Issue: Racial discrimination and retaliation; Hearing Date: 01/06/04; Decision Issued: 01/13/04; Agency: UVA; AHO: David J. Latham, Esq.; Case No. 477,478

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 477 & 478

Hearing Date: January 6, 2004
Decision Issued: January 13, 2004

PROCEDURAL ISSUES

After not being selected as a "lead" employee on April 17, 2003, grievant notified the department's Director on April 21, 2003 that she intended to file a grievance. Later that day, grievant was given a written counseling memorandum regarding her conduct during a telephone call on April 18, 2003. On May 8, 2003, grievant filed two grievances – one grieving her non-selection as lead employee (#477), and a second grieving the counseling memorandum (#478).[1] The agency head declined to qualify either grievance for a hearing.

Grievant appealed the agency's decision to the Director of the Department of Employment Dispute Resolution (EDR). The EDR Director ruled that the second grievance (#478) does not qualify for a grievance hearing because a counseling memorandum is not a disciplinary action.[2] Grievant appealed the Director's ruling to the Circuit Court. The Court concluded that grievant's claim does qualify for a hearing to determine the sufficiency of the claim.[3]

[1] Agency Exhibits 1 & 2. Grievance Forms A, filed May 8, 2003.
[2] *Qualification Ruling of Director* No. 2003-144, September 4, 2003.
[3] Sixteenth Judicial Circuit *Letter Opinion*, October 17, 2003.

Subsequently the EDR Director issued another ruling qualifying the first grievance (#477) for hearing and consolidating both grievances for a single hearing.[4]

Grievant requested as part of the relief she seeks, that she be placed in a "lead" position or other position that she "is willing to accept." Hearing officers may provide certain types of relief including an order that the agency comply with applicable law and policy.[5] However, hearing officers do not have authority to transfer or place an employee in a particular position.[6] Such a decision is an internal management decision 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."

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Director of Recruiting and Staffing
Attorney for Agency
One witness for Hearing Officer

ISSUES

Did the agency discriminate against grievant? Did the agency retaliate against grievant?

FINDINGS OF FACT

The University of Virginia (Hereinafter referred to as "agency") has employed grievant for 15 years. She is currently a recruiter. Grievant is Caucasian but alleges discrimination based on her *advocacy* for minorities, not on her own race. Grievant's immediate supervisor – the Director of University Recruiting and Staffing – is African-American. Grievant has no prior disciplinary actions. Her most recent performance evaluation rated her a contributor.[7] Grievant is the highest paid recruiter in the department.

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[4] *Qualification Ruling of Director* No. 2003-145, November 26, 2003.
[5] § 5.9(a)5. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.
[6] § 5.9(b)2 & 6. *Ibid.*
[7] Under the previous evaluation scheme, she had been rated as meeting or exceeding expectations.

Grievant's supervisor has 15 subordinates. Over a period of time, the supervisor began to conclude that her span of control might be too broad. In addition, the Director's supervisor – the Human Resources Director – had advised the Recruiting Director that she should spend more time on strategic planning and community outreach matters. To accomplish this, the Recruiting Director recognized that she would have to delegate some daily operational tasks. The Recruiting Director had been formally involved in the statewide Compensation Reform project during 1999-2000. During her work on that project she was exposed to job descriptions from many other state agencies. She recalled that some agencies had been utilizing "lead" employees in situations similar to hers.[8]

The Recruiting Director decided that two employees should be selected to function in a "lead" capacity. She discussed this idea with the Human Resource Director and Deputy Director; both agreed with the plan. The lead employees would still have as their primary functions recruitment/outreach and facilitation.[9] In addition, they help the supervisor by managing daily workflow, acting as subject matter experts, collecting data for management reports, monitoring service quality and, performing other coordination functions. During the first week of April 2003, the Recruiting Director announced to all recruiters that two "lead" recruiters would be selected; she invited those who were interested in the positions to email her. Four people including grievant expressed interest. On or about April 10, 2003, the Recruiting Director told the four that they should prepare a presentation outlining their "vision" for the recruiting unit. The presentations were to be made individually on April 17, 2003 to the Director and were to be 10-15 minutes in length, with another 10-15 minutes for interview and questions.

Over the next few days, the Director decided to make the selection process more participatory. At 4:00 p.m. on April 16, 2003, the Director told all recruiters that the presentations would be made to the entire group the following morning. On April 17, 2003, each of the four candidates made their presentations to a group of 11 people (the Director, seven recruiters and three other professional staff). Immediately following the presentations, the 11 people each used an anonymous written ballot to vote for their choice as lead employees. The Director then excused from the meeting all but the four candidates. She tallied the ballots and told the four candidates who the two successful candidates were. Grievant and one other person had applied for the Temps Lead Recruiter position.[10] The other person won the election by a 9-2

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[8] In those state agencies that utilize "lead" employees, the positions are typically created when a supervisor has a large number of subordinates but cannot justify (for organizational or budgetary reasons) an intermediate supervisory level. A lead employee is usually more experienced or knowledgeable, and is one whom other employees can utilize as a resource for questions they would otherwise have to ask the supervisor. Lead employees do not receive promotions when assigned to a lead function. In some agencies, the lead employee may be called a team leader.

[9] Agency Exhibits 6 & 7. Position descriptions for the two lead recruiter positions.

[10] Agency Exhibit 6.

vote and became lead recruiter for the Temps team. The two people selected as lead employees have not been promoted and, as of this date, have not received any form of salary increase such as in-band adjustments, in-band bonuses, or temporary pay. The lead employees do not have authority to hire or fire employees, write performance evaluations, approve leave time, or any of the typical indicia of a supervisor. Grievant agrees that the election was done in an open manner and that it was not fraudulent.

During the afternoon of Friday, April 18, 2003, the Recruiting Director overheard a telephone conversation between grievant and a job applicant. The applicant complained that she believed her non-selection for a job was attributable to age discrimination. Grievant was unable to mollify the caller and offered to transfer her to the Recruiting Director and other management persons. The caller said she had already spoken to those people but had not obtained satisfaction. Grievant then offered to transfer the caller to the staff search group lead employee and stated words to the effect of, "I just got a new supervisor yesterday and she doesn't have any management experience here; maybe the outcome would be different if you spoke to her."[11]

On Monday, April 21, 2003, the Recruiting Director prepared and gave to grievant a written memorandum of counseling regarding this incident. She knew at the time she counseled grievant that grievant intended to file a grievance regarding her non-selection as lead employee. The Director counseled grievant that it was inappropriate to refer the applicant to a lead employee when higher management had already determined that there was no relief available to the applicant. She further advised grievant that she should have referred the caller to the Equal Opportunity Programs (EOP) office. The supervisor decided that the two newly selected lead employees were to begin performing their responsibilities on May 1, 2003.[12] Grievant contends that they began performing their duties immediately after the election on April 17, 2003. On May 8, 2003, grievant filed the two grievances described in the Procedural Issues section, supra. The supervisor acknowledges having been brusque with grievant on occasion. She denies cutting grievant off during staff meetings except when grievant attempts to discuss inappropriate topics.

By her own account, grievant has been an ardent advocate on behalf of African-Americans for several years. She is an area chairperson for the National Association for the Advancement of Colored People (NAACP).[13] After a 1996 report concluded that the agency was not proactive enough in addressing the concerns of African-Americans[14], grievant was assigned to recruit minorities for job openings at the University. Although this formal effort to recruit minorities

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[11] Grievant recalls her statement to have been, "I just got a new supervisor, which may be a good thing for you. Perhaps you should talk to her since you haven't talked to her before."
[12] Agency Exhibit 2. Organizational Chart outlining the lead employee plan.
[13] Grievant Exhibit 2. Banquet Program, NAACP Banquet 2003.
[14] Grievant Exhibit 15. *An Examination of the University's Minority Classified Staff*, June 1996.

was later eliminated, grievant has continued to make extra efforts to recruit minorities whenever possible.

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, including claims of discrimination and retaliation, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[15]

Grievant argues that the alleged discrimination and retaliation violates her rights under the First Amendment of the United States Constitution. Grievant advocates on behalf of African-American causes and minority hiring and recruitment. As it pertains to this case, the First Amendment prohibits the free exercise of speech. Grievant has not shown that the agency has limited grievant's right to verbalize her advocacy goals. While the agency may not fully agree with all of grievant's methods for promoting minority employment, or may not concur with the emphasis that grievant wants to place on certain aspects of the recruiting process, that is the agency's right. Grievant *assumes* that the alleged discrimination and retaliation must be a direct result of her championship of minority causes. However, there is more to proving such a connection than merely making the allegation.

[15] § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

Racial discrimination

An employee may demonstrate racial discrimination by showing direct evidence of intentional discrimination (specific remarks or practices), circumstantial evidence (statistical evidence), or disparate impact resulting from the agency's actions. Grievant does not allege racial discrimination based upon her own race (Caucasian); rather, she alleges discrimination based upon her *advocacy* for those of the African-American race. She argues that the language of the proscription against discrimination is sufficiently broad to include protection for those who advocate on behalf of members of a protected classification. However, in this case, grievant has not presented any testimony or evidence of remarks or practices that would constitute racial discrimination either in the lead employee selection process or in issuance of the counseling memorandum. She has not offered any statistical evidence regarding either her non-selection as team leader or issuance of the counseling memorandum. Finally she has not demonstrated any disparate impact resulting from the agency's actions. Accordingly, even if grievant is correct in arguing that her advocacy is protected under Title VII, she has failed to present evidence that the agency's actions were based on or motivated by a decision to discriminate against her.

Retaliation

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.[16] 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. Grievant meets the first prong of this test because she engaged in the protected activity of filing a grievance.[17]

The second prong of the test is more problematic in this case. Grievant alleges that the issuance of a counseling memorandum was retaliatory because it constitutes an adverse employment action. The EDR Director opined that the counseling does not constitute an adverse employment action because it is not a disciplinary action. The Hearing Officer concurs that counseling does not constitute a "disciplinary action."[18] However, in reversing the EDR decision, the

[16] EDR *Grievance Procedure Manual*, p.24

[17] The grievant did not actually file her grievance until after issuance of the counseling memorandum. However, she had notified her supervisor of her intent to file a grievance before issuance of the counseling memorandum. Therefore, such notice to the supervisor of an impending grievance falls within the ambit of the protected activity requirement.

[18] One must look to the Commonwealth's *Standards of Conduct* policy for guidance in resolving this question. Section II, Department of Human Resource Management (DHRM) *Standards of Conduct* Policy No. 1.60, effective September 16, 1993, defines two separate types of corrective

Circuit Court analyzed Va. Code § 2.2-3004.A and concluded that any *act of retaliation as the result of the use or participation in the grievance procedure* constitutes an adverse employment action. The Court then qualified the grievance for hearing in order to determine the sufficiency of grievant's claim that the memorandum was an act of retaliation.

Thus, the issue is whether the counseling memorandum, and/or her non-selection as lead employee constitute **adverse** employment actions. In addressing this issue, most courts have focused on whether the discrimination affected "what could be characterized as ultimate employment decisions, such as hiring, granting leave, discharging, promoting, and compensating."[19] More recently, the Fourth Circuit has held that to find an adverse employment action, the plaintiff must show that the action "had some significant detrimental effect" on her.[20] The Court noted that an adverse employment action could include a reduction in opportunity for future reassignments or promotions. Finally, if an adverse employment action is found, grievant must show a nexus between agency actions and her non-selection as lead employee and/or the issuance of the counseling memorandum.

"Lead" employee

Grievant argues that the agency's practice has been to place employees in "lead" or "team leader" positions for a period of time and then to later promote those persons. Thus, while an employee who is placed in a lead position does not *immediately* receive either a promotion or salary increase, they might receive a promotion or salary increase months later. Employees who demonstrate an ability to take on and successfully handle additional responsibilities beyond those required in their regular job description are indeed more likely to be recognized and rewarded. This is a common occurrence whether an employee is designated a "lead" employee, a "team leader," or simply volunteers to take on additional responsibility without any particular title. However, the fact that an employee volunteers to be a lead employee is not a guarantee of success. Sometimes, such a volunteer may find the added work to be too demanding and might ask to be removed from the lead position. In other cases, the supervisor might decide to give other employees an opportunity to function in the team leader capacity to determine which employee is most effective in the role.[21]

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action – counseling and disciplinary action. Disciplinary actions involve issuance of an "official Written Notice" and may include termination of employment. Counseling, on the hand, is merely an informal discussion (that may or may not be documented) between employee and supervisor.

[19] *Page v. Bolger*, 645 F. 2d 233 (4th Cir.), cert. denied 454 U.S. 892, 70 L. Ed. 2d 206, 102 S. Ct. 388 (1981).

[20] *Boone v. Golding*, 178 F.3d 253 (4th Cir. 1999).

[21] It is not uncommon that a supervisor will rotate more senior employees through a team leader position for several months each, either to identify the most effective team leader, or simply to give each of them the experience.

Compensation management is addressed in the Department of Human Resource Management (DHRM) Manual. If it is determined that a new position is warranted for the functions being performed by a lead employee or team leader, the agency must follow policy and utilize a competitive selection process. This process is known as a Promotion and involves moving to a *different Role* in a *higher pay band*. However, when management initiates action to move an employee from one position to a different position within the same or different Role in the same Pay Band, the process is known as Reassignment within the Pay Band.[22] In such a reassignment the employee's base salary does not change.[23] Based upon the evidence in this case, the "lead" position grievant seeks did not involve a Promotion because the position is in the same pay band as a recruiter. The lead position did not result in salary changes for the employees who became leads, was management-initiated, and therefore constituted a Reassignment with the Pay Band.

If management later decides to open the position up to a competitive promotional process, grievant will have the opportunity to apply and compete for the position. It is acknowledged that the incumbent lead employee *might* have an advantage in such a competitive process. However, it might also be that the current lead employee does not handle the added responsibilities well and therefore might not have an advantage. Moreover, grievant has ample opportunity to improve her own competitive advantage by performing her own job in a superior manner. Grievant is currently rated a "Contributor" on her annual performance evaluation. She has the opportunity to increase her performance level to "Extraordinary Contributor" and thereby enhance her chance for promotion.

If the Recruiting Director had followed her initial plan, she would have been the sole decision maker because she would have selected the lead employees after hearing the four individual presentations. Had that occurred, grievant might have had some basis for claiming that the Director discriminated against her. However, the fact is that the Director did not make the decision but instead left the decision up to grievant's peers. It was grievant's fellow recruiters and other coworkers who cast secret ballots after hearing the candidates' presentations. Thus, the Director removed herself from the process and agreed to abide by whatever decision the entire group made. Given this unique circumstance, it is clear that the agency did not discriminate or retaliate against grievant in the lead employee process.

Grievant alleges that if her colleagues had voted for her, "There would have been hell to pay." However, grievant has not shown how management could have determined who voted for whom since the ballots were secret.

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[22] Chapter 8, pp. 15-16. DHRM *Human Resource Management Manual*, revised March 1, 2001.

[23] There are two exceptions (dependent upon whether the old and/or new position is in northern Virginia, or whether a competitive differential is assigned to the position). Neither of the exceptions applies in the instant case.

Moreover, grievant's allegation is nothing but speculation and is unsupported by any evidence in the record. Grievant also alleged that her supervisor had interrupted her during her presentation to the group. However, the supervisor stated that she only asked grievant a question during the question/answer portion of the presentation; grievant did not rebut the supervisor's version. Grievant contends that the organization chart (Agency Exhibit 2) is evidence that the lead employees were promoted. This argument is not persuasive. While the chart might suggest the possibility of promotion, this is not supported by the evidence. The two lead employees remain in the same pay band and have not received any form of salary increase.

It is acknowledged that use of an election process to select lead employees is atypical. Generally a supervisor simply selects employees for lead positions from among those who are most experienced or knowledgeable. There is no DHRM policy that regulates the selection of lead employees. Neither party presented any evidence of an applicable agency policy for lead employee selection. In the absence of any written policy, it must be concluded that each supervisor may use her best judgment in selecting lead employees. Here, grievant's supervisor opted to allow grievant's peers to make the selection. As the supervisor stated during the hearing, if grievant had won the election, she would now be the lead employee. From an employee standpoint, one can't imagine a fairer process or a process in which management had virtually no input. Accordingly, grievant has not demonstrated that the agency misapplied any policy, or that the process used by the supervisor was inherently discriminatory or retaliatory.

Counseling memorandum

Given the Circuit Court's analysis, the fact that a counseling memorandum is not a disciplinary action is irrelevant in determining whether retaliation occurred in the instant case. If the evidence supports a conclusion that the Director counseled grievant because of her knowledge that grievant was about to file a grievance, that would be retaliatory and thereby constitute an adverse employment action. Grievant's primary basis for alleging retaliation is that the counseling followed close on the heels of grievant advising the Director that she was going to file a grievance. The juxtaposition of these two events is certainly reasonable cause to question whether retaliation was involved.

The incident that precipitated counseling occurred during the afternoon of Friday, April 18, 2003. The Recruiting Director decided immediately after the incident that written counseling was necessary. She began to prepare the written counseling memorandum during the morning of the next workday – Monday, April 21, 2003. Grievant notified the Director of her intent to grieve her non-selection as lead employee at 8:40 a.m. the same morning.[24] Grievant suggests that the Recruiting Director retaliated by giving her the counseling memorandum

[24] Agency Exhibit 2. Email from grievant to Recruiting Director, April 21, 2003.

later that day. The Recruiting Director's testimony was consistent, direct and credible. There is no reason to disbelieve her statement that she had made the decision to counsel grievant on April 18, 2003, even though she did not begin typing the memorandum until Monday. Grievant has offered no evidence to substantiate her allegation that the Director made her decision after receiving grievant's email.

However, assuming *arguendo* that grievant's allegation about the timing is correct, the agency has established a nonretaliatory business reason for counseling grievant. It is undisputed that the telephone conversation occurred on Friday afternoon. It is also undisputed that grievant attempted to refer the caller to one of the new lead employees and said that the lead employment was new, or without management experience. While grievant and the Director have different recollections of the exact language grievant used, the supervisor believed grievant could have handled the call better. The Director counseled grievant that her attempt to refer the caller to the lead employee was inappropriate, and that she should instead have referred the caller to the EOP office. The Director also felt that grievant had attempted to undermine the lead employee with her comment about lack of management experience. It is possible that grievant did not intend to undermine the lead employee, nonetheless the Director did perceive it that way. However, even if the Director's perception was mistaken, her other suggestions appear to have been reasonable under the circumstances. Grievant has not shown that the legitimate business reasons for counseling were pretextual.

Grievant alleged that agency management has retaliated against colleagues who associate too closely with her. However, grievant did not offer either documentation or the testimony of any witnesses to support her allegation.[25] She contends that the agency's effort to recruit minorities is less active now than it was following issuance of the 1996 report. Grievant, however, has been active and vocal in attempting to proactively seek minority job applicants. She feels that agency upper management is not as receptive to her efforts as it should be. She also believes that her supervisor has been, in effect, discouraging grievant from recruiting minorities by assigning grievant to perform other responsibilities.

Grievant maintains that the Recruiting Director harbors animus against her. The evidence supports a conclusion that grievant is probably not the Recruiting Director's favorite employee. Grievant is vocal, persistent and

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[25] Grievant submitted two written statements from former employees (both of whom left the University in spring 2002). One alleges that the Human Resources Director labeled her a troublemaker because she purportedly supported grievant's allegations of unfair treatment (Grievant Exhibit 16). The other employee worked for the agency for seven months and was dismissed during her probationary period; she feels that her dismissal may have been partially related to her friendship with grievant (Grievant Exhibit 17). These statements have been given relatively little evidentiary weight because the former employees were not made available for cross examination. There is no evidence to show that they could not have testified by telephone.

steadfast in her advocacy. However, since grievant's supervisor is herself African-American, and supports the advancement of minority employment, it is difficult to believe that the animus, if any, is based on grievant's advocacy for *minorities*. More likely than not, it is grievant's persistence, personality, manner of advocacy, or some combination of these factors that may be irritating to the supervisor (and others who have distanced themselves from grievant). Thus, the animus has its roots not so much in *what* is being advocated, but rather in *how* it is being advocated.

Grievant alleged that the Director had placed the counseling memorandum in grievant's personnel file. However, the evidence reflects that the memorandum is in the supervisor's personal file – not grievant's official personnel file. Supervisors routinely retain notes or counseling memoranda in their own personal files to be used as refreshers when writing annual performance evaluations. Depending upon the significance of the memorandum, it may or may not be referenced in an evaluation. Grievant did not offer into evidence a copy of her 2003 performance evaluation (normally completed in October of each year). In the absence of this evidence, it is presumed that the evaluation did not make any mention of the April 2003 counseling. Accordingly, it is concluded that the counseling memorandum was not retaliatory and does not constitute an adverse employment action.

Finally, grievant alleges that her prior use of the grievance process in 1999 was a basis for the alleged retaliation. However, grievant has failed to show any nexus between her prior grievance and the alleged retaliation.

DECISION

Grievant has not borne the burden of proof to demonstrate that the agency discriminated or retaliated against her either in the lead employee selection process, or in counseling her performance. 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. 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.[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]

S/David J. Latham

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

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