

Issues: Retaliation, discrimination, misapplication of hiring policy; Hearing Date: 03/04/05; Decision Issued: 03/07/05; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 7967



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7967

Hearing Date: March 4, 2005
Decision Issued: March 7, 2005

PROCEDURAL ISSUES

Due to inclement weather in central and western Virginia, the hearing was postponed from its originally scheduled date and rescheduled to the 50th day following appointment of the hearing officer.¹

Grievant requested as relief that he be promoted to Captain, given a salary increase of 15 percent, and allowed to choose his own work schedule. The security department at grievant's facility does not have the position of Captain, therefore grievant's request for promotion is not possible. In any case, a hearing officer does not have authority to promote an employee, revise compensation, or direct how work activities are to be carried out.² 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." In this case, the only available remedies would include directing the agency to redo the

¹ § 5.1 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004, requires that a grievance hearing must be held and a written decision issued within 35 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

² § 5.9(b)3, 4, & 7. *Ibid.*

selection process (if misapplication of policy is found), or directing the agency not to retaliate or discriminate (if the agency is found to have done either).

APPEARANCES

Grievant
Attorney for Grievant
Three witnesses for Grievant
Representative for Agency
Five witnesses for Agency

ISSUES

Was the grievant subjected to retaliation? Was the grievant subjected to discrimination? Did the agency misapply policy in selecting a Security Manager?

FINDINGS OF FACT

The grievant filed a timely grievance asserting that he had been subjected to retaliation and discrimination, and that the agency had misapplied policy in selecting a Security Manager.³ The agency declined to qualify the grievance for a hearing and grievant requested a compliance ruling from the Department of Employment Dispute Resolution (EDR). The EDR Director ruled that the grievance was qualified for hearing.⁴ The Department of Mental Health, Mental Retardation, and Substance Abuse Services (Hereinafter referred to as agency) has employed grievant for 12 years. He is currently a Security Officer Supervisor (Lieutenant). Grievant's overall performance evaluation rated him a Contributor in 2001, 2002, and 2003.

In 1997, grievant filed a grievance asserting that his performance evaluation was arbitrary, capricious, and retaliatory. The grievance advanced to a hearing which resulted in a Decision of Hearing Officer in March 1998 that the evaluation reviewer had acted in an arbitrary and capricious manner to downgrade the supervisor's evaluation of grievant.⁵ The Hearing Officer also found that the downgrading was, at least in part, a retaliatory action by the reviewer against grievant because of an earlier grievance filed by grievant against the reviewer (the then Security Manager). The Hearing Officer directed

³ Grievant Exhibit 1. Grievance Form A, filed September 22, 2003.

⁴ Grievant Exhibit 16. *Qualification Ruling of Director* Nos. 2004-624 and 2004-648, December 29, 2004. [NOTE: The Director also ruled that grievant's second grievance – of his 2003 performance evaluation – does not qualify for a hearing. Discussion of the 2003 evaluation was permitted in this hearing as possible evidence relating to grievant's allegations of retaliation and discrimination; however, this Decision does not draw any conclusion as to the merits of the evaluation.]

⁵ Grievant Exhibit 2. Decision of Hearing Officer, March 12, 1998.

that the performance evaluation be redone and rated based solely on grievant's work performance.

At the time of the above grievance, grievant was a Security Officer Senior; his immediate supervisor was a lieutenant who reported to the Security Manager. In May 1998, the Security Manager was removed from his position and reassigned to the Risk Management department. Due to budget constraints, the position of Security Manager remained vacant for the next several months. The Hospital Director appointed the Director of Clinical Operations to oversee the Security function in the interim. In February 1999, a hotline complaint was received apparently alleging that security officers on the night shift (11:00 p.m. to 7:00 a.m.) were not making required rounds to assure that all building doors were locked. Grievant was working on the night shift at that time. An investigation was conducted for several weeks by the Risk Management department; the primary investigator was the former Security Manager (Hereinafter referred to as Security Manager Number 1). Risk Management filed a report in March 1999 that the Director of Clinical Operations concluded was "not very good." The investigation report was inconclusive and no action was taken as a result of the report.⁶

During this same period, grievant applied for, and was selected for, the position of lieutenant (night shift supervisor) on the night shift; he was promoted to lieutenant in March 1999. The position was specifically advertised as being for night shift only.⁷ Budget restrictions eased at about this time and the position of Security Manager was then advertised. Grievant applied for the position, was selected for an interview in March 1999 but did not make the final cut. An applicant from outside the agency was selected for the position of Security Manager by an interview panel of four management persons.

The interview panel was composed of the facility's chief financial officer, the assistant director of nursing, the personnel director, and the clinical operations director. The four members of the interview panel were not told in advance who to select or not select. The panel interviewed each candidate for about 30-45 minutes. All candidates were asked the same questions and a synopsis of their answers was recorded by each panelist. The questions had been prepared in advance by the hiring manager (clinical operations director) and reviewed by the Human Resources department to assure compliance with state and federal rules. After all the candidates had been interviewed, the panel discussed the merits of the candidates for about one hour and selected the successful applicant who took over the position in the spring of 1999.

The new Security Manager (Number 2) resigned in December 1999 and the position was again advertised. Grievant applied for the position, was

⁶ Grievant Exhibit 4. Investigation Report, March 3, 1999.

⁷ Agency Exhibit E. Employee Action Notice, March 2, 1999. [NOTE: The day shift and evening shift supervisors rotate their assignments from time to time but the night shift supervisor is permanently assigned to the night shift.]

selected for an interview but again did not make the final cut. The interview panel was composed of the same members as the earlier panel in March 1999, and the same process described above was followed. Again, the successful candidate (Security Manager Number 3) came from outside the agency. In 2001, Security Manager Number 3 attempted to obtain night differential pay for the night shift to which grievant is assigned.⁸

In February 2002, grievant requested an "In-Band" salary increase. The state's compensation program permits each agency, at the agency's option, to include in its Salary Administration Plan an in-band salary increase for a change in duties or application of new knowledge or abilities. However, grievant's agency had not incorporated the in-band salary adjustment provision in its Salary Administration Plan and therefore grievant's request could not be granted. In January 2003, grievant advised the agency that he had applied for a position at a different state agency and that he had received a job offer at a higher salary.⁹ Grievant requested that the agency increase his salary to match the offer of the other agency plus ten percent. The state's compensation program includes a provision that *allows* agencies to match competitive salary offers *if* the agency deems it in the best interest of the agency, and if money is available in the budget. At the time of grievant's request, budgets were frozen and there was no money available for competitive salary matches, let alone matches plus an additional percentage. The agency has never granted a competitive salary increase to any security officers.

At some point in 2002, Security Manager Number 3 implemented ten-hour shifts for the security staff. However, in December 2002 grievant was injured at work and was absent from work drawing workers' compensation until August 2003. During that time, because of grievant's prolonged absence and a staffing shortage, the ten-hour shift became unworkable and the Security Manager was forced to revert to eight-hour shifts. When grievant returned to work in August 2003, he requested to work a 10-hour shift because he personally preferred it. His request was denied because management determined it to be unworkable.¹⁰

Grievant had applied for certain training classes but his applications were denied. For example, in 2002 grievant applied for a Firearms training course; Security Manager Number 3 denied the request because security officers at grievant's facility do not have firearms.¹¹ After this grievance was filed, grievant applied in 2004 for a Basic Internal Affairs class; Security Manager Number 4 denied this request because of the tight budget and the need to conserve money for a new officer to attend the Training Academy.¹² Also in 2004, grievant applied for a class on Child Abuse and Exploitation Investigative Techniques; Manager

⁸ Grievant Exhibit 9. E-mail from Security Manager Number 3 to Director of Clinical Operations, October 24, 2001.

⁹ Grievant Exhibit 10. Memo from Human Resource Director to Security Manager, January 27, 2003.

¹⁰ Grievant Exhibit 9. E-mails during August 2003.

¹¹ Grievant Exhibit 8. E-mail from Security Manager Number 3 to grievant, August 6, 2002.

¹² Grievant Exhibit 8. Email from Security Manager Number 4 to grievant, March 5, 2004.

Number 4 denied this request because the training is not germane to the Security Department's mission at the facility.¹³

In 2003, the position of Security Manager again became vacant when Security Manager Number 3 left the position. Grievant applied for the position, was found to meet the qualification requirements and, was granted an interview along with six other candidates. The interviews were conducted in July 2003 in the same manner as the previous two panels described above. Three of the four panelists were the same as in the previous two panels; the fourth panelist had replaced the previous personnel director and became the new personnel director in 2001. Three of the seven interviewed were selected for a second interview; grievant was not one of the three. After a second interview with the three finalists, the successful candidate became Security Manager Number 4.

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 retaliation, age discrimination, and misapplication of policy, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.¹⁴

¹³ Grievant Exhibit 8. E-mail from Security Manager Number 4 to grievant, August 31, 2004.

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

Misapplication of Policy

Grievant alleges that his non-selection in the 2003 interview process resulted from agency misapplication of the selection process. The preponderance of evidence and testimony demonstrates that the agency conducted the process according to the current procedure of the Department of Human Resource Management.¹⁵ The procedure explains, *inter alia*, how an agency must determine selection criteria, advertise a position, screen applications and, conduct interviews. Grievant alleges that the agency had preselected the candidate who eventually became Security Manager Number 4. He claims that the agency changed the recruitment announcement and position in such a way as to allow the successful candidate to meet the job qualifications.

Grievant points in particular to differences between the 1999 and 2003 advertisements for the Security Manager position.¹⁶ However, the agency presented credible testimony to explain these differences. First, the Commonwealth's statewide Compensation Reform Program (implemented in September 2000) resulted in changes to every state employee's job description.¹⁷ Descriptions were required to be less specific in order to consolidate a wide range of positions across agency lines. Second, during the four years between 1999 and 2003, there were significant changes in the hospital's operations, some of which impacted the security department. For example, increased interaction between the Security Manager and those outside the hospital required the incumbent to have excellent public relations skills and strong interpersonal skills. Accordingly, it is concluded that the differences in the two advertisements resulted in part from changes to all state position descriptions and, in part from changes in the hospital's operational situation during the four years between the two recruitments. Grievant's allegation of changes to accommodate a specific candidate is purely speculative and is unsupported by the evidence.

Grievant also alleges misapplication of the selection process because – he claims – selection was based only on the interview questions and that qualifications were ignored. In fact, the DHRM recruitment process (described above) requires that all applications for a position be screened by the Human Resources Department *before* the interview process. Human Resources reviews all applications to determine which candidates meet the qualifications specified in the advertisement. It then calls in for interviews *only* those candidates who

¹⁵ A complete description of the recruitment and employment process is contained in Chapter 11 of the DHRM *Human Resource Management Manual*, July 1, 2003. [This manual is available on the DHRM website.]

¹⁶ Grievant Exhibit 13.

¹⁷ For example, the 1999 Security Manager position required the incumbent to be a certified Police Officer. However, when the position description was revised in 2000, this requirement was eliminated. See Agency Exhibit D, current Role Description for Security Manager.

actually meet all required qualifications. In this case, only seven applicants, including grievant, met the qualifications, and those were the only candidates referred to the panel for an interview. Accordingly, the interview panel did not have to focus on candidates' qualifications because Human Resources had already determined that grievant and the other candidates met the written qualifications of the position.

Grievant faults the interviewers for not writing down his responses verbatim. The interviewers indicated that they wrote synopsis notes and attempted to record as many of the salient points as possible. When grievant was questioned during the hearing about what important points were missing from the interview forms, grievant responded that he does not remember what his answers to the questions were. Grievant also faulted one interviewer for incorrectly using the term safety officer instead of security officer. That interviewer testified that he knew full well that grievant was a security officer and simply used the wrong word in his haste to record responses. Grievant admitted that during the course of his employment he has had very little contact with three of the interviewers (financial officer, Assistant director of nursing, and personnel director). Thus, grievant offered no evidence that would demonstrate any retaliatory motive or bias on these members of the interview panel. These three interviewers testified under oath that they had no prior knowledge of grievant's 1997 grievance when they participated in the interview and selection process.

Grievant further alleges that it had been determined in advance that he was not going to be the successful candidate. A security officer who is subordinate to grievant on his shift testified under oath that a human resource employee told him before the interview process, "I don't know if they [management] want him [grievant] in that position." However, the security officer gave grievant an unsworn written statement in October 2004 stating that the human resource employee said, "They [management] did not want [grievant] in the position of Security Manager."¹⁸ During the hearing, the security officer recanted his written statement and adamantly insisted that the actual statement of the human resource employee was what he testified to during the hearing. The officer maintains that grievant, as his superior officer and shift supervisor, required him to write and sign the written statement, even though it is false. The officer felt at the time that he had no choice but to obey the grievant's order; grievant denies telling the officer what to write.

Although the security officer's evidence is tainted by his recanting of his prior inconsistent statement, his sworn testimony – which was subject to vigorous cross-examination by grievant's attorney – must be accorded more evidentiary weight than his unsworn written statement given under duress. Moreover, even if the human resource employee had made the more conclusory statement, there is no showing that she was not simply expressing her opinion. Further, all four interview panelists testified at the hearing. Each presented very credible testimony that their selection of the successful candidate was based solely on his

¹⁸ Grievant Exhibit 12. Memorandum from security officer to grievant, October 26, 2004.

superior responses to interview questions – both quality of response and presentation of response. In addition, each panelist adamantly denied that anyone in agency management had ever attempted to influence the interview process, their deliberations, or the selection of a successful candidate. The evidence fails to demonstrate any arbitrariness or capriciousness in their decision process. To the contrary, each panel member gave logical reasons (both in their testimony and in their written interview notes¹⁹) for their individual conclusions.

Grievant made a number of allegations and assumptions but failed to provide any corroborative evidence. For example, grievant assumed that the 1998 Security Manager made the hotline complaint but had no evidence to support the assumption. In a second example, grievant contends that he was the target of the investigation even though there were other officers working on the night shift but, he provided no evidence to support his contention. Since grievant was promoted to lieutenant in the same month the investigation was concluded, it would seem unlikely that he was under any suspicion of misconduct. In a third example, grievant alleges that the investigation continued for months after the March 1999 report. However, grievant presented no evidence to support the allegation; he only asserts that doors being found open after March 1999 meant that an investigation was ongoing. In fact, the Director of Clinical Operations testified that the investigation ended with the report in March 1999. In a fourth example, grievant said he “believes” that some unknown person suggested to the new Security Manager that he should eliminate undesireables from the department. However, grievant has no tangible evidence to support his “belief.”

A former security officer gave grievant a note claiming that the Personnel Director had made him a competitive salary offer in July 2001.²⁰ However, even though this security officer testified during the hearing, he was very uneasy during cross-examination about this issue. The Personnel Director testified directly and clearly that *all* competitive salary increase requests from security officers have been denied. The Director’s testimony was more credible than that of the former security officer.

Grievant also cites as retaliation the fact that he has not had the opportunity to function in the role of acting Security Manager at times when the position was vacant. However, grievant has offered no evidence to show that he was the best qualified or most appropriate person for that responsibility. Grievant suggests that his non-selection on three occasions is also evidence of retaliation. However, there is no criterion that gives the advantage to a candidate merely because he applies for a position on multiple occasions.

Retaliation

Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or

¹⁹ Grievant Exhibit 14. Written Interview Notes of four panelists, July 22, 2003.

²⁰ Grievant Exhibit 10. Note from former security officer, February 1, 2005.

reported a violation of law to a proper authority.²¹ To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity;²² (ii) he suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. In this case, grievant had engaged in a protected activity when he filed a grievance in 1997. Subsequently, he suffered an adverse employment action when he received an arbitrary and capricious performance evaluation later that year. In 1998, he successfully demonstrated a nexus to a hearing officer who directed that his performance evaluation be redone. Based on grievant's successful 1998 grievance and the evidence in the instant hearing, there is little doubt that a problem existed between Security Manager Number 1 and grievant. A preponderance of evidence supports a conclusion that even after Security Manager Number 1 was transferred to the Risk Management department, he continued to harbor ill will against grievant. However, after the March 1999 investigation ended, Security Manager Number 1 had little or no influence over grievant. Although grievant feels that Security Manager Number 1 was involved in a "dastardly scheme"²³ against him after March 1999, there is no credible evidence or testimony to support grievant's belief. It must be noted that Security Manager Number 1 is no longer employed by the agency and has been gone for several years.

Now, grievant seeks to prove that his nonselection for the competitive position for which he applied in 2003 was an adverse employment action and that it was somehow connected to the 1997 grievance. Grievant suggests that it is now the Facility Director and the Director of Clinical Operations who are somehow orchestrating events against him. However, grievant offered no tangible evidence to support his suggestion; he only suggested that they must be responsible because both were at the facility when he filed the 1997 grievance.

Grievant cited his 2003 performance evaluation as evidence of continuing retaliation. Although his overall rating was the same as the two prior years, grievant received lower ratings on two of the seven core responsibilities. However, the 2001 and 2002 evaluations were written by Security Manager Number 3, while the 2003 evaluation was written by Security Manager Number 4. It does not appear unusual that two different supervisors would have a slightly different evaluation of the same person, particularly when those evaluations cover two different years. Since both Managers gave grievant the same overall rating, small variances in comments or ratings of individual responsibilities are not at all unexpected. It is concluded that these differences are not indicative of retaliation.

Grievant argues that the denial of some of his requests for training suggest retaliation. Grievant's argument is not persuasive. The training to which

²¹ EDR *Grievance Procedure Manual*, p.24

²² § 4.1(b)4, EDR *Grievance Procedure Manual* defines protected activity as: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incident of fraud, abuse, or gross mismanagement, or exercising any right protected by law.

²³ Grievant Exhibit 7. Memorandum from grievant to Commissioner, February 11, 2000.

grievant refers was denied by Security Manager Numbers 3 & 4 – not by Security Manager Number 1. It was Security Manager 1 with whom grievant had a problem and against whom grievant had filed a grievance in 1997. Neither Security Manager Number 3 nor Number 4 was even employed by the agency until years after the 1997 grievance was resolved. Grievant has not shown that Security Managers 3 and 4 had any interest in the old grievance, or any reason to retaliate against grievant because of the old grievance. Grievant did not allege, and there certainly was no evidence, that Security Manager Number 1 had any influence over Security Managers 3 or 4. However, the agency failed to explain why one security officer was allowed to take a course entitled “Flying While Armed.” Since security officers are not armed, and have no occasion to fly while working for the agency, this training course appears not to be germane to the agency’s security function.

Grievant argues that the decision not to retain the 10-hour shift experiment was retaliation against him personally. However, there is no evidence to support his argument. The agency found, that for staffing reasons, it was not practical to retain ten-hour shifts. When grievant requested to be the only person working a ten-hour shift, management did not grant the request. Grievant has not demonstrated that his request to be the sole security person working a ten-hour shift was reasonable when all other staff worked eight-hour shifts.

Grievant asserts that his working third shift was retaliatory. However, the agency has shown that the position for which grievant applied (third shift supervisor) was specifically set up as a third-shift-only position. Grievant knowingly applied for the position. While grievant later decided that he wanted to work other shifts, he knew when he accepted the position that it was for the third shift. Grievant has not shown any retaliation involved in the agency’s refusal to allow grievant to renege on his commitment to work third shift.

Grievant was again absent from work from March to August 2004 due to his earlier worker’s compensation claim. After he returned to work, the agency sent to grievant’s physician a job analysis form requesting that the physician review the analysis and advise whether grievant is capable of performing the functions of his position. Grievant argues that this is a continuing example of the agency trying to get rid of him. Grievant’s argument is unpersuasive. First, grievant had been absent for nine months in 2002-2003 due to his injury and then, after working for several months, was again absent from work for the same reason for five more months in 2004. It is not at all surprising that the agency would have a legitimate concern about grievant’s ability to perform his job in the face of his being absent for 14 of the preceding 21 months. Second, grievant has not contested any aspect of the job analysis form sent to the physician. Accordingly, it is presumed that the agency’s inquiry to the physician was a bona fide effort to ascertain grievant’s physical ability to perform his job in the future.

Discrimination

To sustain a claim of discrimination, grievant must show that: (i) he is a member of a protected group (such as age); (ii) he suffered an adverse job action; (iii) he was performing at a level that met his employer's legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee's protected classification.²⁴ Grievant claimed in his written grievance that the alleged discrimination was based on his age. However, grievant failed to prove his age either in the grievance, the written evidence, or his testimony during the hearing. Moreover, grievant failed to address the issue of age discrimination during the hearing. Grievant claimed only that the selected candidate is younger than he is. Merely being older than someone else is an insufficient basis to claim discrimination on the basis of age; in order to prove discrimination based on age, one must be over 40 years of age. Even if grievant were over 40 years of age, he failed to offer any evidence that the adverse action was in any way based on this protected classification. Since grievant did not pursue this issue during the hearing, and since there is no evidence to support his allegation, it is concluded that the agency did not discriminate against grievant on the basis of his age.

Summary

Grievant has not shown that the agency misapplied the 2003 selection process for the position of Security Manager. The process was conducted according to DHRM guidelines and there is no evidence to show that the process was circumvented or tainted. Further, there is no evidence to show that agency management attempted to influence the panelists who selected the successful candidate. Grievant has not demonstrated that either the Director of Clinical Operations or Security Managers 2, 3 or 4 had any reason to retaliate against him, or that they did retaliate against him in any way. Grievant failed altogether to prosecute his allegation of discrimination.

Grievant believes that every significant event that is not to his liking is somehow attributable to his eight-year-old grievance; however, the evidence in this case fails to support that belief. The evidence does suggest that grievant may not be the most popular officer in the security department. If grievant has rubbed some people the wrong way, it is possible that they may be less than cooperative with him on occasion. While it is understandable that grievant did not like being turned down for certain training or salary increases he sought, the agency has presented reasonable business reasons for making such decisions. Similarly, the agency has offered credible bases for rejecting grievant's request to change shifts, requesting additional information from his physician following two protracted absences from the agency, and for slight variances in the performance evaluations of two different supervisors in two different years.

²⁴ Cramer v. Intelidata Technologies Corp., 1998 U.S. App Lexis 32676, p6 (4th Cir.1998) (unpub).

DECISION

Grievant has not proven that the agency misapplied any policy, that he has been subjected to retaliation, or that he was the subject of discrimination. Grievant's request for relief is hereby DENIED.

APPEAL RIGHTS

You may file an administrative review request within **15 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 15 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 15-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.