Issue: Group III Written Notice with termination (violation of alcohol/drug policy); Hearing Date: 12/04/06; Decision Issued: 12/07/06; Agency: UVA; AHO: David J. Latham, Esq.; Case No. 8452; Outcome: Employee granted partial relief; **Administrative Review: HO Reconsideration Request received 12/21/06; HO Reconsideration Decision issued 12/27/06; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 12/21/06; EDR Ruling #2007-1518 issued 02/27/07; Outcome: Remanded to HO; Second Reconsideration Decision issued 03/19/07; Outcome: Original decision reversed – Agency upheld in full; Administrative Review: DHRM Ruling Request received 12/21/06; DHRM Ruling issued 04/24/07; Outcome: Issue now moot - HO's decision of 03/19/07 affirmed; Judicial Appeal – Appealed to the Circuit Court, City of Charlottesville, 04/17/07; Outcome: HO's Reconsideration Decision affirmed – court lacks jurisdiction to rule on matters that are not contradictory to law (07-115 issued 08/02/07).**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8452

Hearing Date: December 4, 2006
Decision Issued: December 7, 2006

APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
Attorney for Agency
Three witnesses for Agency
Observer for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group III Written Notice issued for violation of the agency's Drug and Alcohol policy.[1] As part of the disciplinary action, grievant was removed from state employment effective September 11, 2006. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2] The University of Virginia (Hereinafter referred to as "agency") has employed grievant for 11 years as an information technology specialist.[3] Grievant does not formally supervise classified employees. However, he does provide training and daily supervision of student assistants who work in the language laboratory.[4]

State policy provides that the unauthorized dispensation, possession and/or use of alcohol in the workplace are violations of the policy.[5] Agency policy provides that alcohol may not be used at an event on University property unless the Vice President for Student Affairs gives written approval in advance.[6] Employees seeking such approval must submit a detailed two-page *Use of Alcoholic Beverages Request* form at least one week prior to the proposed event. When hired, all employees must sign a notice that they have read and understood the alcohol policy.

On September 8, 2006, grievant decided to have a going-away gathering for a student who was moving to the West Coast. Grievant invited two other classified employees to join him and the student in the language laboratory after closing at 5:00 p.m. He mentioned to his supervisor that he and the student would be having a "Mojito toast" after work. The supervisor had not previously heard of a Mojito and it did not register that this might be an alcoholic drink. Grievant did not seek written approval for the event. The student had previously told grievant that he makes a very good Mojito – a rum-based drink.[7] Grievant brought a full bottle of rum to the language laboratory. In addition to grievant and the student, two other student assistants were present; the other classified employees did not attend.

The departing student mixed and poured Mojito drinks for all four participants. Of the three students present, two were older than 21 years of age, and one was 19 years of age.[8] The underage student looks and acts especially young and could easily be mistaken for a high school student. As the four were

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[1] Agency Exhibit 1. Group III Written Notice, issued September 11, 2006.
[2] Agency Exhibit 1. Grievance Form A, filed September 12, 2006.
[3] Agency Exhibit 6. Employee Work Profile Work Description, January 3, 2006.
[4] Agency Exhibit 6. Section D., *Id.*
[5] Department of Human Resource Management (DHRM) Policy 1.05, *Alcohol and Other Drugs*, revised March 2004.
[6] Agency Exhibit 3. Mass E-mail letter mailed to all employees and students, November 14, 2005.
[7] A Mojito is made with 2-3 ounces of light rum, lime juice, sugar, mint sprigs, and soda water. *See* http://www.webtender.com/db/drink/1435 .
[8] The underage student had just turned 19 in June 2006 (He was born June 5, 1987).

drinking, grievant's supervisor entered the language lab because she wanted to say goodbye to the departing student. Grievant offered her a drink. She noticed the odor of alcohol in the room and was suspicious about the contents of the cup. She took a sip and found it to have a very strong alcohol content. She immediately left the area to close the outer doors to the language laboratory to assure that no one else would enter the area. She then returned and told grievant that alcohol cannot be served on university property except with written approval. Grievant told her that he had checked it out and that it was OK after 5:00 p.m. She also asked the ages of the students; the underage student said he was 21 years old. The supervisor did not believe him because of his youthful appearance and because she knew he was only a second-year student.

The supervisor then left and grievant followed her to her office. After calling a colleague to discuss the situation, the supervisor told grievant that the consumption of alcohol was contrary to policy, that one of the students was underage, and that the party must be terminated. Grievant agreed and said he had intended to give the underage student only one drink. They returned to the party and instructed the students that the party was over. By then the underage student had consumed two drinks. On the next workday (Monday, September 11, 2006), the supervisor reported the incident to her supervisor and to Human Resources. She then called grievant in to give him a chance to explain what had occurred. Grievant acknowledged that he had done a stupid thing, was very apologetic, and offered to do anything to keep his job. In his written grievance, grievant offered to perform "community service or whatever was needed" to keep his job.[9]

The Vice President for Student Affairs has delegated the responsibility for approving use of alcohol requests to the Assistant Vice President for Student Affairs. She affirmed that the Alcohol policy is e-mailed annually to all employees and students. She reviews 5-7 requests per week for alcohol use. Both she and Human Resources affirm that there have not been any other instances of alcohol being served without prior written approval.

After consultation with Human Resources, grievant was given a Group III Written Notice and removed from state employment on September 11, 2006. None of the three students was allowed to continue working at the language lab; one student moved to the West Coast and the other two were given the option of resigning, which they did.

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

[9] Agency Exhibit 1. Grievance Form A, filed September 12, 2006.

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 the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[10]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated *Standards of Conduct* Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from state employment.[11] Violation of the Commonwealth's Alcohol and Other Drugs policy can be a Group I, Group II, or Group III offense depending on the nature of the violation.

The agency has shown that grievant violated state policy by promoting and facilitating the unauthorized dispensation of alcohol, and by personally possessing and using alcohol in the workplace. Grievant acknowledged violating the policy in these ways and admitted that he was "dead wrong."[12] Grievant

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[10] § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

[11] Agency Exhibit 2. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

[12] Grievant Exhibit 2. E-mail from grievant to supervisor, September 11, 2006.

points out that he is aware of, and has attended, University events at which alcohol was served. He infers that he did nothing different from what occurred at those events. However, grievant could not identify any such events which had not received advance written approval.

Grievant argues that he did not *personally* mix and pour the drinks for the students. Even if true, this is a red herring. Grievant suggested the party, personally invited others to attend, permitted students to participate, failed to verify the ages of those present, and most importantly, provided the alcohol served at the party. Whether he personally poured the drinks is irrelevant. He was the motivating force behind the idea of serving alcohol, he procured and provided the alcohol, and he acquiesced in its being served to students.

Grievant also argues that the Written Notice is flawed because it does not properly reference the appropriate policy. The purpose of Section I of the Written Notice form is to briefly describe the offense. Section I complied with this requirement because it succinctly stated in the second sentence what was grievant's offense. There is no doubt that grievant knew what his offense was even at the pre-disciplinary stage because he acknowledged wrongdoing and apologized for it.

Grievant asserts that he did not know that one of the students was underage. Based solely on the student's very youthful appearance and demeanor, grievant reasonably should have suspected that he was underage and requested identification that contained his birth date.

Grievant maintains that he was not aware of the agency's alcohol policy. At a minimum, grievant knows, or reasonably should know of, the Commonwealth's alcohol policy that applies to all state employees. As stated above, grievant did violate that policy. The agency contends that the relevant agency policy is the policy promulgated by the Office of Student Affairs.[13] That policy restates applicable state law, most notably in this case that alcoholic beverages are not to be given or served to persons under 21 years of age. The policy further provides that any use of alcohol must be approved in advance by the Student Affairs Vice President or his or her designee. Grievant submitted a different agency policy promulgated by the agency's Human Resources office.[14] However, with regard to the relevant issues in this case, the policy also states that the dispensation, possession and/or use of alcohol in the workplace are prohibited.

Grievant points to a policy provision that outlines management responsibilities and states that employees are to sign a receipt for the policy and, that a copy of the policy shall be posted in a conspicuous place in the workplace. Grievant avers that he has neither signed such a receipt nor seen this policy conspicuously posted in his workplace. Even if grievant has not seen this

[13] Agency Exhibit 3. STU-001, *Alcohol and Drug Policy*, June 1, 2005.
[14] Grievant Exhibit 1. Employee Relations Policy, *Drug and Alcohol Use*, July 1, 1999.

particular policy, he is nevertheless responsible for knowledge of the state policy applicable to all state employees and, he knew or should have known of the Student Affairs alcohol policy referenced in the e-mail sent to all employees. Since all three policies prohibit the unauthorized use of alcohol in the workplace, the fact that grievant may not have seen one of them is irrelevant.

Grievant's denial of knowledge about policy, false statement that he had checked out the event in advance, attempt to shift responsibility to the student who mixed the drinks, attempt to shift responsibility to his supervisor, and attempt to blame the underage student all taint grievant's credibility. During the second-step respondent's meeting with grievant, grievant stated that he had informed his supervisor multiple times in advance that alcohol would be served. However, the witness grievant called to support this assertion denied that this ever happened.[15] The supervisor also denied knowledge that alcohol would be served. During this hearing, grievant claimed that he had asked the underage student if he was of legal drinking age; the student testified credibly that grievant had *not* asked him about his age. Grievant failed to offer any testimony or evidence to show that the student had any motivation to fabricate his testimony.

Mitigation

Notwithstanding the comments in the preceding paragraph, grievant's most salient and persuasive argument is that the discipline imposed was unduly harsh. The normal disciplinary action for a Group III offense is a Written Notice and removal from employment. The *Standards of Conduct* policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant does have long state service (11 years) and his work performance has been more than satisfactory. In 2005 grievant was cited for his extraordinary contributions on two occasions.[16] Additionally, in November 2005, the agency gave grievant an In-Band salary adjustment in order to retain what his supervisor called an "outstanding employee."[17] The supervisor also observed that grievant's "particular skills in these areas are critical" to the department's mission.

There is an additional mitigating circumstance that compels a reduction in the disciplinary action. A violation of the Alcohol and Drug policy can be a Group I, Group II, or Group III offense depending upon the nature of the violation. In considering the gamut of possible violations of the alcohol policy, there are certainly violations far more serious and consequential than grievant's offense. Examples include: a teacher who frequently teaches in an inebriated or hung-

[15] Agency Exhibit 1. Second Step respondent's findings.
[16] Grievant Exhibits 3 & 4. Acknowledgement of Extraordinary Contribution, March 30, 2005 and, September 18, 2005, respectively.
[17] Grievant Exhibit 5. Pay Action Request Form, approved November 8, 2005.

over state; an employee who drinks alcohol to excess and wrecks a state vehicle causing injury or death; or, an employee who habitually keeps alcohol in his desk and drinks while at work. While there is no question that grievant's offense was very serious, it was not at the extreme end of the spectrum of possible offenses involving alcohol. After carefully reviewing the circumstances of this case, it is concluded that the mitigation of the discipline is warranted.

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice with termination of employment is REDUCED to a Group III Written notice with 30 days suspension. Grievant's removal from employment is hereby RESCINDED. Grievant is reinstated to his former position or, if occupied, to an objectively similar position. Grievant is awarded back pay from the date on which the 30-day suspension ends, and benefits and seniority are restored from the date on which suspension ends. The award of back pay must be offset by any interim earnings, and by any unemployment compensation received.

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.[18] 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.[19]

Therefore, grievant is entitled to recover a reasonable attorney's fee, which cost shall be borne by the agency.[20] Grievant's attorney is herewith informed of his obligation to timely submit a fee petition to the Hearing Officer for review.[21]

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this decision was issued, if any of the following apply:

[18] Va. Code § 2.2-3005.1.A.

[19] § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. Section VI(D) EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004.

[20] Va. Code § 2.2-3005.1.A & B.

[21] *See* 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.

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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.[22] 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.[23] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[22] 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).

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

[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

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David J. Latham, Esq.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

RECONSIDERATION DECISION OF HEARING OFFICER

In re:

Case No: 8452-R

Hearing Date:	December 4, 2006
Decision Issued:	December 7, 2006
Reconsideration Request Received:	December 21, 2006
Response to Reconsideration:	December 27, 2006

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 15 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.[24]

OPINION

Grievant's request for reconsideration was submitted on an anticipatory and conditional basis. Grievant stipulated that his request for reconsideration would be withdrawn if the agency did not request a reconsideration. In order to submit a timely request for reconsideration, a request from the agency would have had to be received by the hearing officer not later than December 22, 2006. As of December 27, 2006, the hearing officer has not received a request for reconsideration from the agency. Accordingly, while the need to respond to

[24] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

grievant's request is obviated, the hearing officer nevertheless elects to respond to the points raised by counsel.

A. Grievant believes that the fact that he did not personally *serve* the drinks to the students is relevant and should be a mitigating circumstance. For the reasons stated in the decision, the hearing officer finds this argument to be unpersuasive. In addition, the word *serve* has many meanings depending on the circumstances. While one meaning is to bring food or drink to a table, *serve* is also defined as "to furnish or supply with something needed or desired."[25] The evidence is preponderant and undisputed that grievant supplied the alcohol consumed by the students. Thus, whether grievant personally handed drinks to the students is not relevant in view of the fact that he personally facilitated every other aspect of the students' drinking alcohol on university property.

B. Grievant suggests that the underage student's testimony was either biased or inaccurate. Grievant's hypothesis that the underage student would admit under oath that he had lied to grievant's supervisor, but then falsely maintain that grievant had not asked him about his age is simply not credible. The weight of evidence and demeanor of the witness were sufficient to convince the trier of fact that the student's testimony was accurate. More importantly, even if, arguendo, the student's testimony was inaccurate in this respect, it does not serve to mitigate the offense in this case. Based on the student's obviously very youthful appearance, grievant should have verified his age by requesting some form of identification. Moreover, the student's underage status was only one facet of the overarching offense of serving alcohol on university property without authorization.

C. Grievant alleges that his supervisor also violated the alcohol policy and that his discipline should therefore be reduced. First, this hearing did not adjudicate whether grievant's supervisor violated policy when she served alcohol in her own residence. There was no evidence that the current policy is the same as the policy in effect at the time of the party in her residence several years ago. Second, grievant's purported ignorance of the policy as a factor in determining discipline is not dependent upon whether another employee is knowledgeable about the policy. Third, the supervisor's sip of the drink handed to her to verify whether alcohol was actually in the drink was reasonable given her testimony about grievant's past deceitfulness.

Conclusion

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

[25] *Merriam-Webster's Collegiate Dictionary*, Tenth Edition.

Reinstatement of grievant to his position is a very significant reduction in discipline from termination of state employment. Even if the hearing officer agreed with the points raised by grievant in his request for reconsideration (which he does not for the reasons stated above), the reduction in discipline is more than sufficient given the totality of the circumstances in this case.

DECISION

Grievant has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered grievant's arguments and concludes that there is no basis to change the Decision issued on December 7, 2006.

APPEAL RIGHTS

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

1. The 15 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.[26]

S/David J. Latham

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David J. Latham, Esq.
Hearing Officer

[26] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

RECONSIDERATION DECISION OF HEARING OFFICER

In re:

Case No: 8452-R

Hearing Date:	December 4, 2006
Decision Issued:	December 7, 2006
Reconsideration Request Received:	December 21, 2006
Response to Reconsideration:	December 27, 2006
Reconsideration Order Received:	February 28, 2007
Response to Reconsideration Order:	March 19, 2007

PROCEDURAL HISTORY

The agency requested that the EDR Director review the hearing officer's decision. The EDR Director administratively reviewed the decision and ordered the hearing officer to reconsider the determination with regard to the issue of mitigation.

OPINION

The EDR Director has ruled that a hearing officer may not apply mitigation except when the mitigating circumstances are determined to be "extraordinary." The Director further concludes that the mitigating circumstances in this case were not extraordinary. Because the grievant's offenses constituted a Group III offense, and given the administrative ruling, it must be concluded that the agency's decision to remove grievant from state employment did not exceed the tolerable limits of reasonableness.[27]

DECISION

The initial decision of the hearing officer is hereby reversed.

The disciplinary action of the agency is affirmed.

[27] *Cf.* Davis v. Dept. of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

The Group III Written Notice and the removal of grievant from state employment are hereby UPHELD.

APPEAL RIGHTS

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

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. 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.[28]

S/David J. Latham

David J. Latham, Esq.
Hearing Officer

[28] 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).

April 24, 2007

University of Virginia
PO Box 400225
Charlottesville, Virginia 22904-4225

RE: Case No. 8452

This letter is to acknowledge your correspondence in which you indicated that the University of Virginia (UVA) and the grievant currently are awaiting an administrative review from the Department of Human Resource Management (DHRM) in the above referenced case. As a practical matter, DHRM issues its ruling after all reconsideration requests and administrative appeals have been exhausted. Based on the University's appeal to the Department of Employment Dispute Resolution (EDR), the hearing officer was ordered by EDR to reconsider his determination as related to how he applied the principle of mitigation. In response to that directive, the hearing officer issued a second reconsideration decision dated March 19, 2007, in which he reversed his original decision and reinstated the disciplinary action against the grievant. Because the second reconsideration decision addresses the issues raised by UVA, the Department of Human Resource Management has no basis to review your appeal further. We therefore will not interfere with the execution of the hearing officer's decision.

In light of the hearing officer's second revised decision, we find moot the grievant's request to disallow and to rebut the University's appeal. Thus, we are closing this case, effective the date of this correspondence.

If you have any questions regarding this correspondence, please contact me.

Sincerely,

Ernest G. Spratley, Manager
Employment Equity Services