Issue: Administrative Review of Hearing Officer's Decision in Case No. 9366; Ruling Date: November 24, 2010; Ruling No. 2011-2762; Agency: Department of Corrections; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2011-2762
November 24, 2010

The agency has requested that this Department administratively review the hearing decision in Case Number 9366. In his grievance, the grievant challenged a Group III Written Notice and the termination of his employment.[1] The hearing officer reduced the Group III Notice to a Group I and overturned the termination in an August 16, 2010 hearing decision.[2] For the reasons set forth below, the decision is remanded for further clarification and consideration.

FACTS OF THE CASE

The facts and related policies and conclusions of this case, as set forth in the hearing decision in Case Number 9366, are as follows:

> The Agency's Operating Procedure No. 135.1, Standards of Conduct, defines Group III offenses to include types of act and behavior of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. 6. One such example stated in the policy is
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> > violation of DOC Operating Procedure 040.1, *Litigation (to be issued-see current Department Procedure 5-45 Receipt of Writs, Summons, Subpoenas and Criminal Convictions and Department Procedure and Department Procedure 1-5 Tort Claims, Potential Litigation: Notice to the Office of Attorney General).* (considered a *Group III* offense depending upon the nature of the violation;
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> > The Agency's Operating Procedure No. 040.1, Litigation, states:
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> > I. PURPOSE
> > This operating procedure establishes actions to be taken by employees and supervisors when an event occurs that could result in liability to the Department; or when a writ, summons, subpoena, criminal charge or criminal conviction is received by an agent of the Department.

[1] Decision of the Hearing Officer in Case Number 9366 issued August 16, 2010 ("Hearing Decision") at 1.
[2] *Id.* at 6.

> IV. Procedures
> A. Notifications
> 1. Employees receiving a judicial writ, summons, or subpoena shall notify their organizational unit head immediately, if received during normal working hours, as to the exact nature of the suit, writ, summons or subpoena. If received during non-working hours, employees shall notify their organizational unit head the next day. The organizational unit head shall notify the next management level (Regional Director or Deputy Director) and the Attorney General's Office as appropriate.

Among the policy definitions, "subpoena" is defined as a "written order issued by a judicial officer requiring a specified person to appear in a designated court as a witness or to bring material to the court." "Writ" is defined as an "order issued by a court for the purpose of compelling a person to do or to stop doing something mentioned therein, such as an order of protection." The policy shows it became effective November 15, 2009, and supercedes department procedure 5-45. Agency Exh. 4. Department procedure 5-45 was not produced for the grievance record.

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a welding/sheet metal supervisor, with one active Group III Written Notice. The Grievant has been a valued employed [sic] with the Agency for 21 years. The Agency's witnesses testified that the Grievant was a talented, valuable employee for the Agency.

In 2007, The Grievant was convicted of a 2006 offense of driving while intoxicated (DWI). The Grievant was sentenced to jail for 30 days, with 25 suspended. The Agency was aware of the conviction and would not allow the Grievant to use annual leave to serve his sentence. As long as he served on the weekends while scheduled to be off from work, the Agency raised no concern. The Grievant served 5 days on weekends. The Agency took no special procedures with respect to the Grievant's sentence. In addition to the suspended jail time, the convicting court placed the Grievant on probation and required him to complete the alcohol safety action program (VASAP).

In 2009, VASAP subjected the Grievant to a urinalysis that showed alcohol. Because of this apparent violation of the VASAP program, the Grievant was returned to the convicting court which ordered him to serve another 10 days in jail. The Grievant was allowed by the court to satisfy that sentence with another 5 days served on the weekends in December 2009. The Grievant did not specifically advise the Agency of the 2009 jail time.

The Agency witnesses testified to the security basis and rationale for requiring Agency employees to report any incarceration. According to Agency witnesses, by mixing with a population of offenders (some of whom are coming from or headed to the Agency's facilities), the Grievant could leak (even unwittingly) information about the Agency's security procedures. The Grievant was knowledgeable about the Agency's tool procedures, key procedures, and overall metal fabricating systems, including the fencing. The Agency's witnesses testified that the Agency must be aware of these incarceration situations to protect the security of the Agency's facilities. The Agency's rationale for reporting such circumstances is sound; however, the Agency did not establish that any specific procedures or protections would have been implemented for the Grievant's weekend jail time.

According [to] the Grievant's DWI attorney (through post-hearing submission), the original conviction occurred in February 2007, and the Grievant was sentenced to 30 days in jail with 25 suspended, among other conditions. A condition was attending VASAP. In October 2007, VASAP filed a noncompliance report with the convicting court alleging that the Grievant failed to attend a reinstatement program and failed to attend a rescheduled reinstatement program. Based on that report, the convicting court issued a Show Cause order. At the show cause hearing, the Grievant testified the failures to attend the meetings were due to certain work conflicts and a death in his family. The court took the matter under advisement and reinstated the Grievant to the VASAP.

Further, according to the DWI attorney, in August 2008, VASAP filed a second noncompliance report with the court alleging the Grievant had tested positive for alcohol at an intake interview and based on that report the court issued a second Show Cause. The evidence as the show cause hearing was that the blood-alcohol content was minimal and the court again took the matter under advisement and reinstated the Grievant into VASAP.

Thereafter, the Grievant entered VASAP and concluded treatment and all class requirements. However, the Grievant was under the mistaken belief that when he completed all phases of the program he was no longer under the requirement not to consume alcohol and he tested positive for alcohol at his VASAP exit interview. In December 2009, the court imposed 10 days of the previously suspended sentence based upon the positive alcohol screen at the Grievant's exit interview.

The Grievant was allowed by the court to satisfy that sentence with another 5 days served on the weekends in December 2009. The Grievant did not specifically advise the Agency of the 2009 jail time.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the

hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a 'super personnel officer' and shall give appropriate deference to actions in Agency management that are consistent with law and policy... 'the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action.'

As referenced above, a violation of Operating Procedure No. 040.1 falls squarely within the Group III category of offenses. The Agency, however, has the burden of proving the Grievant's conduct constitutes a violation of applicable policy. I find that a Show Cause order that results in jail time constitutes a triggering event under Operating Procedure No. 040.1. The policy addresses judicial writ, summons, or subpoena, and I find that a Show Cause order falls within those categories.

The Grievant testified that he believed the Show Cause and imposition of additional days in jail that were originally suspended were part of the original sentencing in 2007 for which he had notified the Agency. The Agency took no special measures when he was first incarcerated in 2007, as long as his time served did not interfere with his job. The Grievant testified that he considered the whole thing to be one sentence. Based on his manner, tone, and demeanor, I find the Grievant to be credible. Additionally, the Grievant, by counsel, argues that the Written Notice did not sufficiently put the Grievant on notice of the policy violation. This is a due process issue, but it is also wound up in a mitigating factor of the Grievant's notice of the policy.

The operable policy was effective November 15, 2009. The predecessor policy was not submitted by the Agency, so that is not before the hearing officer. Given that the Operating Procedure No. 040.1 became effective November 15, 2009, and since there was no evidence produced that the Grievant was made aware of this policy by the time he served his weekend sentence in December 2009, I find failure of notice to be a mitigating factor. I also find reasonable the Grievant's belief that he had already satisfied any policy requirement to notify the Agency when he did so after his 2007 conviction. The Grievant's understanding shows, further, that the Agency's interpretation of the policy was not communicated to the Grievant. Finally, the Agency has not shown that it would have done anything differently for the Grievant's December 2009 weekend jail sentence than it did for his 2007 weekend jail sentence.

> In order to determine whether the agency's discipline has exceeded the tolerable limits of reasonableness, the hearing officer must examine all relevant factors. The *Rules* provide a non-exclusive list of factors for consideration by the hearing officer, notably:
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> > • Lack of Notice: The employee did not have notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with it. However, an 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.
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> If, after weighing all relevant factors, the hearing officer determines that the agency's action exceeded the bounds of reasonableness, the hearing officer may mitigate the disciplinary action. I find that the Grievant did not have sufficient notice of the Agency's procedure that was effective November 15, 2009. Further, I find the Grievant did not have sufficient notice of the Agency's interpretation of the policy to include this specific circumstance of the imposition of previously suspended sentence of which the Agency was aware. Because of the mitigating factors, I conclude that the Group III Written Notice is excessive and should be reduced to a Group I Written Notice.[3]

Based on the forgoing, the hearing officer reached the following determination in his hearing decision:

> For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group I Written Notice. The termination exceeds the permissible discipline for a Group I Written Notice, thus, the Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. Grievant is further entitled to seek a **reasonable attorney's fee**, which cost shall be borne by the agency.[4]

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions …

[3] *Id.* at 3-6.
[4] *Id.* at 6.

on all matters related to procedural compliance with the grievance procedure."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

Mitigating Circumstances

In this case, the hearing officer reduced the agency-imposed discipline based on mitigating circumstances, in particular, the grievant's lack of notice of the rule for which he was disciplined. The agency has objected to this reduction, essentially arguing that the discipline issued did not exceed the limits of reasonableness.

Under 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 the Department of Employment Dispute Resolution."[7] EDR's *Rules for Conducting Grievance Hearings* ("*Rules*") provides 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."[8] 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,
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> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[9]

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[5] Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3005(C)(6).
[8] *Rules for Conducting Grievance Hearings* VI(A).
[9] *Rules for Conducting Grievance Hearings* VI(B). The Merit Systems Protection Board's ("Board's") approach to mitigation, while not binding on this Department, can be persuasive and instructive, serving as a useful model for EDR hearing officers. For example, under Board law, which also incorporates the "limits of reasonableness" standard, the Board must give deference to an agency's decision regarding a penalty unless that penalty exceeds the range of allowable punishment specified by statute or regulation, or the penalty is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Service, 819 F.2d 1113, 1116 (Fed. Cir. 1987). *See also* Lachance v. Devall, 178 F.3d 1246, 1258 (Fed. Cir. 1999) (the Board may reject those penalties it finds abusive, but may not infringe on the agency's exclusive domain as workforce manager). This is because the agency has primary discretion in maintaining employee discipline and efficiency. Stuhlmacher v. U.S. Postal Service, 89 M.S.P.R. 272, 279 (2001). The Board will not displace management's responsibility in this respect but instead will ensure that managerial judgment has been properly exercised. *Id. See also* Mings v. Department of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987)(the Court "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all the factors").

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 for that of agency management.[10] Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the "exceeds the limits of reasonableness" standard set forth in the *Rules*.[11] This 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,[12] abusive,[13] or totally unwarranted.[14] This Department will review a hearing officer's mitigation determination for abuse of discretion,[15] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. The grievant has the burden to raise and establish any mitigating factors.[16]

In this case the agency argues that it is not reasonable for the grievant to have concluded that the "show cause" order and additional jail sentence were satisfied by the grievant's 2007 notification to the agency of his original conviction. The agency appears to argue that the grievant knew or should have known of his obligation to report the additional incarceration under Procedure No. 040.1.

As the hearing decision recognized, under the *Rules*, lack of notice of a rule is potentially a mitigating factor. The *Rules* expressly allow the hearing officer to consider whether the

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[10] Indeed, the *Standards of Conduct ("SOC")* gives to agency management greater discretion in assessing mitigating or aggravating factors than the *Rules* gives to hearing officers. An agency is relatively free to decide how it will assess potential mitigating and aggravating circumstances. Thus, as long as such decisions are consistent, based on legitimate agency concerns, and not tainted by improper motives, an agency's weighing of mitigating and/or aggravating circumstances must be given deference by the hearing officer, and the discipline imposed left undisturbed, unless, when viewed as a whole, the discipline exceeds the bounds of reasonableness.

[11] While hearing officers make *de novo* fact-findings under the *Rules*, a hearing officer's power to *mitigate* based on those fact-findings is limited to where his or her fact-findings support the "exceeds the limits of reasonableness" standard established by the *Rules*. Also, where more than one disciplinary action is being challenged in a hearing, the hearing officer's mitigation analysis should consider both whether each individual disciplinary action exceeds the limits of reasonableness and whether the challenged disciplinary actions, in the aggregate, meet this standard.

[12] *See Parker*, 819 F.2d at 1116.

[13] *See Lachance*, 178 F.3d at 1258.

[14] *See Mings*, 813 F.2d at 390.

[15] "'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.*

[16] *See e.g.*, EDR Rulings 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also* Bingham v. Dept. Of Veterans Affairs, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to Kissner v. Office of Personnel Management, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

employee "ha[d] notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with it."[17] 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.[18]

Applying this mitigating factor to the instant facts, the hearing officer apparently found that the grievant did not receive adequate notice of the operable rule (Procedure No. 040.1). The hearing officer held that "there was no evidence produced that the Grievant was made aware of [the operable policy –Procedure No. 040.1] by the time he served his weekend sentence in December 2009."[19] This Department will not disturb a hearing officer's findings if there is record evidence to support such a finding. Here, such evidence exists. First, the grievant testified that he had no recollection of receiving any training that would have obligated him to report the second period of incarceration.[20] He testified that he had no recollection of signing receipt of any policy, other than the Drug and Alcohol Policy (Grievant's Exhibit 2), which he signed on September 12, 1991.[21] He further testified that he asked the agency for a copy of his personnel file and it contained no signed policies other than the Drug and Alcohol policy.[22] The Warden testified that employees receive annual training on updated policies but offered no evidence to rebut the grievant's specific contention that he received no training that would have put him on notice that he was bound to report the additional time served.[23]

The hearing officer also found that the grievant did not have adequate notice of the agency's interpretation of its own policy.[24] First, the "operable" policy offered by the agency (Agency Exhibit 4) 040.1, "Litigation") does not include an express requirement that an

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[17] *Rules* at VI (B)(1).
[18] *Id.*
[19] Hearing Decision at 6.
[20] Hearing recording 1:38:00-1:40:00.
[21] *Id.*
[22] *Id.* It should be noted that the agency did not charge the grievant with violation of the Drug and Alcohol policy. It was introduced by the grievant.
[23] The agency asserts that the "Assistant Warden, testified under oath that policy information is provided to employees through in service training, monthly meetings, department meetings, memoranda, newsletters, and meetings with supervision," and that such "polices are available twenty-four hours a day by computer access." Based on this Department's review of the hearing recording, such testimony from the Assistant Warden was not found. However, the Warden did briefly address employee training in re-direct testimony. In response to the agency representative's question "isn't it true that employees go through training annually to update polices and procedures," the Warden responded "that is correct." Hearing Recording at 1:18:00. However, the agency provided no evidence that the grievant received this annul policy update training between the time the operable policy became effective on November 15, 2009 and when the grievant was incarcerated in December of 2009. The agency argues that the Rules for Conducting Grievance Hearings *("Rules")* state that an employee is presumed to have notice of written rules if those rules have been distributed or made available to the employee. It is precisely the lack of evidence of distribution of the operable rules or the agency's interpretation of those rules that the hearing officer finds problematic, a finding that this Department will not disturb.
[24] Hearing Decision at 6.

employee inform the agency if he or she is incarcerated to serve time previously suspended from a prior sentence. Moreover, the hearing officer found that "[t]he Grievant testified that he believed the Show Cause and imposition of additional days in jail that were originally suspended were part of the original sentencing in 2007 for which he had notified the Agency."[25] The hearing officer observed that "[t]he Grievant testified that he considered the whole thing to be one sentence."[26] The hearing officer found that "[b]ased on his manner, tone, and demeanor, I find the Grievant to be credible."[27] The hearing officer further found "reasonable the Grievant's belief that he had already satisfied any policy requirement to notify the Agency when he did so after his 2007 conviction."[28] The hearing officer found that the grievant's understanding (or more to the point, lack of understanding) serves as further evidence of the agency's failure to communicate its interpretation of its policy. We cannot conclude that this finding lacks support and thus we will not disturb it. Accordingly, for all the reasons set forth above, this Department finds no abuse of discretion in hearing officer's reduction of the Group III to a Group I.

The agency also asserts that the hearing officer is ignoring the active Group III Written Notice and the Standards of Conduct provision that states that "any subsequent written notice issued during the 'active' life period, regardless of level, may result in removal." The agency raised this issue at least twice at hearing, thus this Department presumes that the hearing officer is aware of this policy provision. Yet, the hearing decision states that "[t]he termination exceeds the permissible discipline for a Group I Written Notice, thus, the Agency is ordered to reinstate the Grievant to Grievant's former position, or if occupied, to an objectively similar position." Therefore, it is not entirely evident that the hearing officer considered the active Group III Notice.

Because an accumulation of discipline under the Standards of Conduct can potentially result in discharge (or suspension, depending on the number of active Written Notices and the level of the Notices), in cases where previous active Written Notices exist, the mitigation analysis should consider whether the "exceeds the limits of reasonableness" standard is met in light of the accumulated disciplinary actions (i.e., all active Written Notices along with the sustained Written Notice(s) from the pending grievance.)[29] Accordingly, the decision is remanded to the hearing officer to consider and explain in a reconsidered decision whether termination exceeded the limits of reasonableness in light of the active Group III aggregated with the instant Group I. By remanding this decision, this Department expresses no opinion as to whether or not the termination exceeded the limits of reasonableness, only that the issue of the active Written Notice should be expressly addressed.

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[25] Hearing Decision at 5. "I'd already reported that, my sentence, once before . . . I figured it being part of the original sentence, I didn't need to report it." Hearing Recording at 1:37:00.
[26] Hearing Decision at 5.
[27] *Id*.
[28] Hearing Decision at 6.
[29] This conclusion is analogous to this Department's previous holding that "where more than one disciplinary action is being challenged in a hearing, the hearing officer's mitigation analysis should consider both whether each individual disciplinary action exceeds the limits of reasonableness and whether the challenged disciplinary actions, in the aggregate, meet this standard." EDR Ruling No. 2011-2817 note 9.

CONCLUSION, APPEAL RIGHTS, AND OTHER INFORMATION

For the reason set forth above, we remand the decision for further clarification and consideration. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[30] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[31]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.[32] 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.[33] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[34]

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Claudia T. Farr
Director

[30] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[31] *See Grievance Procedure Manual* § 7.2(a).
[32] *Grievance Procedure Manual* § 7.2(d).
[33] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[34] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).