Issue: Group II Written Notice with suspension (failure to follow established written policy); Hearing Date: 08/09/06; Decision Issued: 08/10/06; Agency: Dept. of Business Assistance; AHO: David J. Latham, Esq.; Case No. 8392; Outcome: Grievant received partial relief; **Administrative Review: HO Reconsideration Request received 08/22/06; Reconsideration Decision issued 08/22/06; Outcome: Original decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8392

Hearing Date: August 9, 2006
Decision Issued: August 10, 2006

APPEARANCES

Grievant
Four witnesses for Grievant
Human Resource Manager
Four 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 II Written Notice issued for failure to comply with established written policy.[1] As part of the disciplinary action, grievant was suspended for ten days. 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 Virginia Department of Business Assistance (VDBA) (Hereinafter referred to as "agency") has employed grievant for ten years. He is a business services manager. He works in the agency's business information center (call center) answering telephone and e-mail inquiries from the public and businesses. The purpose of the call center is to provide information on business formation and how to increase the success of businesses.

The Commonwealth's policy on Internet usage allows for "incidental and occasional" personal use (not job-related) of the Commonwealth's Internet access.[3] However, personal use is prohibited if it: 1) interferes with the user's or other employee's work productivity or performance, 2) adversely affects efficient operation of the computer system, or 3) violates any provision of the policy, any supplemental agency policy or any other policy, regulation, law or guideline. Users employing state computers for personal use must present their communications in such a way as to be clear that the communication is personal and not a communication of the agency or Commonwealth. This agency has not promulgated any supplemental policy regarding Internet usage.

In 2001, grievant became interested in exchanging his views on the Internet with other people about various political issues utilizing a weblog (usually shortened to blog)[4]; this activity is now popularly known as blogging. In January 2006 grievant became one of two principal contributors to a politically-oriented weblog. The home page for the weblog contains a link to a page on which grievant provides brief biographical information stating that he "works in economic development for the Commonwealth of Virginia." The page also includes what he characterizes as a disclaimer promising never to publish anything other than satire that he knows to be false. In some of his postings, grievant identifies himself as one who assists small businesses and mans a state hotline for such.[5] Grievant regularly blogs during working hours.[6] If someone visits the website and reads the commentary, he or she will not see grievant's

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[1] Agency Exhibit 1. Group II Written Notice, issued May 9, 2006.
[2] Agency Exhibit S. Grievance Form A, filed January 4, 2006.
[3] Agency Exhibit 1. Department of Human Resource Management Policy 1.75, *Use of Internet and Electronic Communication Systems*, August 1, 2001.
[4] A **weblog**, which is usually shortened to **blog**, is a type of website where entries are made (such as in a journal or diary), displayed in a reverse chronological order. Blogs often provide commentary or news on a particular subject, such as food, politics, or local news; some function as more personal online diaries. A typical blog combines text, images, and links to other blogs, web pages, and other media related to its topic. Most blogs are primarily textual although many focus on photograph (photoblog), videos (vlog), or audio (podcasting). The word *blog* can also be used as a verb, meaning *to maintain or add content to a blog. See*: en.wikipedia.org.
[5] Agency Exhibit G. Blog, 8:16 p.m., May 9, 2006.
[6] *Id.*

disclaimer unless they click on the link to his biographical page. Many of the regular readers of this weblog know grievant and know that he works for VDBA. The regular readers include several Delegates to the General Assembly, other state officials, as well as clients and allies of VDBA.

In March 2006, grievant posted several positive and complimentary comments about the agency's new director on the weblog. Grievant's supervisor learned about the postings and reviewed the weblog for himself. The supervisor then met with grievant and counseled him regarding his use of the weblog, warning him that grievant would have to be careful not to "cross the line" when he expressed his opinions on the weblog. The supervisor did not give grievant any specific guidelines but told him to be careful about the frequency and content of his commentary on the weblog. He also advised grievant to use good judgment and make sure that his comments did not become a distraction.

On Friday, April 28, 2006, at 12:21 p.m., the primary contributor to the weblog posted a regular feature of the site – the Weekend Caption Contest – filed under Dumb Stuff. The contest featured a photograph of a male playing a guitar and a female wearing a midriff-baring top; the photograph had originally been published in a city newspaper with the caption, "[name] and [name] perform their winning jingle at the Economic Development Corp.'s monthly meeting …"[7] The two people in the photograph were winners of a community pride campaign. Readers of the weblog were invited to provide their own captions. Between 12:51 p.m. and 3:40 p.m., grievant submitted separate 34 entries for the caption contest at 31 different times. On this particular day, another employee was assigned to answer telephone calls; grievant was assigned to answer inquiries that came in via e-mail and a chat site. The volume of inquiries that day was average or slightly below average. He submitted an additional 28 entries on Friday evening and on Saturday. Grievant's suggested captions included, *inter alia*, the following entries:

- "[female's name] top was symbolic of the decline in [the region's name] fabric industry."
- "[name of city]: Easy to Leave."
- "Only one thing we done wrong
  Stayed in [name of city] a day too long.
- "[name of county] wants me,
  Lord, I can't go back there."
- "Fresh out of prison with a new name and a new girlfriend, [name of male] just wanted to give back to the community."

On the following Tuesday, May 2, 2006, a media reporter telephoned grievant because of reports that officials of the named city and county in which the city is located were upset by some of grievant's captions. Some government officials perceived the comments as critical of the community, especially given

[7] Agency Exhibit A. Weblog *Weekly Caption Contest* photograph and log comments, April 28 – 30, 2006.

that grievant works in the economic development arena. Grievant promptly wrote and posted on the weblog an apology acknowledging that he should have "recused" himself from this particular caption contest because of the economic development connection of the photograph. Grievant then notified his supervisor of the reporter's telephone call and acknowledged that he may have crossed the "line" his supervisor had discussed in March.[8] Grievant also admitted that he had exercised bad judgment in submitting entries that mentioned the city, county, individuals and organizations.[9] Grievant acknowledged on another weblog that "…those who argue that I should not blog on state time are right. I was wrong and I have been wrong for a long time."[10]

Grievant was interviewed by a newspaper reporter who published an article about the weblog and grievant's comments on May 3, 2006.[11] On May 5, 2006, another news story appeared in the same city newspaper in which a state delegate urged the governor to remove grievant from state employment.[12] A State Senator was quoted as saying about grievant, "Shame on him." Other legislators and community leaders quoted in the news story were also displeased with grievant's comments; one said grievant's postings in the weblog "do not create positive attention toward our community." Another article about the incident was published by the Associated Press four days later.[13] On the same day, the story was published in the *Richmond Times-Dispatch*. Over the next several days, grievant's weblog comments continued to be the subject of extensive media coverage and editorials.[14]

During this two-week period, the agency head, the Marketing Director, and the Director of Administration all had to answer several telephone calls from the Governor's office, state and local officials, and media representatives – all relating to the controversy generated by grievant's weblog comments. Grievant's supervisor and the agency director had to expend time reassuring callers and agency allies that grievant's comments were personal and did not reflect the agency's position. They also made a trip to the area to speak with community leaders to reassure them of the agency's commitment to do as much as possible to facilitate economic development in the area. In addition, there was a significant amount of talk among agency employees about the situation as well as speculation about grievant's fate.

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

[8] Agency Exhibit B. E-mail from grievant to supervisor, May 2, 2006.
[9] Agency Exhibit B. Grievant's weblog apology, May 2, 2006.
[10] Agency Exhibit G. Blog, 8:57 p.m., May 9, 2006.
[11] Agency Exhibit D. Newspaper article, May 3, 2006.
[12] Agency Exhibit E. Newspaper article, May 5, 2006.
[13] Agency Exhibit G. Newspaper article, May 9, 2006.
[14] Agency Exhibits H, I, J, K.

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, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[15]

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 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 II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.[16] Failure to comply with established written policy is a Group II offense. The offenses listed in the Standards of Conduct are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head undermines the effectiveness of the agency's activities or the employee's performance should be treated consistent with the provisions of the Standards of Conduct.[17]

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[15] § 5.8, Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, Effective August 30, 2004.

[16] Agency Exhibit 1. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

[17] Section V.A, *Id.*

Excessive personal use of the Internet

As noted in the Findings of Fact, state policy permits incidental and occasional personal use of the Internet. When grievant's supervisor learned in March 2006 about grievant's blogging, he did not tell grievant he couldn't blog. He counseled him only that he should limit the amount of blogging and be careful about what he said. Making limited entries on a weblog, assuming such entries are only incidental and occasional, is therefore within the guideline established in the policy. However, the policy does not quantify what constitutes either incidental use or occasional use. The Commonwealth's policy permits each state agency to establish its own guideline or policy on this subject.[18] Some state agencies have established such guidelines; VDBA has not. In the absence of specific guidelines, managers must be guided by common sense, good judgment, and the general guidelines cited in the state policy.

The agency charged grievant with excessive personal Internet access. The agency has not shown that grievant's blogging affected either his or any other employee's productivity or work performance, that it adversely affected the efficient use of the computer system, or that he violated any other policy, regulation, law or guideline. Therefore, grievant did not violate the state policy's general guidelines. The agency's charge is based on the fact that during the afternoon of April 28, 2006, grievant made 34 postings to a weblog in less than three hours. It is undisputed that grievant's posting activity was personal in nature. However, the agency has not shown how much time grievant expended in actually posting his comments. All but four of grievant's postings that afternoon were one-line quips; four were slightly longer. As an experienced keyboarder, it is assumed that grievant spent relatively little time actually keying in the captions. However, it is probable that grievant spent at least a total of 45 minutes to an hour on the weblog.

The agency did not obtain from the Virginia Information Technology Agency (VITA) a detailed log of grievant's computer activity on April 28, 2006. It also did not obtain detailed logs of other employees' Internet activity. Therefore, the agency failed to evaluate in detail how much time grievant expended or how his personal use compared with the personal use of other agency employees. Instead, grievant's supervisor made a subjective judgment that grievant's personal Internet use was excessive "compared with what he felt was reasonable." The supervisor may or may not be correct in his assessment. However, this supervisor's subjective judgment may be quite different from the judgment of another supervisor. Discipline meted out based on varying

[18] An agency guideline must be consistent with the state policy. DHRM determines whether agency policies are consistent with state policy.

subjective judgments opens the door to inequitable results; one employee may be disciplined while another who has committed a more egregious offense goes unpunished. For these reasons, the agency has not borne the burden of proof to show that grievant's personal use of the Internet was excessive.

Inflammatory comments

The agency has demonstrated, by a preponderance of evidence, that grievant's comments were inappropriate and inflammatory. The reaction of community officials, and local and state elected representatives was predominantly unfavorable. Their reactions generated a flurry of media attention that lasted for nearly two weeks. The resultant publicity was unfavorable for the agency. If the offensive comments had been made under a *nom de plume* or by an average citizen, they probably would have gone unnoticed. In this case, however, grievant had identified himself as a state employee involved in economic development both on the biographical page of the web site and in various entries on the site. Moreover, many of the regular readers of this weblog are government and community leaders with an interest in economic development and who know grievant well. As one of the two principal contributors to the weblog, grievant stood out like a lightning rod; unfortunately, his comments attracted some lightning.

It is commendable that grievant immediately apologized when he learned that some readers had taken offense to his comments, and that in subsequent days he issued more apologies. However, by that time the damage had been done and the agency was forced to embark on a damage control campaign. It is also noteworthy that grievant had posted a disclaimer stating that the views he expressed were his own personal views. But, as grievant acknowledged, not everyone who accesses the weblog bothers to read his disclaimer, and those who read it in the past may have forgotten what it said. Thus, contrary to grievant's belief, the posting of his disclaimer was not sufficient to insulate him from violation of the policy given the unique circumstances of this case.[19]

Since the agency has not proven a failure to comply with established written policy, the remaining issue is to determine the appropriate *Standards of Conduct* Group classification for posting inflammatory comments that resulted in an undermining of the effectiveness of agency activities. When an offense is not specifically included among the examples set forth in the Standards of Conduct policy, it is to be treated in a manner consistent with the provisions of Section V. Generally, Group II offenses are those that involve an employee *knowingly and deliberately* disregarding applicable rules and procedures. In this case, there has not been any showing that grievant willfully set out to write comments he knew would be offensive. Rather, he wrote them in a somewhat cavalier fashion

[19] See Agency Exhibit 1. DHRM Policy 1.75. Grievant believes that his disclaimer complies with the Note under the Personal Use section which advises Internet users that they must "present their communications in such a way as to be clear that the communications is personal and not a communication of the agency or the Commonwealth."

without giving sufficient consideration to how others might react. In his *mea culpa*, grievant has correctly categorized his actions as a "bad misjudgment." Accordingly, the offense in this case appears to be most appropriately considered a Group I offense because it is essentially unsatisfactory work performance.

Due Process

Grievant asserts that the agency did not afford him due process before he was disciplined and suspended. The *Standards of Conduct* policy requires that before an employee is suspended, the employee must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.[20] (Usually employees are given a minimum of one day to respond but can be given up to one week or more depending upon the complexity of the charges). The agency failed to give grievant the required advance notice or a reasonable opportunity to respond.

Although the agency did not comply with the policy's pre-disciplinary due process requirements, grievant has subsequently received full due process because he was given an evidentiary hearing before an independent hearing officer at which all due process rights were available to grievant. Accordingly, the procedural defect in the agency's disciplinary action has been cured by the hearing before this hearing officer.

Grievant also suggests that the disciplinary action was defective because the agency head did not state *in writing* that she had made a judgment that grievant's offense undermined the effectiveness of agency activities. The Standards of Conduct policy does not require the agency head to make such a statement in writing. It is sufficient that the agency head make the *judgment* without putting it in writing. In this case, the agency head made such a judgment and delegated to subordinates the task of putting that judgment in writing in the Written Notice issued to grievant.

Mitigation

The normal disciplinary action for a Group I offense is a Written Notice. 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 has both long state service and an otherwise satisfactory work performance record with no previous disciplinary action, both of which are mitigating circumstances.

[20] Agency Exhibit 1. Section VII.E.2, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

Counterbalancing the mitigating circumstances are circumstances that tend to aggravate the offense. First, grievant had been counseled less than two months prior to this incident to limit the quantity of his blogging and assure that the content of his weblog entries was appropriate. Second, even though one cannot definitively conclude that grievant's personal Internet usage was excessive, the frequency and extent of his blogging made it *appear* that he was using the Internet excessively. One of the bloggers who was critical of grievant specifically mentioned that grievant was blogging for "hours every week" and doing so on state time. While that may or may not be true, the fact remains that at least some of the public perceive it to be so. In this case, that perception was damaging to the reputation of the agency. After carefully reviewing the circumstances of this case, it is concluded that there is no basis to apply mitigation and reduce the discipline below a Group I Written Notice.

DECISION

The disciplinary action of the agency is modified.

The Group II Written Notice is hereby REDUCED to a Group I Written Notice.

The agency is directed to reimburse grievant for the ten days of suspension and restore all benefits that were adversely affected by the suspension.

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:

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.[21] 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.[22] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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

[21] 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).

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

RECONSIDERATION DECISION OF HEARING OFFICER

In re:

Case No: 8392-R

Hearing Date:	August 9, 2006
Decision Issued:	August 10, 2006
Reconsideration Request Received:	August 22, 2006
Response to Reconsideration:	August 22, 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.[23]

OPINION

In its request for reconsideration, the agency asserts that the hearing decision's conclusion that the agency did not afford grievant procedural due process prior to the issuance of the disciplinary action was an incorrect legal conclusion. However, the agency does not cite any law, regulation, policy, procedure, or case law in support of this assertion.

[23] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

At the outset it must be noted that the agency includes in its request information not testified to during the hearing and information that contradicts the testimony of an agency witness at the hearing. A hearing officer must base his decision solely on the evidence presented *during* hearing when witnesses are under oath. A hearing officer may not consider evidence presented after the hearing has been closed, except in those cases where the evidence could not reasonably have been discovered prior to the hearing.[24] In this case, the agency attempts in its request to rehabilitate the testimony of its own witness after the fact. Viz., the witness testified under oath that he did not recall any pre-disciplinary due process meeting with the grievant. The agency argues that, subsequent to the hearing, its witness reflected further about the question and now remembers differently. Because this information was not presented during the hearing, the hearing officer is prohibited from giving it consideration in the reconsideration process.

In any case, the hearing officer did not conclude that such a meeting didn't take place. The conclusion is that, even if such a meeting occurred, it was insufficient to constitute procedural due process, as required by DHRM Policy 1.60. The evidence produced at hearing was sufficient to conclude that the agency did not comply with the due process requirements enunciated in DHRM Policy 1.60. Merely telling an employee that disciplinary action is forthcoming does not comply with the requirement to give the employee: 1) notice of the specific charge against him, 2) an explanation of the evidence supporting that charge, and 3) a reasonable opportunity for the employee to formulate a response.[25]

The agency also expresses concern that this conclusion could have contributed to the decision to modify the disciplinary action. In fact, the lack of pre-disciplinary procedural due process did <u>not</u> affect the decision in any way. The rationale for the decision is explained solely on pages 6 & 7 of the decision. The evidence did not support a finding of deliberate failure to comply with written policy. Grievant's offense constituted the Group I offense of unsatisfactory work performance – nothing more and nothing less.

<u>DECISION</u>

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

[24] When a party proffers evidence that could not have been discovered prior to hearing, the hearing officer will rule whether or not to reopen the hearing in order to permit presentation of the evidence and challenges by the opposing party.

[25] The practice of almost all state agencies is to give the employee a letter or memorandum detailing the charge and an explanation of the evidence, and one or more days (depending upon complexity of the charge) to prepare a response. Only after the agency receives and evaluates the employee's response is the final decision regarding disciplinary action made.

considered the agency's argument and concludes that there is no basis to change the Decision issued on August 10, 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).