

Issue: Misapplication of layoff policy; Hearing Date: 08/14/03; Decision
Issued: 09/02/03; Agency: VPI&SU; AHO: David J. Latham, Esq.; Case No.
5770



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5770

Hearing Date: August 14, 2003
Decision Issued: September 2, 2003

PROCEDURAL ISSUES

Due to availability of participants, this case could not be docketed for hearing until the 29th day following appointment of the hearing officer.¹

APPEARANCES

Grievant
Attorney for Grievant
Three witnesses for Grievant
Director of Internal Audit
Attorney for Agency

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.

ISSUES

Did the agency fail to reclassify grievant's position? Did the agency misapply the layoff policy?

FINDINGS OF FACT

The grievant filed a timely appeal after being removed from employment by layoff on December 6, 2002. Following failure of the parties to resolve the grievance at the third resolution step, the agency head declined to qualify the grievance for a hearing.² Subsequently, the grievant requested the Director of EDR to qualify the grievance for a hearing. In a qualification ruling, the EDR Director concluded that a sufficient question of possible misapplication of policy remained such that the grievance should be qualified for a hearing.³

Virginia Polytechnic Institute and State University (Hereinafter referred to as agency) has employed grievant since 1996. She was initially employed as a Senior Internal Auditor (salary grade 13). In 1997 she was promoted to Accounting Manager C (salary grade 15) to reflect changes in her duties, and was designated Fraud Audit Coordinator. On September 25, 2000, the Commonwealth implemented a compensation reform program and the former title of Senior Internal Auditor was "cross-walked" to the new role of Auditor II (Pay Band 5).⁴ Grievant's position was "cross-walked" to the new role of Auditor III (Pay Band 6). Grievant has worked since that time pursuant to a job description signed on October 19, 2000.⁵

During her entire period of employment, grievant has not been employed in a supervisory or management capacity. Neither her job description nor her actual duties included any of the usual indicia of a supervisory/management employee.⁶ On certain audit projects, she functioned as team leader; however, Auditor IIs also frequently functioned as team leaders on audit projects to which they were assigned.

² Exhibit 4. Grievance Form A, filed December 20, 2002.

³ Agency Exhibit 2. Ruling Number 2003-044, *Qualification Ruling of Director*, June 18, 2003.

⁴ Each Pay Band incorporates three of the previous salary grades, i.e., Band 5 incorporated salary grades 11, 12 & 13, while Band 6 included grades 14, 15, & 16. The Commonwealth's Pay Structure provides that the salary ranges for adjoining Pay Bands overlap. For example, the current pay range for Band 5 is \$33,181 to \$69,391; the current pay range for Band 6 is \$44,171 to \$90,653.

⁵ Exhibit 1, p. 22. Grievant's job description, October 19, 2000.

⁶ Grievant did not have the authority to hire, fire, promote or perform annual performance evaluations for employees.

The Internal Audit and Management Services Department (IAMS) generally conducts two types of audits. Fraud audits are usually conducted in response to a specific complaint that fraud, waste, or abuse is occurring. Scheduled audits and special audits are conducted periodically to assess whether departments are in compliance with fiscal and procedural policies. From 1997 until January 2001, grievant performed primarily fraud audits, especially more complex fraud cases. A new IAMS Director was named in January 2001 and he began to change the nature of work assignments. Previously, fraud complaints were addressed as separate audits that focused solely on the fraud complaint. However, as the new Director received fraud complaints, he determined in some cases that it would be more appropriate to conduct a general program compliance audit of the involved department. The fraud complaint was still investigated but it was subsumed into the much broader compliance audit.⁷ Thus, the number of dedicated fraud audits declined, in part because they were now categorized as general program compliance audits.

Within six months, grievant recognized that there was a decline in fraud audit reporting and mentioned this in a memorandum to her immediate supervisor (IAMS Associate Director).⁸ Soon thereafter, grievant wrote to the IAMS Director requesting either that her compensation be increased or that her job duties be revised to be equivalent to those of an Auditor II.⁹ Grievant did not receive a response and renewed her request two weeks later.¹⁰ In April 2002, she again made the same request to the Director.¹¹ In September 2002, grievant again renewed her request for a job description change to the Director.¹² The Director contends that he refused to reduce grievant to an Auditor II because she might file a grievance against him.

In the fall of 2001, the Director assessed the compensation of Auditor IIs before granting in-band pay adjustments to some employees. Even though grievant was an Auditor III, the Director included her in his pay comparison analysis. In explaining grievant's inclusion in this comparison, the Director noted that, "[Grievant's] job duties most closely approximate those of an audit senior [Auditor II]..."¹³

The Commonwealth's budget crisis became apparent in late 2001 and early 2002. From January 2002 forward, the Governor made clear that significant action would be required to remedy the state's fiscal problems. It quickly became apparent that the budget-cutting axe was being honed but agencies did not learn where it would be used until later in the year. During the

⁷ Exhibit 10. Senior HR Manager's audit report, January 24, 2003.

⁸ Exhibit 7. Memorandum to Associate Director from grievant, August 31, 2001.

⁹ Exhibit 4, p. 29. Email to IAMS Director from grievant, December 20, 2001.

¹⁰ Exhibit 4, p. 29. Email to IAMS Director from grievant, January 3, 2002.

¹¹ Exhibit 4, p. 30. Email to IAMS Director from grievant, April 24, 2002.

¹² The Director denies the request during September 2002. However, based on the totality of the evidence it appears more likely than not that grievant did make this request.

¹³ Exhibit 4, p. 27. Comparative analysis of Auditor IIs and grievant.

spring of 2002, the Director attempted to arrange for grievant's move to jobs outside the IAMS department. However, at the same time, the Director advised grievant that "Your specialized fraud experience is extremely valuable to the university in your current capacity."¹⁴

Grievant's direct reporting superior was the Associate Director. It had been his custom to meet monthly with the Associate Director in a "management" meeting. In late 2001, the Associate Director was on sick leave for three months and the Director therefore met from time to time with grievant to keep abreast of her activities. Upon the Associate Director's return to work, the Director resumed his sporadic meetings with the Associate Director, and continued to have grievant attend these meetings. The Director gradually became more involved in grievant's direct supervision, although the Associate Director remained her official supervisor.

In one discussion among staff regarding layoff possibilities, the Director opined that it would be unreasonable to cut the salary of a staff member who had recently purchased a new home – a reference to a male Auditor II who had the least seniority.¹⁵

On October 29, 2002, grievant filed a gender discrimination and related retaliation complaint against the IAMS Director and Associate Director. The agency's Office for Equal Opportunity conducted an investigation and issued a detailed report.¹⁶ The report addresses at length the statistics provided by both grievant and the Director in support of their respective positions. It correctly notes that there are significant differences in some of the numbers, however, notwithstanding such differences, some conclusions are apparent. The facts reflect that grievant was spending significantly less time on fraud-related matters in 2002 than she had in 1997. Grievant contends she spent less than 11 percent of her time on fraud audits in fiscal year 2002, and less than 12 percent in 2003. The Director places the figures at 33 and 18 percent for the same two periods. Taking into account various adjustments in both sets of data, the more realistic figure for both years is approximately 18 percent.

The Commonwealth's layoff policy requires agencies to designate the business functions to be eliminated or reassigned, and to designate the work unit to be affected as appropriate.¹⁷ The policy further specifies the layoff sequence beginning with wage employees, and other categories, and working up to the most senior full-time classified employee. A key determinant in assessing which employees will be impacted by the Layoff Policy is to consider all employees who

¹⁴ Exhibit 1, p. 25. Email to grievant from IAMS Director, April 23, 2002.

¹⁵ Exhibit 1, p. 9. Office for Equal Opportunity Compliance Report, undated.

¹⁶ Exhibit 1. *Ibid.* NOTE: The OEO report concludes that there is a substantial likelihood of retaliatory and/or gender-based discrimination against grievant. This hearing decision draws no conclusion with respect to those issues because they were not raised in the grievance.

¹⁷ Exhibit 13. Department of Human Resource Management (DHRM) Policy No. 1.30 *Layoff*, September 25, 2000.

perform *substantially the same work*. Among the indicators that agencies may use to make that determination is whether the positions are in the same Role, and whether the positions have similar job duties based upon their Employee Work Profile. The agency has promulgated its own guidelines for implementing the Layoff Policy that are consistent in all significant respects with the Commonwealth's policy.¹⁸

On the day of grievant's layoff, the agency gave her a performance evaluation, purportedly for the previous performance cycle, because "it is necessary to have one in the file at termination."¹⁹ There was no explanation of why the evaluation was not completed by the October 24, 2002 deadline.²⁰ The agency also gave grievant on the same day a new Employee Work Profile (EWP) that changed her core responsibilities and the percentage of time allocated to each responsibility. Grievant did not agree with or sign the EWP. There was no explanation of why the EWP was not prepared jointly by grievant and her supervisor as required by Policy No. 1.40.²¹

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:

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

¹⁸ Exhibit 12. Agency Policy No. 4240, *Guidelines for Implementing the State Layoff Policy*, September 30, 2002.

¹⁹ Exhibit 5. Employee Work Profile for grievant.

²⁰ DHRM Policy No. 1.40 *Performance Planning and Evaluation*, August 1, 2001, requires that employees "must have evaluations completed by October 24" of each year.

²¹ DHRM Policy No. 1.40, Attachment B, *Ibid.*, states, "Sections I, II, III and IV are written or reviewed by the supervisor and employee at the **beginning of the evaluation cycle** to determine work plans and developmental needs." (Underscoring added)

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 his evidence first and must prove his claim by a preponderance of the evidence.²²

Scope of Decision

The agency contends that it had ample justification to lay off one employee in the IAMS department, especially in view of the agency's comparison with other universities in the Commonwealth. This decision does not take issue with the agency's determination to lay off one employee in order to achieve budget requirements. The issue addressed herein is whether the layoff procedure was properly applied. The Grievance Procedure provides that the establishment of position classifications does not qualify for hearing if such classification is the sole issue.²³ However, where this issue is inextricably intertwined with an alleged misapplication of the layoff policy, it must necessarily be thoroughly examined in order to adjudicate the latter issue.

A careful reading of the Commonwealth's Layoff policy evinces the general principle that those to be laid off should be the most junior, least experienced employees who have the least amount of time and career invested in the agency. However, the policy also makes clear that the agency must first identify the business function to be eliminated or reassigned. Having made that determination, the pool of those potentially subject to layoff must be identified using the steps specified in the policy. One criterion used by agencies is to identify those employees who perform *substantially the same work*. The policy defines this term, stating that the following are *indicators to assist* agencies in making that determination:

- Positions are in the same work unit;
- positions are in the same Role;
- positions have the same work title;
- positions are at the same reporting level in the organizational structure;
- positions have the same SOC Code; and
- positions have similar job duties, KSAs, and other job requirements, based on the position description or Employee Work Profile.²⁴

²² § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

²³ § 4.1(c). *Ibid.*

²⁴ DHRM Policy No. 1.30 *Layoff*, revised August 10, 2002.

The policy does not require that the person to be laid off necessarily have all of the above indicators. Of course, in most cases, those to be laid off will probably meet most or all of the above indicators. However, the language of the policy is neither mandatory nor directory; it simply assists the agency by suggesting appropriate indicators. The policy's suggestive language implicitly recognizes that there may be unusual situations that do not lend themselves to a cookie-cutter approach.

Grievant's position classification

A preponderance of evidence suggests that the instant case is just such an unusual situation. Indicators such as Roles, work titles, and SOC codes should be given consideration. However, if an employee has been misclassified with an incorrect Role, title, or SOC code, then one must look beyond these appellations and examine the substance of the employee's job. Specifically, one must consider the employee's job duties, and the employee's knowledge, skills, and abilities.

It is undisputed that if grievant's job description had been changed from Auditor III to Auditor II, the potential pool of those subject to layoff would have included four other people, at least two of whom have less seniority than grievant. Grievant has also demonstrated that, beginning in January 2001, the nature of her job duties began to change. Rather than having grievant conduct fraud audits, the new Director folded some fraud complaints into general program audits – audits that were sometimes conducted by grievant but also by Auditor IIs. By September 2001, grievant was sufficiently concerned about this change in her duties to mention it in a memorandum to her supervisor. She then told the Director that she wanted “to have her job duties revised so that they are equivalent to the other senior auditors [Auditor IIs] that are similarly compensated.”²⁵ It must be observed that it is highly unusual for any employee to request such a demotion. However, as is apparent from her written comments to the Director, grievant had reached a point where advancement was not her first priority.²⁶ Performing well within her area of expertise was more important to her.

Interestingly, the word “fraud” does not appear in either the Auditor II or Auditor III role descriptions. Thus, it would appear that the use of “fraud audits” in grievant's job description could have been an attempt in 1997 to justify the position, presumably because fraud audits were deemed to require a more experienced and expert auditor. However, in actual practice, the agency has regularly been using Auditor IIs to conduct many of the fraud audits.

²⁵ Exhibit 4. E-mail from grievant to Director, December 20, 2001.

²⁶ Exhibit 4. E-mail from grievant to Director, April 24, 2002.

The grievant's job description indicates that she spends 70-80 percent of her time on fraud audit duties.²⁷ However, the most realistic estimate of her fraud audit duties in 2002 was no more than 18 percent. Thus, grievant was spending more than 80 percent of her time performing Auditor II duties in the year prior to layoff. It must be observed that there is no policy that prohibits one from occasionally performing the duties of a lower-level position within the same Career Group.²⁸ However, when the primary duties of an employee have changed so significantly, and the change appears to be permanent, the employee's job description should be revised to be reflect consistency between the description and the actual job being performed.

The grievant filed a complaint with OEO alleging gender discrimination and retaliation by the Director. OEO made findings regarding these allegations but it is outside the purview of this decision to draw conclusions about these charges. Nonetheless, the evidence in this case does reflect that there had been a steadily increasing schism between grievant and the Director after he was named Director. Grievant was fairly persistent in pressing for a change in her job description. In response the Director acknowledged that he became frustrated by grievant's complaints and felt that she griped too much. He admits to having using the F-word in a meeting with her on one occasion. This animus may very well have been a factor in the Director's resistance to changing grievant's job description.²⁹

The agency made much of the fact that grievant had been included in "management" meetings with the Director and Associate Director. Because grievant was still coordinating some fraud cases, the Director elected to obtain progress reports directly from grievant rather than through the Associate Director. However, there is no evidence to show that grievant was actually functioning in the management of the IAMS department. She did not supervise any employees, could not hire or fire, did not conduct annual performance evaluations, or in any other way manage employees.³⁰ She tracked the status of ongoing fraud investigations but she did not assign work to other employees and

²⁷ Exhibit 1, p. 22. Job description in effect at the time of layoff, signed October 19, 2000.

²⁸ Exhibit 2. Audit and Management Services Career Group descriptions. This Career Group provides career tracks for auditors who perform, supervise, manage or direct independent, objective, systematic, and disciplined auditing and consulting services or external auditing activities in accordance with applicable professional standards.

²⁹ The OEO report, as well as some collateral testimony, suggested that the IAMS Director might have a bias in favor of the male auditors because of his personal relationships with them. While such evidence is not conclusive, it is suggestive of a possible motivation for not including Auditor IIs in the pool of potential candidates for layoff.

³⁰ See Exhibit 15. Supplemental Information Form to the Executive Vice President, in which the Director states, "It [grievant's position] has no permanent supervisory responsibilities or responsibility to hire, fire, promote, or evaluate the performance of staff." Yet, in the same document, the Director refers to grievant's position as a "layer of management." One cannot have it both ways – either it is management or it isn't management. The facts, and the Director's conclusory statement above make it clear that grievant's position was not a management position.

did not direct their day-to-day activities.³¹ Accordingly, grievant's occasional meetings with the Director and Associate Director appear to have little to do with management of the IAMS department.

The agency sought to emphasize grievant's expertise (and thereby justify the Auditor III role) by stating that she is a Certified Fraud Examiner (CFE).³² In fact, grievant is not a CFE and has not taken the examination required for this designation.³³ Grievant is a certified public accountant (CPA) as are the Auditor IIs.

In this case, the record is silent as to whether grievant had been correctly classified as an Auditor III when she was promoted. Therefore, there is no basis to conclude that the classification policy was misapplied in 1997. However, a preponderance of evidence supports the conclusion that grievant's actual job duties in 2002 were not consistent with the role of an Auditor III. Rather, a significant majority of her duties were equivalent to that of an Auditor II. While she still retained the task of Fraud Audit Coordinator, the actual significance of that responsibility had been considerably diminished during 2001 and 2002.

Compensable Factors

Pursuant to the Compensation Reform Plan of 2000, the appropriate role to which a position must be allocated is determined by the three compensable factors of complexity, results and accountability.

The complexity of grievant's job is more accurately described by the Auditor II role than by the Auditor III role. Grievant did not 1) have the expertise necessary to apply knowledge of internal control standards to multiple computer system platform environments, 2) interact frequently with elected officials and senior officials, or 3) serve as a high level advisor to executive management – all of which are elements of the Auditor III role description. On the other hand, the IAMS Director agreed that grievant was performing nine criteria – all of which are part of the Auditor II role.³⁴

The agency correctly notes that the classification system does not assign any weight to the percentage of time spent on each responsibility of one's role. Thus, a task listed as primary might require relatively little time from the incumbent. While this is true, the amount of time spent on each responsibility is certainly one factor to be considered when determining the appropriate role for a position. It can become especially significant when the amount of time devoted

³¹ As previously noted, grievant did function as a team leader on certain audits but all Auditor IIs also functioned as team leaders on audits to which they were assigned.

³² Exhibit 11. *Addendum* to audit report (prepared by senior HR manager), April 23, 2003.

³³ Grievant does have a less prestigious designation in fraud audits from another organization that does not require an examination.

³⁴ Exhibit 1. *OEO Compliance Report*.

to performing the responsibility has substantially decreased. In this case, the substantial decrease in grievant's fraud responsibilities is important but, as discussed above, is just one of several considerations given weight.

Considerable attention during the hearing was devoted to a comparison of the Auditor II and Auditor III job descriptions, and to the work grievant actually performed. Obviously there is considerable overlap in the job descriptions of both roles, representing as they do, the descriptions for advanced level auditors and expert auditors. However, when grievant's actual duties were assessed, the overlap between her duties and the Auditor II description is significant. Even the Director acknowledged that grievant's job involved nine of the specific criteria in the Auditor II description. He further conceded that grievant did not perform at least three of the important criteria of the Auditor III role description.³⁵ The Director testified that a key factor distinguishing grievant from the Auditor IIs was that she was expected to interact with external senior officials and professionals. However, this responsibility is included in the Auditor II role description. In fact, the grievant interacted only infrequently, not frequently, with such external officials. The Director also stated that grievant interacted frequently with "senior executives" as that term is used in the Auditor III role description; however, the only "senior executive" he said she interacted with was himself.

HR Audit Report v. OEO Compliance Report

The agency argues that more evidentiary weight should be given to the Senior HR Manager's ex post facto report of January 24, 2003 than to the OEO Compliance report because she has more experience in human relations than the Director and Assistant Director of OEO. This argument is not persuasive for three reasons. First, the HR report was not initiated until after the grievant had been laid off and filed her grievance. The Human Resources Department, having already given its blessing to the layoff, could not reasonably be expected to conclude anything other than that it had acted correctly. Therefore, the HR report must be considered somewhat self-serving.

Second, the HR report was based only on input from the IAMS Director and Associate Director; it fails to include input from grievant or her coworkers. The report also fails to include any detailed analysis of the grievant's actual job duties in relationship to the duties being performed by Auditor IIs. Thus, the report is one-sided and reflects primarily input from the Director who decided that grievant should be laid off.³⁶

³⁵ For a detailed list of the criteria, see Exhibit 1, pp. 11-12, OEO Compliance Report.

³⁶ In fact, the agency's Executive Vice President considered the HR report to be so inadequate that he requested HR prepare an addendum report. See Exhibit 12, *Addendum*, April 23, 2003. However, the Addendum report has the same deficiencies as the original report, i.e., it incorporates only the views of the IAMS Director and Associate Director, does not include any input from grievant or her coworkers, addresses only the official job descriptions, and fails to analyze the actual work being performed by grievant.

Third, the report prepared by OEO is far more comprehensive, detailed, and balanced. It reflects a bona fide attempt to explore both sides of the issue, to obtain input from everyone who might have relevant information, and to analyze the data in an objective manner. Although the hearing officer does not necessarily concur with every aspect of the OEO report, the analysis is sound and the conclusions are far closer to the mark than those of the HR report. Moreover, the OEO had no dog in this fight; it had no reason to be partial to either grievant or the agency. Accordingly, the OEO report is much more likely to be an even-handed assessment than that of HR.

Application of Layoff Policy

After careful consideration of the above factors, it is concluded that the layoff policy was misapplied because the agency did not include in the potential layoff pool all those employees who performed substantially the same work. A preponderance of evidence reflects that grievant and the four Auditor IIs were performing primarily scheduled program and general compliance audits. Both grievant and the Auditor IIs were performing fraud audits as a significantly smaller portion of their work. Both grievant and the Auditor IIs sometimes acted as team leaders, but they did not have any supervisory or management authority or duties. Both filed reports to the Associate Director. The Director himself had concluded in the fall of 2001 that grievant's job duties most closely approximate those of an Auditor II. Accordingly, the Director knew, or reasonably should have known, that it was incumbent upon him to change the job description in the fall of 2001 at the beginning of the upcoming performance evaluation cycle.

Especially significant is the fact that grievant raised the issue of similar work duties 15 months prior to the layoff. Had she not raised this issue until after her layoff, she would have a more difficult time proving her case. However, the fact that she had been requesting a change in her job description for more than one year prior to layoff rebuts any contention that her allegation is pretextual. The agency argues that grievant should have grieved her classification much earlier. An employee typically files a grievance only when she recognizes that the grievable issue is adversely affecting her. In this case, grievant was not experiencing any significant adverse effect until the agency removed her from employment.

The Director avers that he refused to change grievant's job description because he was fearful that she would file a grievance against him. However, he has failed to explain why she would grieve such a reclassification when she was the one requesting the action. Such a contention defies logic. While one might conclude that the Director's animus toward the grievant obscured the logical course of action, such a conclusion is not necessary to a resolution of this grievance. The fact is that grievant requested a job reclassification; the Director knew from his own analysis that it was indicated, but he did not grant the request.

The agency suggests that it would be an abuse of the grievance process to retain grievant by reclassifying her to an Auditor II. The hearing officer does not agree with either the premise or the inference of this argument. First, a hearing officer may not direct the agency to reclassify an employee to any specific role.³⁷ The evidence in this case does suggest that grievant's actual job duties should be objectively reevaluated and a new determination made regarding her job classification.³⁸ Second, the grievance process is intended to remedy misapplication of policy; correcting such a misapplication of policy cannot be considered abuse. While reversing a course of action to which one has committed may be difficult and unpleasant, it is necessary in order to correct misapplication of the layoff policy.

DECISION

The agency is directed to reevaluate grievant's position classification based on the duties she was performing during the 2002 performance evaluation cycle and, to reapply the layoff policy according to the guidelines enunciated in the policy and to include in the potential pool for layoff all employees who were performing substantially the same work as grievant.³⁹

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

³⁷ § 5.9(b) EDR *Grievance Procedure Manual*, effective July 1, 2001.

³⁸ That same evidence also suggests that such an objective reevaluation would result in grievant being classified as an Auditor II.

³⁹ If the position reclassification and reapplication of the layoff policy result in grievant's reinstatement, she is entitled to full back pay, benefits, and seniority. Interim earnings, if any, must be deducted from the back pay award.

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.⁴⁰ 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.⁴¹

[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]

David J. Latham, Esq.
Hearing Officer

⁴⁰ 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*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

⁴¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.