Issues: Misapplication of layoff policy and discrimination; Hearing Date: 10/13/04; Decision Issued: 10/21/04; Agency: VCU; AHO: David J. Latham, Esq.; Case No. 867; **Appeal: HO Reconsideration Request received 11/01/04; Reconsideration Decision issued 11/02/04; Outcome: No newly discovered evidence or incorrect legal conclusion. Reconsideration denied; Addendum Decision issued 12/03/04**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 867

Hearing Date: October 13, 2004
Decision Issued: October 21, 2004

APPEARANCES

Grievant
Attorney for Grievant
Six witnesses for Grievant (Three of these also testified on the agency's behalf)
Advocate for Agency

ISSUES

Did the agency misapply the Layoff policy? Did the agency discriminate against grievant on the basis of age?

FINDINGS OF FACT

The grievant filed a timely grievance asserting that the agency misapplied the State Layoff policy and discriminated against her on the basis of her age.[1] Virginia Commonwealth University (VCU) (Hereinafter referred to as agency) has employed grievant for seven years as an Administrative & Program Specialist II in the School of Social Work (Hereinafter referred to as SSW).[2]

The Commonwealth's Layoff policy permits agencies to implement reductions in the workforce when it becomes necessary to reduce the number of employees. The policy encourages agencies to "provide as much notice as feasible to employees to be affected by layoff."[3] The policy further mandates that "between Initial Notice and Final Notice of Layoff, the agency shall attempt to identify internal placement options for its employees."[4] The policy also requires the agency to use procedures to help employees locate positions in other agencies. The agency must identify employees for layoff in a manner consistent with their business needs. Among the decisions that agencies must make prior to layoff is a determination of what "work unit" is to be affected, and to designate the work unit. After the agency designates a work unit, it must select employees for layoff from within the same work unit who are performing substantially the same work.

Grievant's primary function (55% of her time) is clerical support for the SSW doctoral program.[5] A secondary function (25%) is primary time keeper and leave keeper. She also maintains personnel action forms (PAF) (15%) and is responsible for building management (5%). Prior to January 2002, grievant handled all time and leave keeping functions for SSW. Beginning in January 2002, most other grant-funded units within SSW (VISSTA, CRAFFT, Headstart, and CCTP) designated their own timekeepers and began to perform the data-entry function for their own employees. Grievant continued to oversee (audit) the process, handle problem issues, and performed data entry for the various unit timekeepers (who are not allowed to enter their own time into the system).

SSW operates a cooperative program with the Virginia Department of Social Services known as the Virginia Institute for Social Services Training Activities (VISSTA). At this time, most (25) of the SSW staff positions are fully funded by a VISSTA grant that is earmarked for the specific functions performed by those persons. Four staff positions are funded from the SSW educational and general funds (E&G) ledger; two are funded by both VISSTA and the E&G ledgers because they perform functions for both programs.[6] Funds from one

---

[1] Agency Exhibit 1. Grievance Form A, filed July 9, 2004.
[2] Agency Exhibit 1. Employee Work Profile Work Description, October 1, 2002.
[3] Agency Exhibit 10. Department of Human Resource Management (DHRM) Policy 1.30, *Layoff*, revised August 10, 2002.
[4] *Ibid*.
[5] Grievant Exhibit 2. Employee Work Profile (EWP) *Work Description*, July 3, 2003.
[6] Agency Exhibit 9.

ledger cannot be commingled with another ledger and may only be used for their designated purposes.

Sometime in 2003, the president of the University established a policy to increase the size of University programs. Within SSW, it was determined that the most immediate need was to increase the size of the doctoral program. The Dean of SSW and his top administrators concluded that they faced significant competition in the mid-Atlantic region from other universities who were attracting more doctoral candidates because of financial incentives offered by those institutions. Thus, SSW's focus became how to make more money available to attract candidates, and that led to a conclusion that SSW would have to find money within its E&G budget to fund additional teaching assistantships. To make this money available, it was concluded that it might be necessary to abolish staff positions within the E&G budget.[7] The agency budgets VISSTA-funded employees separately and considers them a separate work unit because they perform functions for, and support only, VISSTA-funded projects.

In December 2003, the SSW personnel officer and the school's director of administration and finance conferred with the human resource department to ascertain what procedures should be followed to abolish a position or positions. Because the elimination of a VISSTA-funded position would not increase the amount of E&G funds, it was concluded that any abolishment of work would have to involve an E&G-funded position. Human resources recommended that the school select a position from a pay band that had only one incumbent if possible.[8] All but three of SSW's employees are in pay band 3 or higher. Grievant and two other employees are in pay band 2. Grievant is the only E&G employee in pay band 2; the two other employees are 100% VISSTA-funded. VISSTA-funded employees are hired to fill specific functions in the VISSTA program.

Grievant was initially employed in 1997 as a 100% E&G employee. The agency considers that an employee initially hired as an E&G employee will always remain an E&G employee even though his or her time may be partially reallocated from time-to-time for programmatic purposes. In January 2002, the funding for grievant's position was reapportioned to 50% E&G and 50% VISSTA. This was changed in July 2003 by increasing grievant's VISSTA allocation to 60% and decreasing the E&G allocation to 40%.[9] This change was made because the Director of Administration and Finance revised grievant's duties to add primary timekeeping and leavekeeping for all employees, student workers, and hourly workers in E&G, VISSTA, CWS, Headstart, and CRAFFT programs.

---

[7] The term "staff," as used in this decision, refers to non-faculty employees and includes non-faculty administrators, administrative support staff and others.

[8] Pursuant to the Commonwealth's Compensation Reform Program of 1999, all employees were reclassified into "pay bands" effective September 25, 2000. Pay bands consolidated and replaced what were formerly known as salary grades.

[9] Grievant Exhibit 2. Personnel Action Form, July 9, 2003.

In the early part of 2004, the SSW Director of Administration and Finance began discussions with other SSW management about abolishing grievant's position. On March 10, 2004, grievant's allocation was changed to 100% E&G because the Director of Administration and Finance said she was no longer doing the majority of time and leave data entry. During the spring of 2004 and up to the date of her layoff, grievant continued to perform primary timekeeping audit functions and data entry for some employees. Much of her timekeeping work involved VISSTA employees.

On June 9, 2004, grievant was notified verbally and in writing that her position was to be abolished and that she would be laid off effective June 24, 2004.[10] The agency did not issue an Initial Notice of Layoff form to grievant; the Human Resources Generalist acknowledged that the agency had not followed that procedure in the past and considered that the letter of June 9th was an initial notice. The next morning, grievant received the Final Notice of Layoff.[11] Although a Human Resources Generalist stated on the Layoff form that there was "no placement opportunity available," neither the Generalist nor anyone in the agency had made an effort to determine whether placement opportunities existed; the Generalist *assumed* that there were no positions available.[12]

During the meeting with grievant on June 10, 2004, the Human Resources Generalist instructed grievant to fill out a state application form so that human resources could assist her with job placement if openings occurred. Grievant was given the "yellow form" (inter-Agency Placement Screening form) and placed on paid, administrative leave for the two-week period from June 10-24, 2004.[13] On June 24, 2004, the Human Resource Generalist informed grievant of a position in the agency's parking office but the closing date for applications was that afternoon. Grievant responded that she was not interested in the position but that even if she were, it would be impossible to get an application prepared and submitted by the 5:00 p.m. deadline that day. At the time of her layoff, grievant was 56 years old.

Grievant's duties as building manager, and her time and leave-keeping functions were assigned to another E&G employee. On June 15, 2004, the Dean announced that a new employee had been hired to begin work on June 28, 2004 and would take over grievant's support of the doctoral faculty program and would work 20 hours per week. His message stated that the position filled by the newly hired employee was "NOT a student position, but a permanent part-time position."[14] The school subsequently hired a student worker to perform this function. This employee is currently a student at a community college but has been accepted as a student at VCU for the fall 2004 semester. However, she

[10] Agency Exhibit 1. Letter to grievant from Director of Administration and Finance, June 9, 2004.
[11] Agency Exhibit 1. Final Notice of Layoff, June 10, 2004.
[12] Testimony of the human resource generalist.
[13] During administrative leave, an employee is paid full salary and benefits. The agency gave grievant two weeks leave to afford her time to seek other job opportunities.
[14] Agency Exhibit 1. Email from Dean to staff, (undated but prior to June 28, 2004).

decided to continue her coursework at the community college for the fall semester and will begin coursework at VCU in January 2005. Although the student worker worked 20 hours per week during the summer, she has since been working only 15 hours per week.

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 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, such as claims of discrimination or a misapplication of policy, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[15]

The agency's decision to abolish one position in order to make funds available for teaching assistantships is not an issue for adjudication. The agency must make such business decisions based on the objectives and goals of the agency. Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government." The sole issues to be addressed herein are whether the agency properly applied the Layoff policy, and whether it discriminated against grievant on the basis of age.

[15] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

Misapplication of Policy

Grievant contends that the layoff process was flawed because the agency did not give her an Initial Notice of Layoff. Attachment B (Form L-1) of the Layoff Policy is the official form used for Layoffs. Grievant notes that, in the upper right corner of the form, there are two blocks that can be checked to designate whether the form is a First Notice or a Final Notice. She further observes that although she received a Final Notice of Layoff using Form L-1, she did not receive a Form L-1 with the First Notice block checked. The Layoff policy does not require that two separate L-1 Forms be used. The policy provides only that "The *final* notice must be given to employees on the L-1 Form (Attachment B) immediately prior to the effective date of the layoff."[16] (Italics added). Moreover, the policy further provides that, "This notice can be given *either* as part of the initial notice if the agency has already determined that there are no placement options within the agency, *or* as a final notice after the agency has reviewed all placement options and determined there are none available."[17] (Italics added).

Thus, the policy is sufficiently flexible to permit an agency to give the employee an initial notice of layoff without utilizing Form L-1. The most salient requirement of the policy is that the employee must receive written notice of her layoff "at least two weeks before the date of layoff." In the instant case, grievant received an initial notice of layoff (letter of June 9, 2004) two weeks prior to the date of layoff. Accordingly, it is concluded that the agency complied with the relevant substantive policy requirement. Further, it is concluded that the agency's decision to utilize a letter rather than Form L-1 for the initial notice of layoff is permissible. Therefore, the form of initial notice given to grievant was a permissible application of policy.

Grievant argues that her failure to complete an application form until more than six weeks after her layoff does not excuse the agency from looking for alternative positions for grievant. The policy does not require the agency to engage in a proactive search for employment outside the agency. The policy provides that the agency must facilitate an *employee's* search for alternative outside employment by providing the employee with a "Yellow Form" and by ensuring that the employee has access to the state vacancy listing.

Grievant pointed out that the student worker hired to support the doctoral program was not a student at VCU when hired but was, in fact, a student of a community college in the area. Grievant infers that student workers must be students of VCU if hired in a student capacity. However, grievant has not proffered any written policy or procedure to support her inference. The agency maintains that the student worker was accepted in August for admittance as a fall student at VCU but that she elected to switch schools beginning with the spring 2005 semester. As a student worker, the new employee is 100% E&G funded;

[16] Agency Exhibit 10, p.2. Definitions, DHRM Policy 1.30, *Layoff*, revised August 10, 2002.
[17] Agency Exhibit 10, p.14. *Ibid.*

when she becomes a VCU work-study student, her funding will be 75% federal grant money and only 25% E&G. Accordingly, for the short-term, the agency will not realize as great a savings as it would have if she were a VCU work-study student.

Notwithstanding the fact that the agency complied with the aspects of policy discussed above, it must be concluded for the following reasons that the agency misapplied the Layoff policy in a manner sufficient to grant grievant's request for relief. The SSW Director of Administration and Finance agency began exploring the abolition of a position in December 2003. On March 10, 2004, SSW changed grievant's funding allocation to 100% E&G. The Director of Administration and Finance testified that this change was made because grievant had not been performing timekeeping or leavekeeping functions for VISSTA employees since January 2002. However, the agency's own evidence contradicts this testimony. Grievant's time allocation for VISSTA was *increased* from 50% to 60% only nine months earlier in July 2003. Moreover, her EWP Work Description was changed in July 2003 to state that her timekeeping, leavekeeping, and PAF maintenance duties would include VISSTA employees. Obviously, in July 2003 grievant's duties involving VISSTA functions were increased – not removed. Grievant testified, and a witness corroborated, that grievant was involved in VISSTA timekeeping activities until she was laid off.

There was no change in grievant's EWP Work Description or her PAF between July 2003 and March 2004. Similarly, there was no testimony or other evidence to indicate that grievant's responsibilities changed during these nine months. Accordingly, the agency has not demonstrated any logical basis for reallocating grievant's time in March 2004. It is possible that the agency could have concluded that the percentage of grievant's time allocated to VISSTA was too great and that it should have been reduced to some lesser percentage. However, the preponderance of evidence establishes that grievant was, in fact, performing VISSTA-related functions on a continuing basis from at least January 2002 until her layoff in June 2004. Therefore, it was not appropriate to eliminate grievant's VISSTA time allocation entirely.

The only other apparent reason for eliminating grievant's VISSTA allocation was to effectively make grievant a "work unit" of one. When the agency decided in December 2003 to abolish a position, SSW's three pay band 2 employees were allocated, either partially or totally, to VISSTA. Thus, they would have to be considered in the same "work unit" for purposes of implementing the layoff policy. By eliminating grievant's VISSTA allocation, the agency was then able to claim that grievant was in a "work unit" of one because she was the only pay band 2 employee performing 100% E&G work. Since the evidence shows that grievant continued to perform VISSTA functions after March 10, 2004, and since no other reason for the reallocation has been offered, it must be concluded the decision to eliminate grievant's VISSTA allocation was a pretext for the purpose of carving her out into a "work unit" of one.

The Layoff Policy specifies that an agency must *first* identify the business functions to be eliminated and the work unit to be affected, and after this process, select employees within the identified work unit for layoff. In this case, the agency reversed the procedure by first identifying the employee and then restructuring the work units to facilitate the decision to layoff grievant. This is a clear misapplication of the Layoff policy.

A second misapplication of policy involves the agency's failure to identify internal placement options for grievant. Grievant correctly notes that less than 24 hours elapsed between the initial notice of layoff and issuance of the Final Notice of Layoff. It is true that the Layoff policy does not require any specified length of time between the initial and final notices of layoff. However, the policy specifies that the initial notice must be given two weeks prior to the effective date of layoff and, that the final notice must be given "*immediately* prior to the effective date of the layoff."[18] The policy also provides that "During the time between Initial Notice and Final Notice of Layoff, the agency shall attempt to identify internal placement options for its employees."[19] The policy's intent is that between the two notices, there should be a period of time sufficient to ascertain whether placement options exist and, that the agency should make a bona fide attempt to identify such options. In the instant case, human resources not only made no attempt between the two notices to determine whether placement options existed but simply "assumed" there were no options available.[20] This is a failure to comply with both the intent and the letter of the Layoff policy and, therefore, constitutes a misapplication of policy.

Discrimination

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 her 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.[21] Grievant has satisfied the first three prongs of this test because she is 56 years old, was laid off, and had been performing at the level of "achiever" prior to layoff.[22]

However, for two reasons, the evidence is insufficient to conclude that grievant's layoff was based on her age. First, the agency has presented a

[18] Agency Exhibit 10, p.2. *Ibid.*
[19] Agency Exhibit 10, p.18. *Ibid.*
[20] As noted in the Findings of Fact, after issuing the Final Notice of Layoff the agency notified grievant on the date of layoff that she could apply for a position in the parking office. However, the closing deadline for the position was 5:00 p.m. on the same day; grievant received the call so late that it was not possible for her to prepare and submit an application by the deadline.
[21] *Cramer v. Intelidata Technologies Corp*., 1998 U.S. App Lexis 32676, p6 (4th Cir.1998) (unpub).
[22] The agency has developed its own performance evaluation rating scheme, which varies from the scheme used for other state employees. The term "Achiever" is equivalent to the standard state rating of "Contributor", which is, in essence, a rating of Satisfactory.

legitimate, non-discriminatory reason for the layoff. The agency made a policy decision to reduce staffing in order to utilize the funds for teaching assistantships. The abolishment of one staff position was a legitimate, reasonable method to accomplish the agency's objective of funds reallocation. Second, grievant has offered no other basis for asserting that age was a factor in the agency's decision; there is no evidence that anyone involved in the decision ever mentioned or gave consideration to grievant's age in discussions about the layoff. Therefore, other than speculation, there is no basis to conclude that age was a basis for the layoff.

DECISION

Grievant has borne the burden of proof to show that the agency misapplied the Layoff Policy by failing to determine whether internal placement options were available and, by placing grievant in a work unit of one for the purpose of facilitating her layoff. Creating a work unit of one person in this instance was pretextual and therefore a misapplication of the Layoff policy.

Grievant has not borne the burden of proof to demonstrate that the agency discriminated against her on the basis of age.

Grievant's request for relief is hereby UPHELD. Grievant is reinstated to her former position. She is awarded full back pay from which interim earnings must be deducted. She is entitled to the restoration of full benefits and seniority. She is further entitled to recover a reasonable attorney's fee, which cost shall be borne by the agency.[23] Grievant's attorney is herewith informed of his obligation to timely submit a fee petition to the Hearing Officer.[24]

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

[23] Va. Code § 2.2-3005.1.A & B.

[24] Section VI.D, *Rules for Conducting Grievance Hearings*, effective August 30, 2004. Counsel for the grievant shall ensure that the hearing officer *receives*, within 15 calendar days of the issuance of the hearing decision, counsel's petition for reasonable attorneys' fees.

explain why you believe the decision is inconsistent with that policy. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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.[25] 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.[26]

[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

[25] 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).

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 867

Hearing Date:	October 13, 2004
Decision Issued:	October 21, 2004
Reconsideration Request Received:	November 1, 2004
Response to Reconsideration:	November 2, 2004

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. This 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.[27]

OPINION

The agency requested a reopening of the hearing for three reasons discussed below:

First, the agency correctly observes that grievant's case did not conclude until the late afternoon. However, it must be noted that the agency's cross-examination of witnesses was included in the time being attributed to grievant's case. More significantly, two of the witnesses called by grievant were also the agency's two key witnesses. By the time their lengthy testimony had concluded, the agency's testimony

[27] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

from these two witnesses was already on the record. The agency had only one remaining witness on its witness list. When time became an issue, the Dean (agency party) interceded with the Human Relations Director. He obtained permission to stay in the building as long as needed and obtained the building key so that he could secure the building at the close of the hearing.[28] After this, time was no longer an issue and the agency could have used as much time as needed to present its case. At the end of the hearing, the agency neither made a motion to continue the hearing to another day nor did it contend that it had any additional testimony or evidence to present.

Parties are expected to prepare their case *in full* prior to the hearing, including preparation of possible rebuttal witnesses or documents. Hearings are not continued or postponed for the purpose of discussing possible rebuttal testimony with agency personnel elsewhere on campus or to gather documents from other locations.

Second, the agency disagrees with the testimony of one of grievant's witnesses. However, the witness in question testified that she discussed VISSTA issues with grievant in May and June 2004. It was grievant's testimony that she continued to perform VISSTA-related work throughout the spring of 2004. The agency could have anticipated that grievant would so testify, and therefore, could have anticipated the need to rebut this evidence. Grievant did not dispute that other employees performed some data entry for VISSTA-related employees but she maintains that she also performed some time- and leave-keeping functions for VISSTA employees, particularly oversight and problem-solving responsibilities. As noted in the Decision, the issue is not whether grievant was performing 60% VISSTA, or some lesser percentage; the issue is the fact that she was expending some quantifiable portion of her time (more than de minimus) on VISSTA functions.

Third, the agency reiterates the lack of time complaint. The fact is that the agency's two key witnesses testified for hours. During their lengthy examination and cross-examination, their testimony about every aspect of the agency's case was fully explored.

In the final analysis, the evidence in this case makes it apparent that the agency had decided to remove grievant from the agency well before it surreptitiously changed her funding allocation on March 10, 2004. The changing of the allocation was not communicated to her and no one directed her to cease performing VISSTA-related functions on or about March 10, 2004. The only conclusion that can be drawn is that the change was made solely to facilitate her layoff. Such gaming of the system is a misapplication of the Layoff policy.

DECISION

The agency has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered the

[28] The Human Relations Director said that one of her staff would remain in the building until 6:00 p.m., but she also allowed the hearing participants to stay after that time providing the Dean agreed to lock the building when we left.

agency's argument and concludes that there is no basis either to reopen the hearing or to change the Decision issued on October 21, 2004.

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.[29]

David J. Latham, Esq.
Hearing Officer

[29] 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).

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 867

Hearing Date:	October 13, 2004
Decision Issued:	October 21, 2004
Reconsideration Request Received:	November 1, 2004
Response to Reconsideration:	November 2, 2004
Addendum Issued:	December 3, 2004

APPLICABLE LAW AND PROCEDURE

The grievance statute provides that for those issues qualified for a hearing, the hearing officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the hearing officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.[30] For an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.[31]

DISCUSSION

Following issuance of the hearing officer's decision ordering reinstatement of the grievant, grievant submitted a petition for attorney's fees and costs. The agency disagreed with that portion of the decision that awarded attorneys' fees and requested a

[30] Va. Code § 2.2-3005.1.A.

[31] § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004.

compliance ruling from the EDR Director. The EDR Director issued a ruling upholding the award of attorneys' fees.[32]

Grievant's petition includes attorneys' fees for services rendered by her attorney prior to the August 27, 2004 qualification of her grievance for hearing. Not all grievances proceed to a hearing; only grievances that challenge certain actions qualify for a hearing.[33] The hearing officer may award relief only for those issues that qualify for hearing. Further, the statute provides that an agency is required to bear only the expense for the hearing officer and other associated *hearing* expenses including grievant's attorneys' fees.[34] Attorney's fees incurred during the grievance procedure's Management Resolution Step stage are not expenses arising from the hearing. Accordingly, a hearing officer may award only those attorneys' fees incurred subsequent to qualification of the grievance for hearing and as a direct result of the hearing process. Therefore, grievant's attorney fees for services performed prior to August 27, 2004 are not included in the award.

The petition also includes costs. The statute provides for the award of attorneys' fees, not costs. If the legislature had intended to include costs, it would have included that term in the statute. Accordingly, the hearing officer has no authority to award costs.

AWARD

The grievant is awarded attorneys' fees incurred from August 27, 2004 through November 4, 2004 as listed on the attorney's invoice submitted with the petition. The petition for costs, and for fees for services prior to August 27, 2004, is denied.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

David J. Latham, Esq.
Hearing Officer

[32] Ruling # 2004-901, *Compliance Ruling of Director*, November 16, 2004. [NOTE: The agency has indicated it will appeal the Ruling to Circuit Court].
[33] Va. Code § 2.2-3004.A. *See also* §4, Qualification for a Hearing, *Grievance Procedure Manual*, August 30, 2004.
[34] Va. Code § 2.2-3005.1.B.