Issue: Administrative Review of Hearing Officer's Decision in Case No. 10797; Ruling Date: August 11, 2016; Ruling No. 2017-4402; Agency: Virginia Community College System; Outcome: AHO's decisions affirmed.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Virginia Community College System
Ruling Number 2017-4402
August 11, 2016

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 10797. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10797, as found by the hearing officer, are as follows:[1]

> The Virginia Community College System employs Grievant as a Human Resource Analyst at one of its facilities. Grievant is Exempt under the Fair Labor Standards Act and is not prevented from working overtime as needed. She began working for the College in 2012.
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> One of Grievant's responsibilities included credentialing. Grievant was responsible for researching a faculty member's credentials to verify that the faculty member had a sufficient number of study hours for a specific teaching discipline. A faculty member's credentialing could affect his or her rate of pay. Grievant was responsible for approving the rate of pay. Credentialing for a faculty member should take no more than 30 minutes to complete once all needed documents have been received. Once a faculty member has been credentialed, he or she could be paid and receive a badge enabling the faculty member to access secured areas on the Campus such as laboratories.
>
> On July 28, 2015, Grievant and the Supervisor met regarding Grievant's work assignments. The Supervisor counseled Grievant regarding her untimely responses to email and work requests or assignments. The Supervisor instructed, in part:
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> > I would like for you to give me a thorough list of your pending workload in prioritized order and with time estimates by July 31, 2015. We will meet to discuss your work prioritization on Monday August 3, 2015. You will give me daily updates during that week

[1] Decision of Hearing Officer, Case No. 10797 ("Hearing Decision"), July 5, 2016, at 2-4 (citations omitted).

> so we can monitor your progress. We will also meet on September 4, 2015, October 8, 2015, and November 6, 2015 to evaluate your workload and progress in responding to work assignments and requests.

Moving forward, I expect you to:

- Monitor your emails periodically throughout the day.
- Respond to emails in a timely fashion depending on the content. Notify me if you have an issue in responding to an email.
- Respond to target dates for posting, screening and interviewing set by hiring managers. Notify me if you have an issue in meeting the target dates set by the hiring manager.
- Credentialing adjunct files within five business days of receiving them.

Grievant's workload was not so excessive as to prevent her from completing faculty credentialing in five workdays. The five workday requirement was reasonable.

Grievant was upset before and after the July 28, 2015 meeting. She felt she was being criticized unfairly. She did not work on July 29, 2015 because she had an upset stomach. Grievant notified the College President of her concerns on July 30, 2015. Grievant was not comfortable meeting with the Supervisor.

Grievant did not provide the Supervisor with a prioritized workload list. On Friday July 31, 2015 at 7:37 a.m., the Supervisor sent Grievant an email asking to meet on August 3, 2015 at 9 a.m.

On August 3, 2015 at 9:10 a.m., the Supervisor went to Grievant's office and asked if she had received the Supervisor's email about their meeting at 9 a.m. Grievant said "no" and that she was behind on reading emails. Grievant said she had sent the College President an email about their meeting and was waiting for a response. The Supervisor again said she wanted to meet with Grievant. Grievant said she "had some things to review and I will get with you." Approximately 15 minutes later, the Supervisor returned to Grievant's office and said she needed to meet with Grievant. The Supervisor planned to leave the campus and wanted to meet with Grievant before she left. Grievant said she was waiting for a return phone call and said she could not meet at that time.

On August 5, 2015, the Supervisor attempted to meet with Grievant. Grievant refused to meet with the Supervisor. Grievant met with the College President on August 5, 2015.

On September 1, 2015, Grievant received the file for Faculty P. Grievant was supposed to complete the credentialing for Faculty P within five workdays. Grievant did not complete the credentialing for Faculty P within the time period required.

Faculty P asked for the status of her credentialing because she wanted to get her badge so she could access the "prep room" as part of her duties. She was displeased with the delay. On September 22, 2015, the Supervisor sent Grievant an email asking for the status of the credentialing for Faculty K. Grievant replied:

> Please note that [Faculty P's] file was received on September 1st. However, other files were received prior to that date and were reviewed in order of receipt unless I had to wait on information. Additionally, as you are aware, the on-boarding training was on September 1st and 2nd, which affected the turnaround time for my entire work responsibilities. I reviewed files received up until the 1st week of September and then began focusing on other requests to balance my workload and planned to review her file and others during this month, so adjuncts may receive the next adjunct payment.

Grievant's delay in completing credentialing for Faculty P prevented her from being timely paid.

The Supervisor offered Grievant assistance with time management. The Supervisor offered to help Grievant prioritize her work. Grievant refused these offers of assistance. The Supervisor asked Grievant to inform the Supervisor of any reason why Grievant could not perform her tasks timely. Grievant did not inform the Supervisor of any reasons.

On or about August 5, 2015, the grievant was issued a Group I Written Notice for insubordination and failure to follow instructions and/or policy.[2] She received a Group II Written Notice, also for insubordination and failure to follow instructions and/or policy, on September 23, 2015.[3] The grievant filed a grievance to challenge the disciplinary actions[4] and a hearing was held on June 13, 2016.[5] In a decision dated July 5, 2016, the hearing officer concluded that the agency had presented sufficient evidence to show that the grievant's work performance was unsatisfactory and that she failed to follow her supervisor's instructions and upheld the issuance of both Written Notices.[6] 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."[7] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not

[2] Agency Exhibit 1.
[3] Agency Exhibit 2.
[4] Agency Exhibit 3; *see* Hearing Decision at 1.
[5] *See* Hearing Decision at 1.
[6] *Id.* at 1, 5, 7.
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).

award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[8]

Due Process

In her request for administrative review, the grievant appears to dispute the hearing officer's conclusion that any due process violation in this case did not warrant rescission of the Written Notices.[9] In the hearing decision, the hearing officer found that "[t]he Agency failed to provide Grievant with procedural due process prior to the issuance of the Written Notices in this case," but that this failure "[did] not affect the outcome of this case" because the "Grievant had the opportunity to present to the Hearing Officer any defenses she would have provided to the Agency."[10] In short, the hearing officer determined that "[t]he hearing process cure[d] the Agency's defect in procedural due process."[11] Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[12] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[13] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.

Prior to certain disciplinary actions, the United States Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[14] Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[15] On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence;

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[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Hearing Decision at 6.
[10] *Id.*
[11] *Id.*
[12] *E.g.*, Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Huntley v. N.C. State Bd. Of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974).
[13] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[14] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). State policy requires that

> [p]rior to any (1) disciplinary suspension, demotion, and/or transfer with disciplinary salary action, or (2) disciplinary removal action, employees 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.

DHRM Policy 1.60, *Standards of Conduct*, § E(1). Significantly, the Commonwealth's Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."
[15] *Loudermill*, 470 U.S. at 546.

and the presence of counsel.[16] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[17]

In this case, the grievant had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the opportunity to have counsel present. Accordingly, we believe, as do many courts, that the extensive post-disciplinary due process provided to the grievant cured any lack of pre-disciplinary due process. EDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[18] However, we are persuaded by the reasoning of the many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[19] Accordingly, EDR finds no error in the hearing officer's consideration of the evidence regarding the pre-disciplinary due process provided to the grievant and declines to remand the decision on this basis.

Hearing Officer's Consideration of Evidence

The grievant further asserts in her request for administrative review that the hearing officer "made mistakes on the information provided in his decision and did not consider all the policy violations [she] mentioned." Hearing officers are authorized to make "findings of fact as to the material issues in the case"[20] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[21] 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.[22] 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.[23] 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

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[16] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[17] See Va. Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

[18] *See, e.g.*, Cotnoir v. University of Me. Sys., 35 F.3d 6, 12 (1st Cir. 1994) ("Where an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation.").

[19] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572 (and authorities cited therein).

[20] Va. Code § 2.2-3005.1(C).

[21] *Grievance Procedure Manual* § 5.9.

[22] *Rules for Conducting Grievance Hearings* § VI(B).

[23] *Grievance Procedure Manual* § 5.8.

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 "Grievant was instructed to monitor her emails throughout the day[and] prioritize her workload by July 31, 2015," that she did not so, and that this constituted unsatisfactory work performance warranting the issuance of the Group I Written Notice.[24] The hearing officer further determined that the "Grievant was instructed to process faculty credentialing in five workdays," that she failed to do so, and this action was a failure to follow instructions that justified the Group II Written Notice.[25] In her request for administrative review, the grievant claims that the hearing officer did not properly consider the evidence about her "workload and the faculty files in questioned [sic]," and that he did not address evidence that the grievant was subjected to alleged workplace harassment and/or violence from the Supervisor.

Having reviewed the hearing record, EDR finds that there is evidence in the record to support the hearing officer's conclusions about the instructions given to the grievant and the grievant's failure to comply with those instructions. For example, the agency presented evidence to show that the Supervisor directed the grievant to monitor her emails and prioritize her workload by July 31, 2015.[26] At the hearing, the Supervisor testified that the grievant did not complete these tasks.[27] Furthermore, there is evidence that the Supervisor instructed the grievant to process faculty credentialing within five workdays, and that the grievant did not do so for Faculty P.[28] While the grievant argued that her "work load was excessive and the five workday deadline was unrealistic and unreasonable,"[29] the hearing officer considered these arguments and found that other employees "were able to complete the [credentialing] process within five workdays" and that the "Grievant did not demonstrate that her workload was so excessive as to prevent her from timely completing her work duties."[30] There is evidence in the record to support the hearing officer's assessment of the facts regarding the grievant's workload and task assignments.[31] 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 two Written Notices in this case.

The grievant further argues that the hearing officer did not consider evidence that the Supervisor engaged in workplace harassment/and or violence. At the hearing, the grievant claimed that the Supervisor engaged in harassing behavior and made a threatening gesture

[24] Hearing Decision at 5.
[25] *Id*.
[26] Agency Exhibit 8; *see* Hearing Recording at 23:47-25:19 (testimony of Supervisor).
[27] Hearing Recording at 23:47-25:42 (testimony of Supervisor); *see* Grievant's Exhibit B at 15-16.
[28] Agency Exhibit 8; Grievant's Exhibit C at 38-41; *see* Hearing Recording at 28:22-29:16 (testimony of Supervisor).
[29] Hearing Decision at 5; *see*, *e.g.*, Hearing recording at 2:17:26-2:19:17, 2:26:38-2:27:35 (testimony of grievant).
[30] Hearing Decision at 5.
[31] *See*, *e.g.*, Agency Exhibit 8; Hearing Recording at 4:15:01-4:16:07 (testimony of Supervisor).

directed at her during a meeting.[32] The hearing officer discussed the grievant's allegation that the "Supervisor made threatening gestures" and concluded that the truthfulness of this allegation "would not affect the outcome of this case" because the "Grievant was in control of her work schedule . . . ."[33] In other words, the hearing officer found that the grievant's claims regarding the Supervisor's conduct did not impact her ability to carry out work tasks. As discussed above, there is evidence in the record to support the hearing officer's conclusions about the grievant's unsatisfactory work performance and failure to follow instructions.[34] To the extent any specific evidence of the grievant's allegations was not addressed in the hearing decision, there is no requirement under the grievance procedure that a hearing officer explicitly discuss every piece of evidence presented by the parties at a hearing. Thus, mere silence as any specific piece of evidence does not necessarily constitute a basis for remand. Further, it is squarely within the hearing officer's discretion to determine the weight to be given to the witness testimony and evidence presented. It would appear that the hearing officer did not specifically recount all the grievant's allegations because he did not find them to be credible and/or persuasive on the issue of whether the grievant's failure to carry out the tasks as directed by the Supervisor was justified.[35]

In addition, the grievant asserts that the hearing officer's findings relating to the "first meeting request" on August 3, 2015 are not supported by the evidence in the record. Although the precise basis of the grievant's dispute with the hearing officer's factual conclusions about the meeting is unclear, the hearing officer unequivocally stated that the Group I Written Notice was justified regardless of whether the "Grievant's failure to meet with the Supervisor on August 3, 2015" was considered.[36] As a result, EDR cannot conclude that any factual error in the decision with regard to the meeting, if such error exists, impacted the outcome of this case. Hearing officers must make "findings of fact as to the *material issues* in the case"[37] and determine the grievance based "*on the material issues* and grounds in the record for those findings."[38] The August 3, 2015 meeting was not a material issue in this case, as discussed by the hearing officer. As a result, remanding this case to the hearing officer for reconsideration on this issue would have no effect on the outcome.

In summary, 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,

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[32] *See, e.g.*, Hearing Recording at 2:43:00-2:53:34 (testimony of grievant); Grievant's Exhibit B at 65-67; *see generally* Agency Exhibit 3; Grievant's Exhibit A. While the grievant has cited DHRM Policy 2.30, *Workplace Harassment*, in her administrative review request, there is nothing in the record to indicate that she has alleged that any of the supervisor's alleged behavior was based on a protected status listed in that policy.
[33] Hearing Decision at 5; *see* Hearing Decision at 42:57-43:34 (testimony of Supervisor).
[34] *See supra* notes 25-30 and accompanying text.
[35] The agency also presented evidence that it conducted an investigation of the grievant's allegations the Supervisor had engaged in workplace harassment and/or violence, and concluded that her claims could not be substantiated. *See* Agency Exhibits 10, 11; Hearing Recording at 3:54:59-3:55:09 (testimony of Witness S).
[36] Hearing Decision at 5.
[37] Va. Code § 2.2-3005.1(C) (emphasis added).
[38] *Grievance Procedure Manual* § 5.9 (emphasis added).

we decline to disturb the hearing decision on the bases raised by the grievant in her request for administrative review.

While the grievant may disagree with the hearing officer's decision, there is nothing to indicate that his consideration of the evidence regarding the instructions given to the grievant by the Supervisor, or her failure to carry out those instructions as directed, was in any way unreasonable or not based on the actual evidence in the record. The hearing officer's findings are based upon evidence in the record and the material issues of the case, and EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, we decline to disturb the decision on this basis.

Newly-Discovered Evidence

The grievant appears to further assert that additional information about the Supervisor's conduct should be considered newly discovered evidence. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[39] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[40] However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[41]

The grievant has provided no information to support a contention that any documents or other evidence should be considered newly discovered evidence under this standard. Even assuming the grievant was able to demonstrate that the cited information about the Supervisor could be considered newly discovered under the standard discussed above, there is no basis for EDR to conclude that additional evidence about the Supervisor's conduct in the workplace is material or would result in a new outcome if the case was remanded to the hearing officer. Indeed, it appears from the grievant's description that much, if not all, of the alleged newly discovered evidence is either unrelated to the conduct that prompted the Written Notices, or it occurred after the Written Notices were issued. Accordingly, there is no basis for EDR to re-open or remand the hearing for consideration of this additional evidence.

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[39] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).

[40] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

[41] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

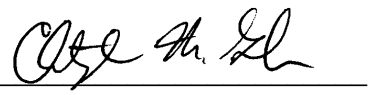
Length of Hearing

Finally, the grievant asserts that she did not have sufficient time to present her case, as the hearing officer allowed the parties 180 minutes each for the presentation of their evidence. The grievant argues that she did not have a "sufficient amount of time to describe many of the details surrounding the history of the issues being presented," and appears to claim that she was unable to call witnesses who would have testified if she had been given additional time. The *Rules for Conducting Grievance Hearings* 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.[42] However, a hearing should last as long as necessary for the parties to have an opportunity to fully and fairly present their evidence.[43]

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 180 minutes 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.[44]

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.[45] 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.[46] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[47]



Christopher M. Grab
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[42] *Rules for Conducting Grievance Hearings* § III(B).
[43] *See id.*
[44] To the extent this ruling does not address any specific issue raised in the grievant's request for administrative review, EDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.
[45] *Id.* § 7.2(d).
[46] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[47] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).