

Issue: Permission to Appeal to Circuit Court - Hearing Officer's Decision in Case No. 8567; Ruling Date: November 16, 2007; Ruling #2008-1866; Agency: Department of Mines, Minerals and Energy; Outcome: Permission Granted.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

APPEAL REVIEW RULING OF DIRECTOR

In the matter of Department of Mines, Minerals and Energy
Ruling No. 2008-1866
November 16, 2007

Pursuant to Va. Code § 2.2-3006(B), the Department of Mines, Minerals and Energy (the agency) seeks approval from the Director of this Department to appeal the final hearing decision in Case No. 8567 on the basis that it is “contradictory to law.” We note, however, that most of the grounds asserted by the agency for its appeal do not appear to challenge the hearing officer’s decision on such a basis.¹ First, the agency does not state the “constitutional provision, statute, regulation or judicial decision”² it is relying upon in support of its claim that its “due process” rights have been violated, or what these rights would be. In addition, some of the agency’s assertions ask the court to interpret state human resources policy, which lies solely within the jurisdiction of the Director of the Department of Human Resource Management.³ The agency also challenges certain alleged violations of the grievance procedure, though the EDR Director has sole authority to rule, with finality, on all matters of procedural compliance with the grievance procedure.⁴

Nevertheless, because the agency has stated at least one potential basis on which it contends the hearing officer’s decision was arguably contradictory to law, and there is no evidence that the agency’s appeal is based on any improper purpose such as to harass or cause delay, its request to appeal is granted. The agency’s overriding and repeated

¹ Under the grievance procedure, the decision of a hearing officer may *only* be appealed to a circuit court on the ground that it is “contradictory to law.” Va. Code § 2.2-3006(B); *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002); *Grievance Procedure Manual* § 7.3(a).

² *Barton*, 39 Va. App. at 446, 573 S.E.2d at 323.

³ See Va. Code § 2.2-1201(13) (Director of the Department of Human Resource Management “shall have the final authority to establish and interpret personnel policies”); *Murray v. Stokes*, 237 Va. 653, 657, 378 S.E.2d 834, 836 (1989) (stating that the “final authority” language ... supports and is consistent with a legislative intent ... to preclude judicial review”); *Grievance Procedure Manual* § 7.2(c) (noting that decisions by the Director of Department of Human Resource Management (DHRM) are final and nonappealable).

⁴ See Va. Code § 2.2-1001(5); *Grievance Procedure Manual* § 7.2(c). The EDR Director has already ruled on the procedural compliance matters raised by the agency in its request for administrative review in EDR Ruling No. 2007-1680, which did not disturb the hearing officer’s decision. Indeed, the EDR Ruling concluded that “this Department cannot find that the hearing officer exceeded or abused his authority.” EDR Ruling No. 2007-1680.

allegation is that the hearing officer's decision was not supported by the evidence. It is not clear, however, upon what "law" the agency bases its claim that it can properly make such a challenge to the facts as found by the hearing officer. In *Barton*, the Court of Appeals of Virginia indicated that under the grievance statutes, the grievance hearing officer is the fact finder, and the hearing officer's findings are not "subject to judicial review, but only that part of the grievance determination 'contradictory to law.'"⁵ To the knowledge of this Department, however, no appellate court in Virginia has explicitly determined that a circuit court may *never* review or weigh the facts found by a hearing officer in a grievance hearing. It may be that at some point a hearing decision could be so inconsistent with the record evidence that it may be erroneous as a matter of law.⁶ Because this question is unclear, the agency's request to appeal is granted.

The agency may now file a notice of appeal with the Circuit Court in the jurisdiction in which the grievance arose. Any such notice must be filed within 30 calendar days of November 4, 2007, the date the hearing decision became final.⁷ Approval to proceed with the circuit court appeal in no way reflects the substantive merits of the appeal.

Claudia T. Farr
Director

⁵ *Barton*, 39 Va. App. at 445, 573 S.E.2d at 322.

⁶ This Department notes, however, that in EDR Ruling No. 2007-1680, which reviewed the decision for the requisite support in the record under the grievance procedure, it was determined that "substantial evidence supports the hearing officer's decision" in this case.

⁷ The decision became final following the expiration of the ten day period for appealing the fees addendum. *Grievance Procedure Manual* §§ 7.2(e), 7.3(a). "Within 10 calendar days of the issuance of the fees addendum, either party may petition the EDR Director for a decision solely addressing whether the fees addendum complies with this *Grievance Procedure Manual* and the *Rules for Conducting Grievance Hearings*. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original decision becomes 'final' as described in § 7.2(d) and may be appealed to the Circuit Court in accordance with § 7.3(a)." *Grievance Procedure Manual* § 7.2(e). If neither party appeals the fees addendum to the EDR Director, the original decision, along with the fees addendum, will become "final" ten days following the issuance of the fees addendum. EDR Ruling No. 2008-1853; EDR Ruling No. 2004-914.