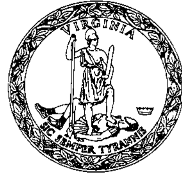
Issue: Administrative Review of Hearing Officer's Decision in Case No. 10879; Ruling Date: January 26, 2017; Ruling No. 2017-4462; Agency: Virginia Commonwealth University; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution[1]

ADMINISTRATIVE REVIEW

In the matter of Virginia Commonwealth University
Ruling Number 2017-4462
January 26, 2017

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 10879. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10879, as found by the hearing officer, are as follows:[2]

> Virginia Commonwealth University employed Grievant as a Student Employee Personnel Coordinator. Grievant had prior active disciplinary action. On April 11, 2016, Grievant received a Group II Written Notice for failure to follow policy and/or instructions.
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> The Agency hired Graduate Assistants and provided them with stipends and scholarships. The Supervisor asked Grievant to complete pay action forms for five graduate students. She began working on the assignment which required her to contact employees in another division including Ms. T. A question arose regarding how to interpret a policy governing how many hours the Graduate Assistants could work. On August 2, 2016, Grievant sent an email to the Manager with copies to other staff expressing her interpretation of the policy.
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> On August 2, 2016, the Manager sent Grievant an email instructing Grievant to meet with the Supervisor to discuss the policy. The Manager explained that the Supervisor already had had discussions with Ms. T about the policy.
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> The Supervisor wanted to work directly with Ms. T, an employee of the other unit, and for Grievant to discontinue her involvement. On or about August

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[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as "EDR" in this ruling to alleviate any confusion. EDR's role with regard to the grievance procedure remains the same post-merger.

[2] Decision of Hearing Officer, Case No. 10879 ("Hearing Decision"), December 5, 2016, at 2-4 (citations omitted).

2, 2016, the Supervisor instructed Grievant to discontinue contacting Ms. T in the other unit regarding processing the pay action forms under the policy. The Supervisor said she would resolve the issue directly with Ms. T.

On August 4, 2016, Grievant sent Ms. T an email stating:

> I just want to check in with you regarding the policy you and I discussed with respect to the work hours/requirement for G9 graduate assistants …. Where are we? … have we come up with a resolution?

On August 4, 2016, the Supervisor sent Grievant an email reaffirming their conversation several days earlier. The email stated:

> [Grievant] as we discussed in our one on one meeting yesterday, I am working directly with [Ms. T] on this. I advised you there was nothing further needed from you other than letting HR know to hold off on the PAF's you submitted at my request for the [graduate assistants]. Thank you for your concern and follow up but [names] and I am working on this.

In February 2016, the Supervisor assigned Grievant responsibility for drafting policies relating to onboarding. The Supervisor reminded Grievant of the assignment in April 2016. On April 15, 2016, Grievant submitted a draft of the document to the Supervisor but it was incomplete and did not show operations or procedures.

On June 1, 2016, the Supervisor sent Grievant an email as a "recap of our conversation in our one on one". The Supervisor wrote, "I asked you what you are currently working on. You advised me that you are working on the policies and the blackboard onboarding project. (Please send me what you have updated on blackboard and the HR policy by tomorrow, June 2, 2016.)"

On June 2, 2016 at 3:23 p.m., the Supervisor sent Grievant an email "to remind you of the deadlines that I gave you yesterday that haven't been met …. (Please send me what you have updated on blackboard and the HR policy by tomorrow, June 2, 2016.)" Grievant had already left the office by 3:23 p.m. Her shift was scheduled to end at 3:30 p.m.

On June 3, 2016, Grievant replied to the Supervisor, "Attached you will find the policy that I've been working on. As you will see, it is incomplete. I work on it here and there when I have time." Grievant did not submit a complete draft of the policies.

Grievant served as the unit's timekeeper. She was to review time cards, approve them, and send them to the payroll department. In July 2016, a student failed to clock out at the end of his shift. The time records for this student showed he worked 28 hours more than he actually worked. An employee in the payroll

department recognized the error after the student had been paid. The Agency had to recover the overpayment from the student.

On August 16, 2016, the grievant was issued two Group II Written Notices, both for failure to follow instructions and/or policy and terminated from employment with the University.[3] The grievant timely grieved the disciplinary actions[4] and a hearing was held on November 14, 2016.[5] In a decision dated December 5, 2016, the hearing officer found that the University had presented sufficient evidence to show that the grievant failed to follow the Supervisor's instruction not to contact Ms. T and upheld the issuance of the first Group II Written Notice.[6] The hearing officer further determined that evidence in the record regarding the grievant's failure to draft policies and her payroll processing error did not show that she had failed to follow instructions, but that those actions did constitute unsatisfactory work performance, and reduced the second Group II Written Notice to a Group I Written Notice.[7] The hearing officer upheld the grievant's termination based on her accumulation of two Group II Written Notices.[8] The grievant now appeals the hearing 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."[9] 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.[10]

Inconsistency with State and/or Agency Policy

In her request for administrative review, the grievant asserts that the hearing decision is inconsistent with state policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[11] The grievant has requested such a review. Accordingly, pursuant to the *Grievance Procedure Manual*, the grievant's policy claims will be addressed in a separate policy review.

Length of Hearing

The grievant asserts that she did not have sufficient time to present her case, as the hearing officer allowed the parties three hours each for the presentation of their evidence. The grievant argues that she "still had several witnesses to call" at the end of her "allotted time," but

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[3] Agency Exhibits 1, 2.
[4] Agency Exhibit 3; *see* Hearing Decision at 1.
[5] *See* Hearing Decision at 1.
[6] *Id.* at 4.
[7] *Id.* at 4-5.
[8] *Id.* at 5-6; *see* DHRM Policy 1.60, *Standards of Conduct*, § (B)(2)(b) (stating that the issuance of "[a] second active Group II Notice normally should result in termination").
[9] Va. Code §§ 2.2-1202.1(2), (3), (5).
[10] *See Grievance Procedure Manual* § 6.4(3).
[11] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

that those witnesses could not testify "due to the time restraint." The *Rules for Conducting Grievance Hearings* (the "*Rules*") do not expressly require the hearing officer to grant a party a particular amount of time to present evidence. Generally, hearings can be concluded in a day or less but there is no requirement that a hearing last an entire day.[12] However, a hearing should last as long as necessary for the parties to have an opportunity to fully and fairly present their evidence.[13]

Based upon a review of the record in this case, EDR cannot conclude that the hearing officer did not allow the grievant a fair opportunity to present her case or that she was unfairly prejudiced by the hearing officer's directive that she would have three hours to present her case. It does not appear that the grievant attempted to call any additional witnesses at the hearing that were prevented from testifying by the hearing officer. Furthermore, the grievant has not described in sufficient detail what additional evidence she wished to present. As such, EDR will not disturb the decision on this basis.

Alleged Bias

In addition, the grievant argues that the hearing officer conducted the hearing in a manner that gave the University "an unfair advantage" and that her case was not "adequately heard." More specifically, the grievant claims the hearing officer should have "insisted that [one witness] respond to [her] questions" instead of "respond[ing] with questions . . . and/or rambl[ing] on about" other matters, and that she "was instructed" to ask questions of witnesses when the University's advocate objected to the form of her statements. The *Rules* provide that a hearing officer is responsible for avoiding the appearance of bias and:

> [v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[14]

The applicable standard regarding EDR's requirements of a voluntary disqualification is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.[15] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[16] EDR finds the Court of Appeals' standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is

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[12] *Rules for Conducting Grievance Hearings* § III(B).
[13] *See id.*
[14] *Id.* § II. See also EDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if "a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself."
[15] While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.
[16] Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); *see* Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.").

whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.[17]

The moving party has the burden of proving the hearing officer's bias or prejudice.[18] In this case, the evidence presented by the grievant is insufficient to establish bias or any other basis for disqualification. Further, EDR's review of the hearing record did not indicate any bias or prejudice on the part of the hearing officer. Accordingly, EDR will not disturb the hearing decision on this basis.

University's Production of Documents

The grievant also claims in her request for administrative review that the University failed to produce records of disciplinary action issues to other employees. Prior to the hearing, the hearing officer ordered the University to provide the grievant with copies of "any disciplinary actions taken against the student" and the two supervisors of the student who were involved in the timekeeping error that resulted in an overpayment to the student. At the beginning of the hearing, the parties discussed this issue and the University's advocate stated that no documents responsive to these requests existed.[19] The grievant claims that the University failed to disclose the documents based on the Manager's testimony at the hearing that the action taken against these individuals had been documented. The grievant argues that the University's advocate and the Manager contradicted one another and that the disciplinary records were improperly withheld.

Having reviewed the evidence in the record and the parties' submissions, EDR finds that remanding the case is not warranted based on the grievant's allegation that the University failed to produce the requested disciplinary records in response to the hearing officer's order. There is no record evidence, and the grievant has presented nothing further, to indicate that any responsive documents existed and were in the University's possession at the time of the hearing.[20] While the Manager did testify that the actions taken in relation to the student and the managers had been documented, he later clarified that a "formal conversation" had taken place, but there was "no formal documentation" because they did not work in classified positions, and thus were subject to a different disciplinary process than the grievant.[21] According to the Manager, a performance issue of this nature could be noted in a non-classified employee's performance evaluation, but would not be addressed through a formal disciplinary process that would result in the creation of written documentation.[22]

Furthermore, even assuming the University had possession of and failed to provide the grievant with responsive disciplinary records, EDR does not find that the grievant suffered any material prejudice. At the hearing, the grievant had the opportunity to present her arguments regarding the allegedly inconsistent discipline, call witnesses and question them about their knowledge of those issues, and also cross-examine any witnesses called by the University about

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[17] *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.
[18] *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.
[19] Hearing Recording at 3:09-4:06.
[20] The agency was under no obligation to produce documents that were not in its possession or create documents that did not exist in response to the grievant's requests. Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.
[21] Hearing Recording at 4:07:07-4:08:56 (testimony of Manager).
[22] *Id.* at 4:11:44-4:12:35 (testimony of Manager).

those topics. The grievant exercised these rights and questioned the Manager about the treatment of the student and the managers, which resulted in the explanation discussed above. The hearing officer received and considered this evidence about the corrective actions taken with respect to the student and the managers. Considering the totality of the evidence presented by the grievant at the hearing, EDR has no reason to conclude that the grievant's ability to mount a defense to the charges against her was materially prejudiced as a result of the University's alleged failure to produce the disciplinary records, if they in fact existed. Accordingly, EDR declines to disturb the hearing decision on this basis.

Hearing Officer's Consideration of Evidence

The grievant essentially argues that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. Specifically the grievant asserts that (1) the hearing officer erred in upholding the Group II Written Notice for failing to follow instructions because there was not credible evidence in the record to support such a finding, and (2) the hearing officer improperly considered evidence about her work on drafting policies in finding that her work performance was unsatisfactory and constituted a Group I offense.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[23] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[24] 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.[25] 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.[26] 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 upon 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.

In the hearing decision, the hearing officer assessed the evidence and concluded that "the Supervisor instructed Grievant to refrain from further conversation with Ms. T about work hours policy" on August 2, 2016, that the grievant subsequently "sent Ms. T an email to continue her discussion with Ms. T about the interpretation" on August 4, 2016, and that this constituted a failure to follow instruction warranting the issuance of a Group II Written Notice.[27] In her request for administrative review, the grievant asserts that she was not instructed to cease communication with Ms. T and that the "conflicting testimonies by the Agency's witnesses" do not support the hearing officer's findings.

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[23] Va. Code § 2.2-3005.1(C).
[24] *Grievance Procedure Manual* § 5.9.
[25] *Rules for Conducting Grievance Hearings* § VI(B).
[26] *Grievance Procedure Manual* § 5.8.
[27] Hearing Decision at 4.

Having reviewed the hearing record, EDR finds that there is evidence in the record to support the hearing officer's conclusions about the instruction given to the grievant and the grievant's failure to comply with that instruction. For example, the Supervisor testified that she verbally directed the grievant not to communicate with Ms. T about the issue.[28] The University presented two emails sent to the grievant by the Manager and the Supervisor expressing the Supervisor's stated intention to address the issue going forward.[29] The hearing officer considered the grievant's argument that she had not been directed to stop communicating with Ms. T and found that the University had "presented sufficient evidence to show the Supervisor's instruction for Grievant to discontinue addressing the issue."[30] Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts 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. EDR finds no basis to disturb the hearing officer's conclusion that the evidence in the record was sufficient to demonstrate that the grievant engaged in behavior that justified the issuance of the Group II Written Notice.

With regard to the second Written Notice, the grievant appears to correctly argue that she was not charged with failing to complete drafts of policies on the second Group II Written Notice. In his decision, the hearing officer noted that the grievant had "failed to complete satisfactorily" the policy draft in reducing the Group II Written Notice to a Group I Written Notice for unsatisfactory work performance.[31] The Written Notice charged the grievant with "fail[ing] to follow timekeeping procedures and neglect[ing] to review [a] student's worktime before it was extracted by payroll," not failing to complete a draft of a policy.[32] While charges not set forth on the Written Notice cannot be deemed to have been qualified, and thus are not before a hearing officer,[33] EDR cannot conclude that any error in the hearing officer's consideration of the evidence impacted the outcome of this case. In assessing the evidence relating to the second Written Notice, the hearing officer found that the "Grievant served as the Agency's timekeeper" and failed to verify the time records of a student, which resulted in an overpayment.[34] Even if the grievant's responsibility for drafting policies is not considered in relation to the second Written Notice, there is evidence in the record to support the hearing officer's conclusion that the grievant's timekeeping error was an instance of unsatisfactory work performance that warranted the issuance of a Group I Written Notice.[35] Accordingly, EDR finds that remanding this case to the hearing officer for reconsideration on this issue would have no effect on the outcome.

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[28] Hearing Recording at 42:13-43:01 (testimony of Supervisor).
[29] Agency Exhibits 8B, 8C.
[30] Hearing Decision at 4.
[31] *Id.* at 5.
[32] Agency Exhibit 2.
[33] *Rules for Conducting Grievance Hearings* § VI(B) (citing O'Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002) (holding that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.")); *see*, *e.g.*, EDR Ruling No. 2011-2704; EDR Ruling No. 2007-1409.
[34] Hearing Decision at 5.
[35] *Id.*; *see*, *e.g.*, Hearing Recording at 3:05:43-3:07:01, 3:19:47-3:20:04, 3:33:18-3:34:23 (testimony of Supervisor); Agency Exhibit 7 at 1.

While the grievant may disagree with the hearing officer's decision, there is nothing to indicate that his consideration of the evidence was in any way unreasonable or not based on the actual evidence in the record. Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. Because the hearing officer's findings in this case are based upon 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. Accordingly, EDR declines to disturb the hearing decision on the bases raised by the grievant in her request for administrative review.

Mitigation

Fairly read, the grievant's request for administrative review alleges that the hearing officer erred in not mitigating the Group I Written Notice. Specifically, the grievant claims that "the student inputted the time incorrectly" and that two other managers should have corrected the mistake. The grievant asserts that the student and managers did not receive a formal Written Notice for their role in the incident. 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]."[36] The *Rules* provide that "a hearing officer is not a 'super-personnel officer'" and that "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."[37] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[38]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on the issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[39] EDR will review a hearing officer's mitigation determination for abuse of

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[36] Va. Code § 2.2-3005(C)(6).
[37] *Rules for Conducting Grievance Hearings* § VI(A).
[38] *Id.* § VI(B).
[39] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving 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).

discretion,[40] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include "whether the discipline is consistent with the agency's treatment of other similarly situated employees." As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[41] Upon conducting a review of the hearing record, it does not appear that the evidence in the record is sufficient to support a conclusion that the University's treatment of the grievant was different from other employees who may have been similarly situated to her. The Manager testified that the two managers were not employed in classified positions, and thus were subject to a different disciplinary procedure that did not include the issuance of a formal Written Notice for their role in the incident.[42] The Manager further explained that the matter was addressed with the managers and the student to the extent possible based on their status.[43]

Based on EDR's review of the hearing record, there is nothing to indicate that the hearing officer's mitigation analysis was in any way unreasonable or not based on the actual evidence in the record. Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer, and EDR cannot conclude that the hearing officer's decision not to mitigate the Group I Written Notice constitutes an abuse of discretion in this case. Accordingly, EDR will not disturb the hearing decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR declines to disturb the hearing officer's decision. 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.[44] Within thirty 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.[45] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[46]

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Office of Employment Dispute Resolution

[40] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts." *Id.*
[41] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).
[42] Hearing Recording at 4:07:07-4:08:56, 4:11:44-4:12:35 (testimony of Manager).
[43] *See id.*
[44] *Grievance Procedure Manual* § 7.2(d).
[45] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[46] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).