilized by offenders in accordance with Operating Procedure [OP] 310.3, *Offender Access to Information Technology*. . . .
>
> Offenders shall not have direct, unsupervised access to output and storage peripherals such as printers, scanners, DVD burners, and copy machines unless to perform specific educational or job tasks.
>
> Offenders must be under constant sight supervision of [agency] staff when performing such tasks. At a workstation in a controlled area with locked doors (such as VCE shops or CTE classrooms) offender use of information technology equipment is allowed under the general supervision of a trained employee.[52]

Subpart 12 of Part B addresses prohibited uses. Its 27-item list, though not exhaustive, does not cite offender use of information technology.[53] Part E, "Internet Services Usage," also contains no provisions citing offender use. It lists "activities supporting . . . [j]ob functions" as an example of authorized use.[54]

Thus, while it is undoubtedly within a hearing officer's discretion to presume adequate notice of relevant policies where they have been made available to the employee, he or she may decline to apply the presumption – or consider it rebutted – where the relevant policy requirements are contradictory, exceedingly inconspicuous, and/or reliant on specialized or technical language in which the employee lacks training or expertise. In this case, the hearing officer upheld removal while observing that mitigating facts were present, that he did not agree with the removal, and that the grievant should be made eligible for immediate rehire. Thus, the hearing decision is ambiguous as to whether the hearing officer chose to presume adequate notice based on the facts, or whether he instead applied an erroneous mandatory presumption based only on the grievant's access to the relevant policies. This ambiguity merits remand to the hearing officer to determine (1) whether a

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[50] Agency Ex. 6, at 9.
[51] OP 310.2 does not define "Information Technology Resource," though it defines "Information Technology" as "[e]quipment or interconnected system or subsystem used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information; this term includes computers, peripherals, software, firmware, and similar procedures, services, and related resources." *Id.*
[52] *Id.* at 9.
[53] *Id.* at 11-12.
[54] *Id.* at 14-15.

presumption of adequate notice should govern in this case; (2) if not, whether constructive notice was deficient to the point of being a mitigating circumstance; and (3) if so, whether the mitigating circumstances in total are sufficient to warrant reduction of the agency's disciplinary action in this case.

As additional guidance on remand, the *Rules* do not suggest that the discipline imposed will automatically exceed the limits of reasonableness whenever notice is deficient. Even if the hearing officer finds that an employee lacked notice of a standard and the potential discipline for violating it, the hearing officer must still consider all facts and circumstances to determine whether "managerial judgment has been properly exercised within the tolerable limits of reasonableness."[55] Accordingly, the *Rules*' notice provision does not require or even permit a hearing officer to mitigate discipline simply on the basis that an agency failed to provide the employee with prior notice that particular conduct could result in the specific discipline imposed (although such notice is certainly a good management practice).[56]

Thus, if the hearing officer determines based on all relevant facts and circumstances that notice to the grievant was lacking here, he must then consider whether the agency's disciplinary action – if it remains upheld on remand in light of the hearing officer's fraternization analysis discussed above – exceeds the limits of reasonableness and should be mitigated due to the lack of notice and in light of *all other surrounding facts and circumstances*.[57] In this case, for example, other relevant circumstances may include the seriousness of the grievant's actual offense and its effect on the agency's operations; the grievant's past performance, disciplinary record, and overall ability to perform his duties going forward; whether he is likely to repeat the offenses identified and whether an alternate sanction would adequately deter similar future violations by the grievant or others; and whether the agency adequately considered mitigating circumstances in the first instance. Here, because the notice standard applied by the hearing officer in his mitigation analysis is unclear, the hearing decision must be remanded for further explanation and/or reconsideration of the issue of notice and the mitigation standard, consistent with this ruling.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands this case to the hearing officer for further consideration of the evidence in the record. The hearing officer is directed to issue a remand decision considering whether the evidence (1) supports a conclusion that the grievant engaged in misconduct as to the agency's charges under OP 135.2, and (2) is consistent with a presumption

[55] *Rules for Conducting Grievance Hearings* § VI(B)(2) (citation omitted).
[56] *See, e.g.*, DHRM Policy 1.60, "*Standards of Conduct*." § B ("The Commonwealth's disciplinary system typically involves the use of increasingly significant measures to provide feedback to employees so that they may correct conduct or performance problems."); c*f.* Va. Dep't of Transp. v. Stevens, 53 Va. App. 654, 674 S.E.2d 563 (2009) (in the due process context, declining to recognize "a new substantive right not to be fired at all if the employer does not warn the employee of each specific example of misbehavior for which the employee could be fired").
[57] *See Rules for Conducting Grievance Hearings* § VI(B)(2) (citing Douglas v. Veterans Admin., 5 M.S.P.R. 280, 302 (1981)).

that the grievant had adequate notice of the requirements giving rise to the agency's disciplinary action against him and, if not, whether any lack of notice merits mitigation of the discipline.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.[58] 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.[59] 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.[60] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[61]

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