



JANET L. LAWSON  
DIRECTOR

**COMMONWEALTH OF VIRGINIA**  
*Department Of Human Resource Management*  
*Office of Employment Dispute Resolution*

James Monroe Building  
101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, Virginia 23219

Tel: (804) 225-2131  
(TTY) 711

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Behavioral Health and Developmental Services  
Ruling Number 2024-5599  
September 7, 2023

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 11935. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 11935, as found by the hearing officer, are as follows:<sup>1</sup>

The Department of Behavioral Health and Developmental Services [(the "agency")] employed Grievant as a Registered Nurse at one of its locations. Grievant had prior active disciplinary action consisting of a Group II Written Notice.

Grievant received training regarding Therapeutic Options of Virginia (TOVA) which informed him of how employees were to restrain patients who were not compliant and combative.

Grievant was working at the Facility on October 18, 2022. Grievant was returning from the cafeteria with lunch bags for patients. Grievant walked past Mr. 1 into the room to store the bags. Mr. 1 and the Patient were in the hallway. The Patient put up both hand and rushed towards Mr. 1 and pushed Mr. 1 backwards several feet into the room Grievant had entered. The Patient began fighting Mr. 1, trying to hurt Mr. 1. Grievant heard a loud bang sound behind him. When Grievant turned around, he observed the Patient lying on top of Mr. 1 and pounding Mr. 1 with closed fists across his face. Mr. 1 could not protect himself from the Patient's attack. Grievant called the Patient's name, but the Patient would not stop his attack.

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<sup>1</sup> Decision of Hearing Officer, Case No. 11935 ("Hearing Decision"), July 14, 2023, at 2-4 (citations omitted).

Grievant grabbed the Patient from behind and pulled the Patient off of Mr. 1. Grievant pulled the Patient into the hallway as the Patient held Mr. 1's glasses. Grievant was attempting a TOVA technique by positioning himself behind the Patient with one of his hands grasping his other arms to hold the Patient. Grievant dragged the Patient towards the seclusion room.

Grievant called out for help from other staff. Two female staff observed Grievant but did not provide any assistance to help him control the Patient.

Grievant's initial objective was to put the Patient in the seclusion room for the safety of the Patient, staff, and other patients. The seclusion room was locked, and staff were not able to open it immediately.

As Grievant tried to move the Patient to the seclusion room, the Patient was kicking and screaming and threatening to harm staff.

The Patient continued to kick, spit, and try to bite Grievant.

As Grievant attempted to lift and move the Patient towards the seclusion room, the Patient used his right leg to kick at a female staff. The Patient pushed back against Grievant and then moved forward. The Patient fell down facing the floor. Grievant's body moved with the Patient's body and Grievant was on top of the Patient. One female staff positioned herself towards the Patient's right shoulder.

The Patient turned to face upwards and kicked Grievant and the female staff off him.

Grievant backed away and looked at the Patient. The Patient kicked at Grievant and one of his shoes fell off and to his left. The Patient moved to get his shoe. Grievant then moved behind the Patient who was kneeling on the floor. Grievant attempted a TOVA technique to wrap his arms around the Patient's upper body. The Patient resisted and then twisted his body moving to his right. The Patient moved so he was flat on the floor. Grievant's body followed the Patient's body and Grievant was on top of the Patient. Mr. 1 moved towards the Patient's left leg to grasp it. One female staff picked up something off the floor and walked down the hallway away from Grievant.

An employee brought an Emergency Restraint Chair (ERC) to the hallway.

The weight of Grievant's body remained on his knees which allowed the Patient to turn over facing upwards. Grievant continued to hold the Patient's wrists to try to stop him from hitting. Grievant then moved the Patient's left wrist across his neck and face to pin it on the Patient's right side. Grievant move the Patient's right wrist across his neck and face to pin it on the Patient's left side. This meant the Patient's arms were crossed near his neck, chin and jaw. Grievant moved off of the Patient as other staff held the Patient down.

One employee grabbed the Patient's right ankle. Grievant grabbed the Patient's left ankle. Two other employees held the Patient's wrists while the Patient was facing upwards and struggling.

Grievant and the three other employees lifted the Patient up and moved him towards the ERC. The Patient did not want to be placed in the ERC and he kicked while Grievant was holding his leg. Grievant held the Patient's ankle and then leg as the group tried to position the Patient over the ERC and put him in the ERC. Eventually, the Patient was secured in the ERC and Grievant's involvement in the matter ended.

Several of Grievant's attempts to restrain the Patient did not consist of TOVA techniques. For example, Grievant did not use TOVA techniques when he pulled the Patient across the floor, got on top of the Patient<sup>2</sup>, crossed the Patient's arms at the chin or jaw<sup>3</sup>, grabbed the Patient's ankle, lifted the Patient by the leg to put the Patient in the ERC, and put the Patient in the ERC against his will.

The Agency took disciplinary action against four other employees involved in the incident.

On January 13, 2023, the agency issued to the grievant a Group III Written Notice with termination, citing client abuse.<sup>2</sup> The grievant timely grieved the disciplinary action, and a hearing was held on June 8, 2023.<sup>3</sup> In a decision dated July 14, 2023, the hearing officer found that the agency had "presented sufficient evidence to support the issuance of a Group III Written Notice."<sup>4</sup> Although the hearing officer noted that he did not agree with the agency's disciplinary action, he declined to mitigate the grievant's termination because it did "not exceed the limits of reasonableness."<sup>5</sup>

The grievant now appeals the decision to EDR.

## DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure . . ."<sup>6</sup> If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.<sup>7</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>8</sup> The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

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<sup>2</sup> Agency Exs. at 7-9; *see* Hearing Decision at 1.

<sup>3</sup> *See* Hearing Decision at 1.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>7</sup> *See Grievance Procedure Manual* § 6.4(3).

<sup>8</sup> Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

In his request for administrative review, the grievant challenges the hearing decision on three grounds. First, the grievant contends that the hearing officer failed to consider testimony presented by the grievant's witnesses. Second, the grievant maintains that, contrary to the hearing officer's findings, his conduct did not constitute abuse under agency policies. Finally, the grievant argues that the hearing officer should have mitigated the agency's disciplinary action.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>9</sup> and to determine the grievance based "on the material issues and the grounds in the record for those findings."<sup>10</sup> Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.<sup>11</sup> Thus, in disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.<sup>12</sup> Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

### *Hearing Officer's Consideration of Evidence*

#### Witnesses

In his request, the grievant asserts that the agency failed to produce all of his requested witnesses and that the hearing "decision did not take into consideration the testimonies of" the witness who did appear nor "even acknowledge them. On June 5, 2023, three days before the hearing, the hearing officer became aware of the grievant's request for the hearing officer to issue witness orders for eight agency employees.<sup>13</sup> On June 6, 2023, the hearing officer issued eight witness orders at the grievant's request. In response, the agency advised the hearing officer and the grievant that "many of these individuals work evening shift[;] based on the limited notice the agency could not arrange for them to be placed on dayshift for the hearing." Nevertheless, the agency distributed the orders and notified the recipients that their participation would be compensated as work time.

At the hearing, the agency contacted each of the grievant's requested witnesses on the record. Ultimately, five offered testimony, including Mr. 1 and four other staff members who were present for the incident with the Patient. As to the three witnesses who did not testify, it is not clear from the grievant's request for administrative review or from the hearing record in general how their unavailability affected the grievant's defense. Moreover, there is no indication that the agency failed to make reasonable efforts to make its employees available for the hearing, given the grievant's late request for witness orders.

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<sup>9</sup> Va. Code § 2.2-3005.1(C).

<sup>10</sup> *Grievance Procedure Manual* § 5.9.

<sup>11</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>12</sup> *Grievance Procedure Manual* § 5.8.

<sup>13</sup> The grievant's email was sent in the overnight hours of Saturday, June 3, 2023. The hearing officer did not receive the information until the following Monday, June 5, 2023.

As to the five witnesses who did testify for the grievant, upon review of their respective testimonies and the hearing decision, EDR finds nothing to indicate that the hearing officer disregarded any of their testimony in his analysis. We note that there is no requirement under the grievance procedure that the hearing decision specifically address each aspect of the parties' evidence presented at a hearing. Thus, mere silence in the decision as to particular testimony or other evidence does not necessarily constitute a basis for remand. Here, EDR cannot find that there is evidence the hearing officer failed to consider on any disputed issue of material fact, and the grievant identifies no particular point of testimony that was not reflected in the hearing officer's analysis.

To the extent that the hearing decision includes findings contrary to testimony by the grievant's witnesses, conclusions as to the credibility of witnesses are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.

#### "Abuse" Under Agency Policy

The grievant further challenges the hearing officer's conclusion that the grievant's conduct during the incident with the Patient constituted abuse under agency policy. The grievant argues that the agency did not prove his "intent to abuse," maintaining that his intent was instead to keep everyone present, including the Patient, safe.

In his decision, the hearing officer found that, in the grievant's interaction with the Patient, he "used force on the Patient that was not taught as part of TOVA" and "restrained the Patient using methods not approved under TOVA and that could have injured the Patient."<sup>14</sup> Examples included when the grievant "pulled the Patient across the floor, got on top of the Patient, crossed the Patient's arms at the chin or jaw, grabbed the Patient's ankle, lifted the Patient by the leg to put the Patient in the ERC, and put the Patient in the ERC against his will."<sup>15</sup> The hearing officer found that at least some of these actions were specifically prohibited by agency policy.<sup>16</sup> Ultimately, he concluded that the grievant's conduct met the definition of client abuse articulated in the agency's Departmental Instruction 201, which defines the offense as "any act or failure to act by an employee or other person responsible for the care of an individual in a[n] [agency] facility that was performed or was failed to be performed knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person receiving care or treatment . . . ."<sup>17</sup>

Upon a thorough review of the record, EDR finds evidence that supports the hearing officer's determinations. As to the grievant's actual conduct, the agency's video evidence supports the hearing officer's description of the grievant's specific actions toward the Patient.<sup>18</sup> According

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<sup>14</sup> Hearing Decision at 5.

<sup>15</sup> Hearing Decision at 4 (footnotes omitted).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 4; Agency Exs. at 24.

<sup>18</sup> Agency Ex. 8.

to the facility's policy regarding patient restraint, "[t]he use of the least restrictive method for the individual . . . must be utilized for the shortest period necessary to assure the safety of the individual and others."<sup>19</sup> More specifically, "[u]nder no circumstances may staff lie on, straddle, or apply pressure to an individual's chest/trunk."<sup>20</sup> Also, "[u]nder no circumstances may staff . . . place something that could obstruct breathing over an individual's nose or mouth."<sup>21</sup>

In addition, agency witnesses testified that these specific actions were not consistent with TOVA requirements.<sup>22</sup> Specific limitations on how agency staff execute physical restraints are also included in the TOVA Manual.<sup>23</sup> The Manual advises that staff facing a physically aggressive patient should "focus [their] energies on . . . personal protection skills" because the most serious injuries to individuals are caused by restraint situations rather than attacks.<sup>24</sup> For example, the Manual cites "positional asphyxia" while face-down as a significant mortality risk in restraint situations and, therefore, "weight applied to a person's back . . . is specifically forbidden."<sup>25</sup> In restraint situations, standing restraints are preferred, then seated restraints, and then supine restraints.<sup>26</sup> When an individual must be restrained in a supine position to prevent harm, the individual should be "lying on [their] back, face up."<sup>27</sup> During such a restraint, it is "inappropriate to put pressure on the person's shoulder to hold him to the floor."<sup>28</sup> Also, staff "may secure the individual's legs above the knees by lying across the thighs while resting his body weight on his own elbow. The staff's body weight is NOT on the individual's legs."<sup>29</sup>

In sum, there is evidence to support the hearing officer's finding that the grievant's restraint methods during the incident in question might have caused physical or psychological harm to the Patient, in violation of agency policy. We note that, under the agency's Departmental Instruction 201, a finding of client abuse or neglect is not necessarily conditional on the intent of the accused employee; indeed, the hearing officer specifically noted that it was "not necessary for the Agency to show that Grievant intended to abuse a client – the Agency must only show that Grievant intended to take the action that caused the abuse."<sup>30</sup> Therefore, although the grievant argues that the agency failed to prove his intent to abuse the Patient, no such proof was required to demonstrate that the grievant's conduct constitute "abuse" as it is defined by agency policy. Accordingly, we decline to disturb the hearing decision on these grounds.

### *Mitigation*

Finally, the grievant contends that the hearing officer should have exercised his authority to mitigate the agency's disciplinary action, pointing out that other employees who violated TOVA

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<sup>19</sup> Agency Exs. at 40. The policy also provides that restraint "shall never be used . . . in a manner[] that causes undue physical discomfort or harm to the individual." *Id.* at 41.

<sup>20</sup> *Id.* at 40.

<sup>21</sup> *Id.*

<sup>22</sup> Hearing Recording at 24:10-26:25, 1:14:20-1:14:30, 1:17:25-1:17:50 (investigator's testimony); *id.* at 1:43:00-1:43:45, 1:46:40-2:04:15 (TOVA Training Director's testimony).

<sup>23</sup> See Agency Ex. 4(d).

<sup>24</sup> Agency Exs. at 91.

<sup>25</sup> *Id.* at 92; *see id.* at 93.

<sup>26</sup> *Id.* at 97-100.

<sup>27</sup> *Id.* at 100.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Hearing Decision at 5.

requirements during the incident were not terminated. The grievant also cites the hearing officer's stated belief that "the Agency should have mitigated the disciplinary action" for several reasons, arguing that the hearing officer should have ordered mitigation consistent with his reasoning in that regard.

By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."<sup>31</sup> The *Rules for Conducting Grievance Hearings* ("Rules") provide that "a hearing officer is not a 'super-personnel officer'"; therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."<sup>32</sup> More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>33</sup>

Because reasonable persons may disagree over whether and to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is high.<sup>34</sup> Where the hearing officer does not sustain all of the agency's charges and finds that mitigation is warranted, they "may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."<sup>35</sup> EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion<sup>36</sup> and will reverse the determination only for clear error.

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<sup>31</sup> Va. Code § 2.2-3005(C)(6).

<sup>32</sup> *Rules for Conducting Grievance Hearings* § VI(A).

<sup>33</sup> *Id.* § VI(B).

<sup>34</sup> The federal Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can serve as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein). The Board's similar standard prohibits interference with management's judgment unless, under the particular facts, the discipline imposed is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." *Parker v. U.S. Postal Serv.*, 819 F.2d 1113, 1116 (Fed. Cir. 1987) (citations and internal quotation marks omitted). On the other hand, the Board may mitigate discipline where "the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness." *Batten v. U.S. Postal Serv.*, 101 M.S.P.R. 222, 227 (M.S.P.B. 2006), *aff'd*, 208 Fed. App'x 868 (Fed. Cir. 2006).

<sup>35</sup> *Rules for Conducting Grievance Hearings* § VI(B)(1).

<sup>36</sup> "An abuse of discretion can occur in three principal ways: 'when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.'" *Graves v. Shoemaker*, 299 Va. 357, 361, 851 S.E.2d 65, 66-67 (2020) (quoting *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011)). The "abuse-of-discretion standard includes review to determine that the [exercise of] discretion was not guided by erroneous legal conclusions, because a court also abuses its discretion if it inaccurately ascertains [the] outermost limits of the range of choice available to it." *Lambert v. Sea Oats Condo. Ass'n*, 293 Va. 245, 253, 798 S.E.2d 177, 182 (2017) (internal quotation omitted) (alterations in original); *see also United States v. Jenkins*, 22 F.4th 162, 167 (4th Cir. 2021) (A tribunal abuses its discretion "when it acts arbitrarily or irrationally, fails to consider . . . recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law.").

Having thoroughly reviewed the hearing record and the grievant's request for administrative review, EDR cannot find that the hearing officer clearly erred in his consideration of potential mitigating circumstances. In his decision, the hearing officer noted that he disagreed with the agency's disciplinary action for the following reasons:

First, Grievant was the primary employee taking action to prevent harm to others. If he had not intervened, the damage to Mr. 1 could have been extensive. Other female staff were near him but did not lend assistance. Second, Grievant did not intend to harm the Patient. Third, Grievant did not injure the Patient. Fourth, it is not possible to perform TOVA techniques at every moment when a patient is fighting staff. Fifth, Grievant was on top of the Patient only because the Patient moved downward and Grievant moved with the Patient because he retained his grasp of the Patient. Grievant attempted to keep his weight on his knees and not the Patient.<sup>37</sup>

Nevertheless, the hearing officer found that, despite his own disagreement with the agency's decision, the agency's disciplinary action did not exceed the bounds of reasonableness for a sustained finding of client abuse under agency policies.<sup>38</sup> Accordingly, the hearing officer concluded that he lacked authority to mitigate the disciplinary action.

EDR finds no error in the hearing officer's conclusions regarding mitigation. Arguably, when an agency presents sufficient evidence to support the issuance of one or more Group III Written Notices, dismissal is an inherently reasonable outcome.<sup>39</sup> Notwithstanding the hearing officer's own opinions about how best to balance the risks that arise in the course of the agency's mission, the agency retains the exclusive right to manage its affairs and operations.<sup>40</sup> As such, the hearing officer correctly concluded that he lacked authority to mitigate the agency's disciplinary action if it was within the bounds of reasonableness.

The grievant nevertheless objects to the hearing officer's mitigation determination on grounds that other staff charged with abusing the Patient during the same incident were not terminated, as the grievant was. However, evidence in the record supports the hearing officer's apparent conclusion that inconsistent discipline was not a factor sufficient to mitigate the agency's disciplinary action. At the hearing, a facility manager testified that, while management chose to mitigate discipline for other employees, the grievant's disciplinary action was not mitigated due to the severity of his departures from TOVA requirements (relative to other staff on the scene), as well as the grievant's prior active discipline for failure to follow policy, which other staff did not have.<sup>41</sup> Ultimately, the hearing officer determined that the agency's decision in this regard did not exceed the bounds of reasonableness, even if he personally disagreed with it. EDR perceives no error in the hearing officer's reasoning or his conclusion that the grievant failed to prove by a preponderance of the evidence that the grievant's removal exceeded the bounds of reasonableness. Accordingly, we decline to disturb the decision on these grounds.

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<sup>37</sup> Hearing Decision at 5.

<sup>38</sup> *Id.* at 6.

<sup>39</sup> Comparable case law from the Merit Systems Protection Board provides that "whether an imposed penalty is appropriate for the sustained charge(s) [is a] relevant consideration[] but not outcome determinative . . ." *Lewis v. Dep't of Veterans Affairs*, 113 M.S.P.R. 657, 664 n.4 (2010).

<sup>40</sup> *Rules for Conducting Grievance Hearings* § VI(A); see Va. Code § 2.2-3004(B).

<sup>41</sup> Hearing Recording at 3:20:30-3:21:15 (Chief Operating Officer's testimony); see Agency Exs. at 135.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>42</sup> Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.<sup>43</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>44</sup>

*Christopher M. Grab*  
Director  
Office of Employment Dispute Resolution

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<sup>42</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>43</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>44</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).