

Issue: Administrative Review/Hearing Decision; Ruling Date: November 16, 2004;  
Ruling #2004-901; Agency: Virginia Commonwealth University; Outcome: hearing  
officer in compliance



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

COMPLIANCE RULING OF DIRECTOR

In the matter of Virginia Commonwealth University  
Ruling Number 2004-901  
November 16, 2004

Virginia Commonwealth University (VCU or University) has requested a compliance ruling addressing the hearing officer's October 21, 2004 award of attorney's fees in Case Number 867. For the reasons set forth below, this Department finds that the hearing officer did not exceed the scope of his authority by awarding fees in this case.

FACTS

The grievant timely filed a grievance asserting that the University had misapplied the state's layoff policy and discriminated against her on the basis of her age. The grievance advanced to hearing and on October 13, 2004, the hearing officer found that VCU had misapplied the layoff policy by targeting the grievant's position first and then restructuring the work units to facilitate her layoff.<sup>1</sup> He concluded that the University's actions constituted a "gaming of the system."<sup>2</sup> Accordingly, the hearing officer ordered the grievant's reinstatement and awarded attorney's fees.

DISCUSSION

VCU asserts that the hearing office exceeded the scope of his authority when he ordered the award of attorney's fees. Specifically, the University asserts that a hearing officer cannot award attorney's fees to an employee who prevails in a layoff case, because the statute authorizing fees is limited to "discharge" cases.

The grievance statutes provide that "[i]n grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust."<sup>3</sup> For an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order

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<sup>1</sup> October 21, 2004, Hearing Decision.

<sup>2</sup> November 2, 2004, Reconsideration Decision, p. 3.

<sup>3</sup> Va. Code § 2.2-3005.1(A).

that the agency reinstate the employee to her former (or an objectively similar) position.<sup>4</sup> Because the term “discharge” is not defined by the grievance statutes, the University urges that the plain and ordinary meaning of the term “discharge” is controlling. According to VCU, the plain and ordinary meaning of “discharge” is to “fire” or “dismiss from employment.” The University asserts that because the grievant was “laid off,” as opposed to “being fired,” she was not “discharged” and therefore not entitled to fees.

In the absence of controlling court precedent to the contrary, we do not interpret the statutory term “discharge” so narrowly as to exclude all layoff situations. Indeed, “discharge” may be viewed simply as an involuntary separation from employment, including involuntary layoffs.<sup>5</sup> Further, based on the particular facts of this case, this Department concludes that the award of attorney’s fees was appropriate. Here, the hearing officer essentially found that the grievant was ‘fired’ or ‘discharged,’ as she was not laid off in accordance with state layoff policy, but rather terminated through a manipulation of that policy. The hearing officer concluded that the grievant was deliberately targeted for separation from service, finding that:

The Layoff Policy specifies that an agency must *first* identify the business functions to be eliminated and the work unit to be affected, and after this process, select employees within the identified work unit for layoff. In this case, the agency reversed the procedure by first identifying the employee and then restructuring the work units to facilitate the decision to layoff grievant.<sup>6</sup>

He further found that VCU made no attempt to determine whether alternate job placement options existed for the grievant. In sum, the hearing officer found that the University had violated state layoff policy by manipulating the system to reach a particular result -- the grievant’s involuntary separation from employment -- an action that is, in essence, a discharge. We therefore conclude that under the facts of this case, the hearing officer did not abuse his authority under the grievance procedure by ordering the grievant’s reinstatement<sup>7</sup> or by awarding attorney’s fees.

#### APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer’s original decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>8</sup> Within 30 calendar days of a final hearing

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<sup>4</sup> *Rules for Conducting Grievance Hearings* VI(D).

<sup>5</sup> See Va. Code § 40.1-27, which categorizes former employees as either “discharged” or as having “voluntarily left” their employment, the implication being that a discharged employee is one who did not voluntarily leave, for whatever reason.

<sup>6</sup> October 21, 2004 Hearing Decision, p. 8 (emphasis in original).

<sup>7</sup> See *Rules for Conducting Grievance Hearings* VI(C)(1) (where written policy places specific limitations on removing an employee from his or her position, a hearing officer may order reinstatement when these limitations were not observed.)

<sup>8</sup> *Grievance Procedure Manual*, § 7.2(d).

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decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.<sup>9</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>10</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>11</sup>

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Claudia T. Farr  
Director

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<sup>9</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

<sup>10</sup> Id. See also *Va. Dept. of State Police vs. Barton*, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

<sup>11</sup> Va. Code § 2.2-1001 (5).