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ADMINISTRATIVE REVIEW

In the matter of the Department of Juvenile Justice
Ruling Number 2024-5648
January 26, 2024

The Department of Juvenile Justice (the "agency") has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 12006. For the reasons set forth below, EDR remands the decision for further consideration by the hearing officer consistent with this ruling.

FACTS

The relevant facts in Case Number 12006, as found by the hearing officer, are as follows in part, with remaining parts incorporated in later portions of this ruling by reference:[1]

> Grievant has been employed by the Agency for 27 years. Currently she serves as the Court Service Unit (CSU) Director for District 5.
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> Grievant's immediate boss is Supervisor. He has been Grievant's supervisor for seven (7) years. All annual reviews of Grievant completed by Supervisor have rated Grievant as a contributor or "above contributor." Grievant's two most recent evaluations rated Grievant as "above contributor." Further, Grievant has been promoted several times during her employment with Agency. During her 27 years with Agency, Grievant had never been disciplined until she received a Group II Written notice on May 26, 2023 for reasons stated here.
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> On March 23, 2023, a father and his 13-year-old daughter were supposed to be in the juvenile and domestic court of City 2. Juvenile had been charged with a misdemeanor assault and battery on her mother. The case was scheduled to be adjudicated in court on March 23, 2023. When the case was called, it was

[1] Decision of Hearing Officer, Case No. 12006 ("Hearing Decision"), November 21, 2023, at 2-6 (internal citations omitted).

determined that the custodial parents, the father, and juvenile had not appeared for court. Apparently some message was provided to the court that the father/juvenile was receiving medical services from a medical provider. When the court did not receive any paperwork from a doctor verifying medical services were being received, on March 23, 2023, the court ordered that a detention order and capias be for the child. Court ordered a failure to appear notice be provided to father.

Intake staff of the Agency prepared the Detention Order/Capias on March 23, 2023, as instructed by the court. The detention order indicated that the youth was to be taken into custody and brought before the court or intake officer. If court was not in session when the youth was taken into custody, youth was to be placed in the custody of Detention Center 2, per the order prepared by intake. The detention order was dated March 23, 2023, and signed by an intake officer.

Pursuant to the order, police from City 2's Police Department took the juvenile in custody on March 25, 2023, at 8:49 a.m. March 25, 2023. This date was a Saturday and the court was not in session. Since court was not in session on that Saturday, under the order prepared by intake, the juvenile was to be placed in detention. Specifically under the order, the juvenile was to be placed at Detention Center 2.

However, after the police took the juvenile into custody, it was determined that she could not be placed in a detention facility. Specifically, a subordinate of Grievant, Senior Probation Officer (PO), attempted to have the juvenile detained at Detention Center 2. However, upon attempting to place the child at Detention Center 2, PO was informed that there was no space for the juvenile at the facility. Further, the Detention Center 2 spokesperson stated that juvenile was denied a bed at the facility because the juvenile had a catheter. PO also contacted another detention facility that in the past had taken juveniles from the 5th district on a case-by-case bases. That facility was Detention Center 3. Detention Center 3 also denied the juvenile admission to its facility. PO then contacted her supervisor (On-Call Supervisor)/Grievant informing On-Call Supervisor/Grievant that she had been unable to find a facility that would admit the juvenile. Grievant then attempted to get the juvenile admitted at Detention Center 2. Grievant contacted the superintendent of the facility inquiring if the juvenile could be admitted. The superintendent confirmed there was no space for the juvenile. Grievant contacted other detention facilities and was not successful in finding a bed space for the juvenile.

Prior to March 25, 2023, Grievant had already reached out to other jurisdictions to determine if those jurisdictions could accept District 5's youths in their detention facility. Although eventually, Merrimac and James River Detention centers agreed to accept juveniles from District 5 who required detaining, agreements with those two facilities for that purpose were not effective until July 1, 2023; that is, after the March 25, 2023 situation.

Grievant determined there was no facility available for the juvenile to be admitted in.

Grievant then caused a risk assessment to be completed on the child to determine if there was a risk to the community if the child was released to her parent. The risk assessment indicated that the child was not a risk to the community. This was the case because the incident bringing the child before the court was an alleged assault and battery on her mother. Child was not living with her mother as she was living with her father. The incident had occurred six months before. Further, the child and father were instructed to appear in court on Monday, March 27, 2023, the next day the court was open.

She then informed her subordinate, On-call Supervisor, that juvenile would need to be released because there was no bed space for the child in a detention facility due to her medical condition. On-call Supervisor relayed Grievant's suggestion to his subordinate, PO.

Police Officer not under the authority of Agency or CSU Director. Police Officer was not required to follow the suggestion of a CSU director.

On-call Supervisor has been employed by the Agency for over 20 years. When the incident occurred on March 25, 2023 (not being able to place juvenile in a detention facility) it was the first time he had experienced their being no placement for a juvenile in a detention facility.

On-call Supervisor had no qualms with Grievant's decision. The situation was novel. Never had they been faced with not being able to place juvenile in a detention facility. He did not view the actions of Grievant as a violation of the court's order. The order could not be complied with.

Grievant had a plan. A risk assessment was completed and it was determined the juvenile was not a risk to the community if she was released. She was to report to court on the next business day, Monday. Electronic monitoring was not available because it was the weekend.

Per Grievant's testimony, while the incident was taking place on March 25, 2023, Grievant texted her Supervisor to get assistance.

Hearing Officer finds Grievant's testimony credible.

Grievant never received a response from Supervisor on the day of the text or the next day; that is Saturday and Sunday, March 25 and 26, 2023. Supervisor saw the text on Sunday, March 26, 2023. Per Supervisor's testimony, the text was informing him of what had occurred. Supervisor responded on Monday, March 27, 2023, asking for more information about the incident on March 25, 2023. Grievant responded with details of the incident.

In response to Supervisor requesting additional information, Grievant sent Supervisor an email on March 27, 2023.

> Per testimony of Deputy Director of Community Program, she understood that Grievant's text was more of an "after the fact" email sent to inform Supervisor of what Grievant had done.
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> The text was not offered as evidence during the hearing. Hearing Officer had no opportunity therefore to review this communication. Accordingly, the Hearing Officer finds the evidence is insufficient to show Grievant was simply informing Supervisor of what action she took on March 25, 2023, regarding the incident.
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> On the next day court was in session. Grievant went to the judge's chambers and explained what had occurred. Judges had no problem with actions Grievant took. The child and father reported to court as instructed. Child was placed on electronic monitoring. Judges did not sanction Grievant.
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> Prior to the incident that occurred on March 25, 2023, Grievant had had conversations with her judges of the possibility of an incident occurring like the one that occurred on March 25, 2023. Grievant had established a relationship with the judges and understood they would not have a problem with a youth being released when placement in a detention facility was not possible.
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> . . .

On May 26, 2023, the agency issued to the grievant a Group II Written Notice for unsatisfactory performance, failure to follow instructions or policy, and failure to follow DHRM Policy 1.60, *Standards of Conduct*.[2] The grievant timely grieved the disciplinary action, and a two-part hearing was held on October 25 and November 3, 2023.[3] In a decision dated November 21, 2023, the hearing officer determined that the agency had not shown by a preponderance of the evidence that the grievant engaged in misconduct, that her work performance was unsatisfactory, or that she violated any agency or DHRM policy.[4] Consequently, the hearing officer rescinded the Group II Written Notice in full.[5] The agency now appeals the decision to EDR.

DISCUSSION

By statute, EDR has been given 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 . . . ."[6] 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 either party; the sole remedy is that the hearing officer correct the noncompliance.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing

[2] Hearing Decision at 8; Agency Ex. 4.
[3] *See* Hearing Decision at 1; Grievant Ex. 1.
[4] Hearing Decision at 10-12.
[5] *Id.* at 13.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).

decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In their request for administrative review, the agency has argued that the hearing decision and hearing officer's assessments were "based on several groups of findings that were inconsistent with law and/or policy."[9] First, the agency takes issue with the hearing officer's finding that the order to take the child into custody was impossible to comply with, arguing that (1) it was not legally impossible to comply with and (2) the agency is not responsible for identifying detention placements. Second, the agency takes issue with the finding that the grievant enjoyed a special relationship with the judges that allowed intake and probation officers to do the "next best thing" and that there was no potential liability on the agency, arguing that (1) court orders grant no additional authority to the grievant to make such modifications and (2) the agency did in fact face potential liability for the grievant doing so. Third, the agency disputes the finding that the grievant was merely making a suggestion to the policer officer via her subordinate, arguing that it was in fact an order with no room for interpretation. Finally, the agency disputes the hearing officer's finding that the grievant's response to the issue was satisfactory, arguing that she did not properly utilize her chain of command.[10]

After a thorough review of the record, the hearing recording, and the agency's request for administrative review, EDR is unable to fully address the agency's objections due to certain questions not resolved by the hearing decision. Accordingly, we remand to allow the hearing officer to reassess and reconsider these questions and add necessary clarifications.

Agency's Responsibility for Placement of Juveniles

The primary issue to be considered on remand is what (if any) responsibility the agency holds regarding the placement of juveniles. On appeal, the agency has argued that no one at the agency has the authority to designate a detention center for a juvenile,[11] and that the hearing officer's findings did not properly consider evidence allegedly in support of that point.[12]

The agency seems to primarily take issue with the hearing officer's finding that "[the] [a]gency provided no written policy or guidance on handling a situation when a court orders a youth to detention and no facility is available to detain the youth,"[13] arguing that the grievant was aware of written policy and/or guidance regarding this issue. However, upon further review of the cited exhibits, EDR cannot find that the hearing officer erroneously disregarded this evidence. Grievant Exhibit 13, for example, includes nothing more than the repeated policy stance that detention location is a locality issue. Agency Exhibit 9 consists almost solely of the grievant's emails to various agency personnel regarding the placement situation that was unfolding. Nothing in these exhibits offers specific guidance on what to do when a court orders a youth to detention and no facility is available to detain them, on top of the youth having a particular medical condition and the court being closed on that day. Additionally, other evidence adds even more ambiguity as to the role of the agency, suggesting that there is some level of responsibility on the agency to

[8] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] Request for Administrative Review at 1.
[10] *Id*. at 1-2.
[11] Request for Administrative Review at 1; *see* Grievant Ex. 13; Agency Ex. 9.
[12] *See, e.g.*, Grievant Ex. 13; Agency Ex. 9.[13] Hearing Decision at 4.
[13] Hearing Decision at 4.

"support localities in implementing detention requirements" and assist in finding detention centers.[14] The Deputy Director also testified that agency employees are allowed to *assist* in finding beds for the juveniles, which is not necessarily conclusive as to employees' authority or performance expectations.[15]

Adding to this confusion (from EDR's perspective), the particular detention order issued in this case was issued by the agency's own intake officer.[16] These orders have a space to be filled in for the agency intake officer to list the location where the juvenile is to be detained if the court is closed. It would follow that if agency employees are responsible for signing off on these orders and specifying a location for detention on that order, they would then have at least some responsibilities on behalf of the agency to determine such a location. EDR is unable to identify testimony or evidence that would explain or clarify these issues. Although some agency testimony suggests that the agency's responsibilities regarding compliance with court orders falls on the police officer assigned to the court order, and that the officer's role is to transport the juvenile,[17] neither this testimony nor the hearing officer's findings resolve ambiguity as to the ultimate issue of the agency's proper role in this type of scenario and how its employees are expected to carry out this role. We are confused by the agency's apparent position that its employees would have no role in determining how a police officer is to execute an order that the agency's own employee issued, when the available evidence is that there was no apparent location to which the juvenile could be taken, or, at a minimum, the location specified in the order was not available. Because this question is fundamental to the misconduct charged, the hearing officer must make specific findings as to the matter of exactly what responsibilities the agency holds regarding the placement of juveniles and whether the grievant engaged in misconduct in light of those responsibilities with regard to following the order.

Impossibility of Complying with Court Order

The agency contends that the court order in question was not legally impossible to comply with, contrary to the hearing officer's findings, and that violating the court order was the primary basis for the issuance of the Written Notice.[18] The hearing officer found that, because of the combined complications of there being no available detention centers and the child's particular medical condition, there was effectively no way to carry out the court order.[19] The agency argues on appeal that the order was not legally impossible to comply with because "DJJ does not execute Detention Orders" and that "the responsibility of what to do with a juvenile taken into custody [is] on the person who takes them into custody."[20] The agency adds a provision from Virginia Code § 16.1-249(G1) (not included in the exhibits or discussed in agency witness testimony), which states that "any juvenile who has been ordered detained . . . may be held . . . (ii) in a nonsecure area, provided that constant supervision is provided."[21]

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[14] Grievant Ex. 34; *see* Hearing Recording Pt. 1.3 at 3:30-5:30.
[15] Hearing Recording Pt. 1.4 at 28:30-30:30; Grievant Ex. 27 at 3.
[16] *See* Agency Ex. 8 at 2.
[17] Hearing Recording Pt. 1.3 at 58:00-1:00:00.
[18] *See* Hearing Recording Pt. 1.4 at 18:15-19:00 (Deputy Director Testimony).
[19] Hearing Decision at 10-11.
[20] Request for Administrative Review at 1.
[21] *Id.*; Va. Code § 16.1-249(G1).

Despite this contention on appeal, a review of the proffered exhibits and the hearing does not clearly indicate what exactly the grievant should have done to avoid the agency considering her to have violated the court order.[22] The order states that if the court is closed when the juvenile is taken into custody (the situation that occurred), the juvenile was to be taken to a particular detention center. That particular detention center (listed on the order) would not accept the juvenile. The order listed no other options or considerations of next steps other than that the agency's intake officer was to be contacted.[23] Agency witness testimonies of both the grievant's supervisor and the agency's Deputy Director do not offer much additional guidance as to what the grievant should have done;[24] the bulk of the guidance is simply that the placement of the child is a locality issue.[25] The most concise guidance arose from the cross-examination of the agency's Deputy Director, who testified that "if you are unable to comply with the court order, you must let the court know" and request authority to do something different.[26]

Given the lack of other evidence or explanation about how the grievant should have handled the matter, the option to contact the judge, presented in testimony, is the most reasonably articulated in this case. However, because the hearing decision does not address whether this was a reasonable agency expectation and the evidence is unclear on this point, EDR concludes that this issue must be remanded for further consideration by the hearing officer. On remand, the hearing officer must specifically assess whether the grievant should have contacted the judge before directing an outcome with the juvenile's custody when she made the determination that they could not comply with the order. If so, the hearing officer must determine whether this failure is misconduct and, if so, what level of misconduct is supported under policy.

In sum, given that the violation of the court order is the primary reason for the issued Written Notice, remand is necessary for additional consideration of what the grievant should have done differently, if anything, to comply with the court order.

"Special Relationship" Finding

The hearing officer appears to have found that the grievant enjoyed a special relationship with the judges in her jurisdiction, and such a relationship allowed her to act on her own judgment without first consulting the appropriate judge. The agency contends on appeal that the court order "granted no additional authority to the Court Service Unit and the Grievant," adding that the grievant could have first contacted the judge and receive verbal confirmation that they would modify the order before acting on her own judgment.[27] Specifically, the hearing officer found that "the usual practice in the region per the testimony of several CSU directors is that when a judge's order cannot be complied with, intake/probation officer[s] may do the 'next best thing.'"[28] The hearing officer further found specifically that "because of the relationship Grievant had with the

[22] EDR observes that we are confused by the agency's description of the grievant's conduct as violating a court order when a) the order at issue was issued by an agency employee and b) the order, as argued here, does not direct the grievant to do anything. However, while it is unclear how the grievant would violate this court order, the agency could still address the grievant's conduct in instructing others.
[23] *See* Agency Ex. 8.
[24] Hearing Recording Pt. 1.3 at 14:30-16:30; *see* Grievant Ex. 35.
[25] *See, e.g.,* Hearing Recording Pt. 1.2 (Grievant Supervisor Testimony) at 6:00-7:30; Hearing Recording Pt. 1.3 (Grievant Supervisor Cross-Examination) at 17:30-19:30.
[26] Hearing Recording Pt. 1.5 (Deputy Director Cross-Examination) at 10:45-11:30.
[27] Request for Administrative Review at 1-2.[28] Hearing Decision at 11.
[28] Hearing Decision at 11.

judges they had agreed to the 'next best thing' when a court's order of detainment could not be implemented."[29] Therefore, the hearing officer found that "evidence showed Grievant's actions were consistent with this usual practice in the region."[30] In essence, the hearing officer appears to have found that the grievant acted properly when relying on her "region's" consistent practices and her established relationship with the judges to make a decision without first consulting the appropriate judge.

EDR directs that this issue also must be further assessed by the hearing officer on remand. The hearing officer's decision is explicitly based, at least in part, on the findings that the grievant relied on these "special relationships" and the usual practices of her region to make the judgment call without first consulting the relevant judge, that the grievant thereafter informed the judge of her decision, and that the judge did not take issue with the decision itself but informed her to let the court know ahead of time if a similar incident arises again. However, we do not find evidence in the record to support the finding that there was an agreement between the grievant and her jurisdiction's judges that allow for the "next best thing" if a court order cannot be followed.[31] The grievant testified that she "knew based on [her] relationship with the judges" that her decision would not be an issue, with examples attesting to this relationship, such as utilizing one of the judges' personal cell number after hours and corresponding with that judge about how to handle the aftermath of her decision.[32] But this testimony does not seem to suggest anything about a "next best thing" agreement or understanding between her and the judges. The extent of the grievant's testimony regarding her own special relationship is that she relied on this relationship to make the judgment call to release the juvenile, and she consequently knew that the judge would not have an issue with her decision. This still, however, leaves the question of how this relationship defined the grievant's authority to determine what may be the next best thing – especially in the circumstance at issue in this case when it comes to releasing a juvenile in custody. The record and decision imply that the "next best thing" was exactly what the grievant did – to first try consulting her superiors, and if she could not reach them, act on her judgment and determine via a risk assessment whether it was safe to release the juvenile. Regardless, there still seems to be insufficient evidence in the record to conclude that the grievant had authority from the court to make that determination independently.

It is for these reasons that EDR remands the matter for the hearing officer to reconsider the finding regarding the grievant's special relationship with the judges, specifically in regard to the "next best thing" aspect, and determine whether there is sufficient evidence to support a finding in the manner outlined in the decision. It should also be noted that the grievant has the burden to prove her affirmative defense, absent sufficient evidence already in the record, that there was in fact an agreement in place to do the "next best thing."[33]

Grievant's Authorization of Juvenile's Release

On appeal, the agency also argues that the hearing officer improperly applied policy in her finding that the grievant had no authority to direct a subordinate to tell the police officer to release

[29] *Id.* at 12.
[30] *See id.* at 11.
[31] *Id.*
[32] *See, e.g.*, Hearing Recording Pt. 2.1 (Grievant Testimony) at 32:00-33:00, 55:30-56:30; Hearing Recording Pt. 3.3 (Grievant Cross-Examination) at 18:00-18:45.
[33] *See Rules for Conducting Grievance Hearings* § VI(B)(1).

the juvenile, acting on the alleged authority of the agency. In this instance, the issue of the grievant authorizing the police officer via her subordinate to release the juvenile was clearly charged as misconduct in the Written Notice.[34] The record is also clear that the grievant did in fact email her subordinate to authorize the police officer, acting on the agency's purported authority, to release the juvenile. The record also supports the Written Notice's implication that the grievant did not have express authority from the agency to act in this manner, did not preemptively ask the judge, and did not rely on any code or policy to allow for that action.[35]

The hearing officer found that the police officer "had no obligation to follow anything the Grievant may have said" because she merely "made a suggestion through her subordinate [to tell the officer to release the juvenile]."[36] The agency contests this finding on appeal, emphasizing that while the grievant did not have authority over the officer, the language in the subordinate's email made it clear that she was not making a suggestion to her subordinate, and was in fact ordering the officer to release the juvenile.[37] After a review of the email in question, EDR finds that the record does not support interpreting its instruction as merely a "suggestion."[38] Indeed, given that the order the police officer was to follow was issued by one of the grievant's subordinates, it is understandable that the officer would interpret the email as a directive modifying the order the agency employee had issued.

On remand, the hearing officer must reassess her findings upon consideration of the record evidence and this discussion. In so doing, the hearing officer must address the authority or approval the grievant was acting under to direct that the juvenile be released. The agency's position would appear to be that the grievant had no such authority or approval (absent consultation with the judge). Accordingly, it would be the grievant's burden to demonstrate that her actions were appropriately within her authority. Depending on the hearing officer's determinations of these issues on remand, the hearing officer must reconsider whether the grievant engaged in misconduct and what level of discipline is supported by the record.

"Chain of Command"

Finally, the agency argues that the grievant was at fault for not properly utilizing her chain of command when confronted with the issue at hand.[39] However, the original Group II Written Notice does not appear to cite anything about the grievant's failure to utilize her chain of command.[40] This discrepancy likely negates the agency's argument, as the hearing officer's review should be limited to the conduct charged in the Written Notice.[41] That said, because this matter is being remanded for reassessment of the nature of the grievant's misconduct, the hearing officer should also consider whether any new findings as to the misconduct charged might fairly encompass the grievant's failure to escalate the situation within her agency.

CONCLUSION AND APPEAL RIGHTS

[34] *See* Agency Ex. 4.
[35] *See generally* Hearing Recording Pt. 1.5.
[36] Hearing Decision at 12.
[37] Request for Administrative Review at 2.
[38] *See* Agency Ex. 9 at 3.
[39] Request for Administrative Review at 2; Hearing Recording Pt. 1.4 at 10:00-11:00.
[40] *See* Agency Ex. 4.
[41] *Rules for Conducting Grievance Hearings* § VI(B).

For the foregoing reasons, EDR finds that the hearing decision must be reconsidered by the hearing officer in order to clarify and reconsider the issues addressed above. These matters include (1) the extent of the responsibility (if any) the agency had in regard to the placement of juveniles; (2) whether the grievant failed to substantially comply with the court order and, relatedly, whether the grievant should have contacted the judge; (3) the finding of the grievant's "special relationship" and "next best thing" directive with the judges and its relevance in regard to the hearing decision; (4) whether the issue of the grievant instructing the police officer via her subordinate to release the juvenile was misconduct; and (5) the finding of the grievant's alleged failure to utilize her "chain of command" in consideration of this charge not appearing in the Written Notice. In each of these issues, there are at least some ambiguities between the record and the hearing decision as to what exactly was expected of the grievant, how she was supposed to act, and whether any of her actions constituted misconduct. Therefore, the matter is remanded to the hearing officer for further consideration and application of the relevant state and agency policies consistent with this ruling. In addition, given the numerous questions that exist in this case on both sides of the record, EDR grants the hearing officer the discretion to open the record to accept new evidence and or argument as to the matters remanded.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[42] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[43]

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 their remanded decision.[44] 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.[45] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[46]

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