Issue: Permission to Appeal Hearing Decision in Case No. 9710 to Circuit Court; Ruling Date: February 24, 2012; Ruling No. 2012-3287; Agency: Department of Juvenile Justice; Outcome: Permission Granted.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

APPEAL REVIEW RULING OF DIRECTOR

In the matter of Department of Juvenile Justice
Ruling No. 2012-3287
February 24, 2012

The Department of Juvenile Justice (the agency) seeks approval from the Director of this Department to appeal the final hearing decision in Case No. 9710 on the basis that it is "contradictory to law."

Under Va. Code § 2.2-3006(B), a party to a grievance may appeal a final hearing decision to a circuit court on the grounds that the decision is contradictory to law. An agency, however, "shall request and receive prior approval of the [EDR] Director before filing a notice of appeal" for judicial review.[1] The *Grievance Procedure Manual* further provides that:

> To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal, in other words, the basis for its position that the hearing decision is "contradictory to law."[2]

In its original request for permission to appeal, the agency stated that the hearing decision was contradictory to law because the hearing officer had applied an incorrect legal standard in reaching his decision. This Department sought further clarification regarding the legal basis for the appeal because it was not clear what incorrect legal standard was referenced or how it may have been incorrect.

The agency supplemented its original request by providing three bases on which it contends the hearing officer's decision was contradictory to law. To summarize: the agency asserts that the hearing decision is contradictory to law because (1) the hearing officer required a

[1] Va. Code § 2.2-3006(B).

[2] Grievance Procedure Manual § 7.3(a). Notably, 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." See Barton v. Va. Dept. of State Police, 39 Va. App. 439; 573 S.E.2d 319 (2002). 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. See, e.g., EDR Ruling Nos. 2010-2556; 2010-2663, 2008-1866; 2007-1534.

heightened showing of intent that the grievant *knowingly* violated agency policy, a showing, the agency argues, that is reserved for criminal statutes; (2) the hearing officer, when analyzing whether DJJ proved by a preponderance of the evidence "that the discipline of the Grievant ***was*** warranted and appropriate ***under the circumstances,"*** considered evidence not presented to DJJ at the time of the offense; and (3) the hearing officer, in considering mitigating factors, acted beyond the scope of authority vested by Va. Code 2.2-3005(c)(6) by reversing DJJ's management decision without finding that the agency's discipline exceeded the limits of reasonableness.

Acting within its statutory role as reviewer of agency requests for permission to appeal, this Department cannot conclusively conclude that the objections raised are based on law. Concerning the first objection—that the hearing decision is contradictory to law because the hearing officer required a heightened showing of intent reserved for criminal statutes (i.e., a *knowing* violation)—it remains unclear how such an argument poses a true legal objection. The grievant was disciplined for a violation of policy, not law. The appropriate reviewer for any argument regarding what policy does or does not require in terms of intent was the Department of Human Resource Management, which declined to disturb the decision on appeal.[3]

As to the second objection—that the hearing decision is contradictory to law because the hearing officer considered evidence not presented to DJJ at the time of the offense—such an argument would be itself contradictory to the only potential rule or regulation at issue: the grievance procedure and its charge to the hearing officer to review the facts of the case "de novo (afresh and independently, as if no determinations had yet been made)."[4] This Department addressed essentially the same argument in this case in EDR Ruling 2012-3186, explaining that:

> Hearing officers are authorized to make "findings of fact as to the material issues in the case" and to determine the grievance based "on the material issues and grounds in the record for those findings." 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. 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.[5]

The ruling further explained that:

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[3] See Barton, 39 Va. App. 439; 573 S.E.2d 319. (In Barton, the Court of Appeals concluded that the hearing officer is to act as fact finder and the Director of the Department of Human Resource Management is to determine whether the hearing officer's decision is consistent with policy; in the grievance process, neither of these determinations is subject to judicial review, but only that part of the grievance determination "contradictory to law").

[4] *Rules for Conducting Grievance Hearings* § VI(B). This rule of de novo review by a hearing officer has been in place for well over a decade, spanning at least five Governors and three Directors of this Department.

[5] EDR Ruling No. 2012-3186 at 4-5 (footnotes omitted).

> Here, the agency essentially argues that the hearing officer should have given deference to the agency's internal investigative findings and should have found them to be more credible than the grievant's testimony at hearing. However, the determination of witness credibility is left entirely to the hearing officer as the finder of fact. This Department will not instruct hearing officers to adopt a rule that the testimony of the accused should always be viewed as less credible than an agency's internal investigative findings. It is the job of the hearing officer, as he expressly states he did here, to consider the credibility of witness testimony. In doing so, the hearing officer found the grievant's explanation credible and plausible.[6]

Moreover, the agency has cited no specific law to support its position that a hearing officer can consider only the evidence that was considered by the agency at the time it issued the discipline,[7] a position that would effectively render a de novo hearing superfluous.

Finally, the agency argues that the hearing decision is contradictory to law because the hearing officer, in considering mitigating factors, exceeded the scope of his authority under Va. Code § 2.2-3005(c)(6) by reversing DJJ's management decision without finding that the agency's discipline exceeded the limits of reasonableness. While this argument is unique among the three advanced by the agency in that it does state a specific law with which the decision allegedly contradicts, it nevertheless misstates the basis for the hearing decision's reversal of the charge of providing "false and misleading information." The hearing officer did not use mitigation to reverse the discipline. Rather, he found, based upon record evidence, that the agency had failed to prove that the grievant had engaged in the behavior described in the Written Notice. Thus, the hearing officer could not have exceeded the scope of his mitigation authority.

Under the *Rules for Conducting Grievance Hearings*, a hearing officer considers mitigating circumstance only *after* finding that:

> 1. the grievant engaged in the behavior described in the Written Notice (in this case, providing "false and misleading information to an investigator … [in] "violation of DJJ Directive 05-009.2 'Staff code of Conduct'")(emphasis added);
> 2. the behavior constituted misconduct; and
> 3. the agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).[8]

Here, on the charge of providing false and misleading information, the hearing officer never addressed the issue of mitigation (nor should he have) because he had already found that the

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[6] *Id.* at 5.
[7] Instead, the agency relies on the "aggregate of law" without citing to any particular authority.
[8] *Rules for Conducting Grievance Hearings*, § VI(B). The *Rules*, like the *Grievance Procedure Manual*, were established by EDR pursuant to Va. Code § 2.2-1001(2) and (3), which provide that the EDR Director shall establish the grievance procedure and adopt rules for grievance hearings.

agency had *not* carried its burden of proving that the grievant made false or misleading statements to the investigator. Only for the second charge—refusing to submit to a polygraph test—did the hearing officer consider mitigating circumstances, and only after finding the agency had carried its burden of proof on that charge. Moreover, for that second charge, he found no mitigating factors existed, and thus refused to mitigate the discipline for that particular charge.

For all the above reasons, finding a plausible argument that the hearing decision is "contradictory to law" has been an exceedingly difficult task. However, we are loath to deny the agency the opportunity to present its arguments to the circuit court, and believe the better course of action is to express candid concern and skepticism 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. The court can make the ultimate call as to whether any of the three stated objections meet the statutory "contradictory to law" grounds for judicial appeal.

Accordingly, 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 January 31, 2012, the date the hearing decision became 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.

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Claudia T. Farr
Director

[9] A hearing officer's decision becomes final once all timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision. *See Grievance Procedure Manual* § 7.2(d).