Issue: Misapplication of layoff policy, retaliation, discrimination, hostile work environment; Hearing Date: 01/14/03; Decision Date: 02/03/03; Agency: Va. Museum of Natural History; AHO: David Latham, Esquire; Case No. 5606; **Administrative Review: HO Reconsideration Request received 02/13/03; Reconsideration Decision Date: 02/18/03; Outcome: No basis to reopen the hearing or change the 02/03/03 decision. Administrative Review: EDR Ruling Request received 02/13/03; Outcome: TBA**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5606

Hearing Date: January 14, 2003
Decision Issued: February 3, 2003

PROCEDURAL ISSUES

Due to the holiday season, and the availability of parties and witnesses, it was not possible to docket this case for hearing until the 35th day following appointment of the hearing officer.[1]

Grievant has requested four forms of relief, only one of which is available through the grievance process. First, she requested payment of salary and benefits for a period of one year. Such a monetary payment amounts to a claim for damages – a form of relief not available through the grievance process.[2] Second, grievant requested a meeting with the Secretary of Natural Resources. A hearing officer may not commit a cabinet secretary to meet with an employee.

[1] § 5.1 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001, requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

[2] § 5.9(b)1. EDR *Grievance Procedure Manual*.

Moreover, the purpose of providing relief is to restore an aggrieved employee to the status quo before any adverse action occurred. Therefore, arranging such a meeting would be inconsistent with the grievance statute.[3]

Third, grievant requested removal from her personnel file of all material pertaining to her whistleblowing activities. There is no evidence that grievant's personnel file contains any such material. However, even if there were such material, a hearing officer's authority is limited to rescinding the disciplinary action. Finally, grievant requested a different position. A hearing officer's authority is limited to reinstating grievant to her prior position. A hearing officer may not direct an agency to transfer an employee to a different position.[4] Grievant has now obtained other employment and no longer desires to be reinstated, however, she sought to pursue this hearing in order to have a full review of all the evidence.

APPEARANCES

Grievant
Six witnesses for Grievant
Human Resource Manager
Advocate for Agency
Three witnesses for Agency

ISSUES

Did the agency retaliate against grievant? Was the layoff selection process misapplied? Did the agency create a hostile work environment? Did the agency discriminate on the basis of age, gender or disability?

[3] § 5.9(b)7. *Ibid.*
[4] § 5.9(b)2. EDR *Grievance Procedure Manual*, Ibid.

FINDINGS OF FACT

The grievant filed a timely appeal following the termination of her employment due to a layoff. Following failure to resolve the grievance at the third resolution step, the agency head declined to qualify the grievance for a hearing.[5] Subsequently, the grievant requested the EDR Director to qualify the grievance for a hearing. In a qualification ruling, the EDR Director concluded that a sufficient question of possible retaliation and other issues remained such that the grievance should be qualified for a hearing.[6]

The Virginia Museum of Natural History (Hereinafter referred to as "agency") has employed the grievant for six years. Before that she had been employed on a part-time basis for three years. At the time of her layoff, grievant was the Assistant Director of Outreach.

During 2001, grievant contacted the agency's Board of Trustees and reported that the Executive Director was misspending or misappropriating agency funds. An outside auditor was hired to investigate the allegation; the auditor concluded that there had been no malfeasance of agency funds. Grievant also complained to the Board that the Executive Director had ignored complaints about two carpenters who had made inappropriate remarks to female staff. The Director had already looked into the complaint and took what he considered to be appropriate corrective action. Following grievant's complaint to the Board, the Board chairperson asked him to reinvestigate the matter.[7] He reinvestigated but the females who had been offended refused to pursue the matter or press charges.

During the fall of 2001, it became apparent that budget cuts were on the horizon for all state agencies due to a revenue shortfall.[8] State government directed agencies to find methods to reduce expenditures. The agency's Executive Director and the Board of Directors concluded that a reorganization of the staff was necessary to achieve budget reductions. The Board told the Executive Director that he should form a committee of employees to develop a plan for reorganization. The Board felt that this would be a good opportunity to address what they felt was an ineffective reporting structure.[9] The committee was to be given two prime objectives: to reduce the number of direct reports to the Executive Director from nine to three people, and to achieve the budget reduction percentage mandated by the Governor. The Executive Director named five employees to a Structure Committee on February 14, 2002.

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[5] Exhibit 1. Grievance Form A, filed June 10, 2002.
[6] Exhibit 19. Ruling Number 2002-155, *Qualification Ruling of Director*, December 4, 2002.
[7] *See* Exhibit 34. Written comments of the Chairman of the Board of Trustees, January 6, 2003.
[8] Exhibit 20. Memorandum from Executive Director to Trustees, October 23, 2001.
[9] Exhibit 21. Organization chart, January 11, 2002. *See also* Exhibit 9. Email from Chairman of the Board of Trustees to committee member and Executive Director, February 19, 2002.

The committee formulated a broad restructure of the organization that achieved the primary goal of reducing the number of direct reports to the Executive Director. A proposed reorganization chart was prepared which reflected that 11 different functional areas would report through two primary division heads who in turn, reported to the Executive Director.[10] The chart included only functions, not the names of people who would fill each position. The Structure Committee memorialized its initial discussions in two memoranda.[11] To achieve the required budget cuts, the committee proposed the elimination of five classified and two wage positions, including the grievant's position.[12] The committee prepared a revised reorganization chart that, again, identified only functions – not who would be assigned to those functions.[13]

The Executive Director reviewed the plan and responded to the committee indicating that it might not be possible to maintain publications at the existing level due to financial considerations.[14] The Committee concluded early in its deliberations that publishing had largely become a luxury that the agency could not afford in a restricted budget situation. The agency published a magazine that continually lost money, even though it was intended to be self-supporting. Thus, elimination of this money loser and some of the staff who produced it were logical targets to reduce the agency's budget. The consensus was that the agency would have to concentrate the available reduced revenue on its core functions – the acquisition of, and display of collections.

In mid-March 2002, the committee submitted a draft proposal. The Executive Director reviewed the draft proposal, made suggestions, and directed the committee to further develop its ideas.[15] Among other things, the Director questioned whether the plan reduced too much the functions of sales, marketing, public relations and communications, and who would manage publications and exhibits. On March 27, 2002, the Director added five additional members to the structure committee, bringing the total to ten people.[16] By mid-April, five more members including grievant were added to the structure committee.[17] Other employees submitted ideas to the Director, including the grievant.[18] On April 22, 2002, grievant participated in a committee meeting. Grievant presented her ideas but the committee was not enthusiastic about them. Grievant felt that two committee members in particular did not give her a full opportunity to present her

[10] Exhibit 8. Proposed reorganization chart, February 19, 2002.
[11] Exhibit 22. Structure Committee report, and email from one committee member to other members, February 21, 2002.
[12] Exhibit 24.
[13] Exhibit 24. Proposed reorganization chart, revised February 26, 2002.
[14] Exhibit 25. Memorandum to Structure Committee from Executive Director, March 5, 2002.
[15] Exhibit 11. Memorandum to Structure Committee from Executive Director, March 22, 2002.
[16] Exhibit 16. Memorandum to five new committee members from Executive Director, March 27, 2002.
[17] Exhibit 13. Memorandum to committee members from Executive Director, April 17, 2002.
[18] Exhibit 12. Memorandum to Executive Director from grievant, April 16, 2002.

ideas. She complained to the Executive Director and he arranged for grievant to meet with the human resource director and two others on April 26, 2002.

On May 8, 2002, the Executive Director and the committee finalized the reorganization plan and forwarded it to the Department of Human Resource Management (DHRM) for review.[19] The memorandum includes the names, positions, and employment dates of all classified employees. Three people were identified for layoff including grievant. The agency followed the layoff sequence specified in the Commonwealth's layoff policy and determined that there was no other position to which grievant could be assigned.[20] DHRM approved the plan. Grievant's Role title was PR and Marketing Administrator II (Manager). The Layoff policy specifies that agencies must select employees for layoff within the same work unit, geographic area and Role, who are performing substantially the same work. The agency had no other employees holding the same Role title as the grievant. Initial notice of layoff was given to grievant on May 22, 2002, and her last day of official employment was June 10, 2002. There were no valid vacancies available to which grievant could be placed during this time period.

Grievant identified four positions she believes she could have been placed in. Two of the positions were part-time wage PR & Marketing Specialist II positions, one was a classified Education Administrator position, and one was a classified Media Specialist III position. However, all four positions were filled at the time.[21]

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

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[19] Exhibit 14. Letter to DHRM from Executive Director, May 8, 2002.

[20] Exhibit 33. DHRM Policy No. 1.30, *Layoff,* effective September 25, 2000.

[21] The two wage employees were laid off in a second round, which resulted in seven layoffs on August 30, 2002. Seven additional employees were laid off in October 2002. Thus, a total of 17 employees (approximately 50 percent of the staff) have been laid off from May through October 2002.

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[22]

Grievant contends that the Executive Director laid her off in retaliation because grievant had reported to the Board of Trustees that the Director failed to investigate harassment charges and misspent agency funds. Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.[23] To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action.

There is no doubt that grievant did not enhance the Director's view of her when she reported this information to the Board. Since he had already investigated the harassment charges when she reported him, and since an outside auditor exonerated him of financial malfeasance, the Director was not pleased. Further, the tenor of the Director's email messages to the Human Resources Manager reflects his exasperation with grievant's lengthy email memoranda to him.[24] However, grievant has not provided any evidence to show that the Director said or did anything that *directly links* her layoff to his displeasure. A preponderance of evidence reflects that the original five members of the Structure Committee formulated the plan that ultimately resulted in the decision to eliminate most of the agency's publishing functions. Since grievant's major role was publishing, it was logical that her position be eliminated.

Grievant claims that the layoff policy was misapplied. However, the preponderance of evidence reflects that the agency applied the layoff policy correctly. As a higher-level manager, grievant was the only employee in her Role in the agency and geographic area. Grievant misunderstands the term "Role." This term refers to her specific Role title (PR & Marketing **Administrator** II). Although there were other employees in lower-level Roles such as PR &

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[22] § 5.8 EDR *Grievance Procedure Manual,* effective July 1, 2001.
[23] EDR *Grievance Procedure Manual*, p.24
[24] Exhibits 3 & 5.

Marketing Specialist, grievant was the only Administrator. Further, the policy requires agencies to offer lower-level positions only if *vacancies* exist. There were no available *vacancies* in lower-level positions at the time of the layoff. DHRM reviewed and approved the layoff plan. Accordingly, grievant has not borne the burden of proof to show misapplication of the layoff policy.

Grievant alleges that the committee's early decision to consider the elimination of the publishing function resulted in other employees becoming aware that grievant might be laid off, and that this created a hostile work environment. Whenever layoff plans are developed over a period of time, it is not unusual that other employees will learn through office gossip which employees will be likely candidates for layoff. This is an unfortunate side effect of the process but there has been no evidence that this was done intentionally to create a hostile work environment for grievant, or any of the other 16 people laid off during 2002.

Grievant also maintains that when the Director spoke to her about various work issues over a period of months, a hostile work environment was created. Many managers are demanding in the workplace. However, being demanding about work-related issues, particularly when deadlines are missed, is insufficient to create a hostile work environment.

Grievant claims to have a permanent disability but the agency disapproved her application for disability. She was allowed to use short-term disability during the spring of 2002. However, she has not proven a disability that would qualify under the terms of the Americans with Disabilities Act (ADA). Grievant has a stress disorder but was unable to demonstrate that this emotional illness substantially limits a major life activity. Pursuant to the ADA statute, an emotional illness of brief extent, duration and impact is considered a mild impact on major life activities and therefore does not qualify as a disability.

Finally, grievant has alleged that her layoff was the result of age and gender discrimination. The courts have established a four-part test to determine whether discrimination has occurred. To sustain a claim of age discrimination, grievant must show that: (i) she is a member of a protected age group (over 40 years old); (ii) she suffered an adverse job action; (iii) she was performing at a level that met his employer's legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee's age.[25] Grievant is over 40 years of age and female, both of which are protected classes. She was laid off, and was performing satisfactorily. However, there is no evidence that the layoff was the result of either grievant's age or gender. Most (67 percent) of the agency's employees are female. Based on the available evidence it appears only coincidental that the first three of 17 people laid off were female and over 40 years of age. Accordingly, grievant has

[25] Cramer v. Intelidata Technologies Corp., 1998 U.S. App Lexis 32676, p6 (4th Cir.1998) (unpub).

not borne the burden of proof to show that she was discriminated against on the basis of age, gender, or disability.

In summary, there is little doubt but that grievant had become a thorn in the Director's side, and that he probably shed no tears when she left. However, the grievant has failed to show, by a preponderance of evidence, that the Director orchestrated the layoffs of three people (and 14 more within a few months) in order to discharge the grievant. The agency was forced to dramatically reduce expenses, and since 85 percent of its budget is personnel costs, it was inevitable that many employees would lose their positions. The publication function was draining money from the budget instead of being self-supporting. It was entirely logical to target this function for elimination; grievant happened to be the manager. However, grievant has not demonstrated that any of her alternative theories were the real reason behind her layoff.

DECISION

The grievant has not demonstrated by a preponderance of evidence that she was retaliated against, that the layoff policy was misapplied, that the agency created a hostile work environment, or that the agency discriminated against her on the basis or age, gender, or disability. Grievant's requests for relief are hereby DENIED.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[26] You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[27]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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David J. Latham, Esq.
Hearing Officer

[26] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, Record No. 2853-01-4, Va. App., (December 17, 2002).

[27] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

DECISION OF HEARING OFFICER

In re:

Case No: 5606

Hearing Date:	January 14, 2003
Decision Issued:	February 3, 2003
Reconsideration Received:	February 13, 2003
Reconsideration Response:	February 18, 2003

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 10 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. The request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.[28]

[28] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

OPINION

Grievant's request for reconsideration failed to comply with the procedural requirements because she did not provide a copy of her request to either to the other party or to the EDR Director. However, in this case, the hearing officer will respond to grievant's request in order to address certain issues raised therein.

Grievant's request for reconsideration has three bases: 1) she argues that she has made a prima facie case of causality based on a case decided by the Fourth Circuit; 2) she disagrees with representations made by the chairperson of the Board of Trustees; and 3) she seeks to present new evidence in the form of financial statements. Grievant also disagrees with the hearing officer's Findings of Fact, and Opinion.

Causality

Grievant acknowledges that she has no direct evidence to show that the Executive Director issued an order that she was to be among those laid off. She goes on to cite language from a Fourth Circuit case indicating that, "merely the closeness in time between the protected act and an adverse employment action is sufficient to make a prima facie case of causality."[29] It is correct that closeness in time may be sufficient when the facts of the case are appropriate. For example, when an employee engages in a protected act one day, and is discharged the next day for no other justifiable business reason, the closeness in time is indeed sufficient to make a prima facie case of causality.

In grievant's case, however, her whistleblowing activity occurred in December 2000 and July 2001 but she was not laid off until June 2002. Thus, the protected activity and the adverse employment action were not so close in time as to make a *prima facie* case of causality. Moreover, even if the two events were deemed sufficiently proximate in time, the agency has offered a justifiable business reason for the decision to lay off the grievant.

It should also be noted that the Tinsley language cited by grievant was extracted from an earlier Fourth Circuit case, which made clear that, "It is improper to presume that any action against an employee's aspirations is retaliatory merely because the decision-maker knew of the employee's protected activity."[30]

Chairperson's representations

Grievant takes issue with the statement by the Board of Trustees' chairperson that multiple investigations of the Executive Director had failed to substantiate grievant's complaints of financial mismanagement. The chairperson

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[29] Tinsley v. First Union National Bank, 155 F.3d 435, 443 (Fourth Cir. 1998).
[30] Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989).

stated that the investigations involved the Museum's Foundation, Virginia Auditor of Public Accounts, Chief Deputy Auditor of the Department of Environmental Quality, Department of Human Resource Management, Office of the Attorney General and Virginia State Police. No evidence of financial mismanagement, inappropriate or illegal activity was found.

Grievant attempts to rebut this by claiming that the Executive Director's resume contains an error in his employment dates for one employer more than two decades ago.[31] Grievant's evidence is insufficient because there is no authentication of who sent the email, or whether that person is properly authorized to disclose information for the former employer. However, even if the alleged error could be proven, it has no relevance. Grievant did not tell the Board that the Executive Director's resume contained an error. In fact, it appears that grievant only learned of the error subsequent to her layoff.

Grievant also contends that some employees disagree with the chairperson's statement that grievant had been accorded preferential treatment over her staff. Grievant had the chairperson's written statement in advance of the hearing. She therefore had ample opportunity during the hearing to present rebuttal evidence or witnesses regarding this issue. However, this issue is moot because the grievance is not whether preferential treatment was accorded grievant, but whether there was retaliation or misapplication of policy.

Additional evidence

Grievant proffered with her request for reconsideration excerpts from 1999 and 2001 agency financial statements. The general rule regarding the reopening of a hearing for presentation of new evidence requires that the evidence be *newly discovered*. The statements proffered by grievant were in existence well before this grievance was filed. With the exercise of due diligence, grievant could have proffered these statements during the hearing. Accordingly, such statements are not *newly discovered* and, therefore, do not meet the criteria necessary to justify reopening the hearing.

Further, even if grievant had proffered such records, they would not have altered the outcome. Without evidence or testimony from a competent auditor, the statements by themselves prove nothing. Moreover, grievant reported these allegations to the Board of Trustees in 2001. As noted above, the Board and several outside agencies investigated the allegations and found them to be without merit.

[31] On his resume, the Executive Director had listed the employment dates for one employer as 1978-80. Grievant proffers an email message (purportedly from the employer) that states the Director was employed from 1978-79.

Grievant takes issue with certain Findings of Fact, and with the hearing officer's Opinion. The grievant's disagreements, when examined, simply contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, or the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

Grievant also misstates some of the hearing officer's conclusions. For example, the hearing officer did not conclude that the allegations of financial mismanagement were investigated before grievant reported the allegations. Rather, it was concluded that one reason the Director may have been displeased with grievant was that, despite her allegations, he was fully exonerated by multiple investigations.

Grievant also harbors a misconception about the issue of disability. The Virginia Sickness & Disability Plan (VSDP) approved grievant to utilize benefits provided by the plan for a short-term disability (up to six months), and subsequently extended benefits for an additional 45 days. However, approval to use benefits under this plan does not necessarily mean that an individual has a "disability" as the Americans with Disabilities Act (ADA) defines that term. Pursuant to the ADA, an "individual with a disability" is one who has *an impairment that substantially limits one or more major life activities*. The ADA defines each of the terms in the preceding phrase. Grievant did not demonstrate that she meets the ADA definition of an individual with a disability. As noted in the decision, an emotional illness of brief extent, duration and impact is considered a mild impact on major life activities and, therefore, is not a disability. In any case, even if grievant were deemed to have a disability, she has failed to present any evidence of a nexus between the alleged disability and her layoff.

Grievant objects to mention in the decision of layoffs subsequent to her layoff. To assure that those who may review this decision have access to all facts, a brief footnote (page 5) and a parenthetical comment (page7) did mention the subsequent layoffs. However, these facts were presented for complete historical context purposes and did not alter the outcome of the decision.

DECISION

The hearing officer has carefully reconsidered grievant's arguments and concludes that there is no basis either to reopen the hearing, or to change the Decision issued on February 13, 2003.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.[32]

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David J. Latham, Esq.
Hearing Officer

[32] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, Record No. 2853-01-4, Va. Ct. of Appeals, (December 17, 2002).