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QUALIFICATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2022-5331
February 10, 2022

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") on whether her August 11, 2021 grievance with the Department of Behavioral Health and Developmental Services (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

The grievant works for the agency as a Program Administrative Specialist II. Her current Employee Work Profile ("EWP") indicates that she is responsible for supporting an agency program to ensure compliance with regulatory requirements; the grievant describes her position as primarily involving data management. In approximately June 2020, the grievant contacted an assistant commissioner in her reporting line to express concern that she was paid less than a similarly situated employee allegedly in the same Role and to request a review of her compensation. At that time, the grievant worked on a different team, though it appears her job duties were similar and concerned the same agency program.

Several months later, in August 2020, the assistant commissioner notified the grievant that she would be reassigned to another team, though still reporting up to the assistant commissioner. The grievant was initially pleased about the reassignment but did not receive any further communication regarding her compensation review. The grievant believed that she would retain her same job responsibilities following the reassignment, which appears to have occurred in early September 2020.[1]

Prior to the reassignment, the grievant and her supervisor at the time disagreed about listing the grievant's work phone number as the primary means of contact for some clients. The agency delivered a due process notice to the grievant on or about September 3, 2020 regarding her conduct during an interaction with her former supervisor about this issue. The grievant submitted a

[1] The precise effective date of the reassignment is not clear from the evidence in the grievance record.

response on September 8. The agency ultimately counseled the grievant regarding this incident but did not issue formal discipline. The grievant's former supervisor later resigned from the agency.

In early September 2020, the grievant inquired about the status of her compensation review.[2] The assistant commissioner indicated that the review was in progress and the results would be shared with the grievant when it was complete.

When the grievant was reassigned in September 2020, she wrote to the assistant commissioner expressing concerns about her new supervisor and changes to her job responsibilities. The assistant commissioner advised the grievant to work with her new supervisor to resolve these issues before escalating to higher management and stated that the grievant would retain a large portion of her existing job duties as she requested. The grievant's new supervisor subsequently altered her EWP. The grievant expressed displeasure about her perceived loss of management responsibilities; her previous EWP indicated that she "supervise[d] assigned contract employee(s) supporting" her program. In response, the supervisor appears to have modified the grievant's EWP to indicate that she would, "[a]s applicable, oversee[] assigned contract employee(s) supporting" the program. The grievant also disagreed with her performance evaluation rating for 2019-2020. The grievant states that she had received "Extraordinary Contributor" ratings in the past but her supervisor would not approve a higher rating than "Contributor" in 2020.

Following her reassignment in September 2020, the grievant alleges that she continued to perform some administrative tasks, including mailing program-related letters to clients. According to the grievant, she previously had assistance with these responsibilities but did not receive support after the reassignment. The grievant also alleges that she was required to lift heavy boxes and perform other manual tasks that are difficult for her because of a medical condition.

Meanwhile, the grievant's supervisor retired and the grievant began reporting to a third supervisor. In April 2021, the grievant requested assistance from other staff performing certain tasks, but her new supervisor declined to make other employees on the grievant's team available. During this time, the assistant commissioner and other members of management continued to request the grievant's assistance with data reporting projects. The grievant did not feel she had the time or ability to take on such additional responsibilities but felt pressured into accepting. The grievant became upset that she had kept her existing responsibilities but was unable to develop new skills.

On August 11, 2021, the grievant initiated a grievance with the agency challenging her "[c]ompensation" and "[r]esulting circumstances since [she] requested relief."[3] As support for these claims, the grievant provided extensive documentation about her prior communications with

[2] In late August 2020, the grievant also wrote to the assistant commissioner saying not to "worry about a compensation review now" and indicating her desire to be reassigned due to issues with her supervisor at the time.

[3] The grievant originally submitted an expedited grievance, which the agency addressed through three management steps because the issues raised in the grievance did not qualify for the expedited process. *See Grievance Procedure Manual* § 3.4

management regarding both her compensation and the work-related concerns recounted above. As relief, the grievant sought "the compensation as [she has] always wanted."

During the management steps, the respondents explained that the agency reviewed the grievant's compensation and found she is paid appropriately in her current position based on an analysis of applicable pay factors. The respondents further indicated a willingness to address at least some of the grievant's concerns about communication with clients, her participation in team meetings, her need for assistance with certain tasks, and her feeling of being overwhelmed by her workload. The third-step respondent clarified that, prior to her reassignment and EWP modifications, the grievant managed contract staff, which the agency does not consider equivalent to supervising full-time employees. The third-step respondent otherwise noted that the grievant's EWP revisions in 2020 "add[ed] clarity to [her] roles and responsibilities" in certain areas and removed some work that was specific to her position prior to the reassignment.

It appears that, after the grievant initiated the grievance, her management later communicated with her about further modifying work processes for which she is responsible. According to the grievant, these changes involve communicating with clients by email rather than by mail, thus reducing the need for some manual tasks. The grievant disagrees with this and other proposed modifications to work processes. In addition, the grievant received a newly-revised EWP in November 2021, though she declined to sign the document because she did not agree with the physical requirements of her job described therein. She has not yet received a final EWP for 2021-2022. Relatedly, the grievant submitted a request for reasonable accommodation in December 2021 addressing her need for job modifications due to a disability. This request still appears to be under review by the agency. Finally, the grievant claims that she does not have a current telework agreement.[4]

Following the management resolution steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[5] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[6] Thus, claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether

[4] Although the grievant also alleges that she does not have a current telework agreement, the agency has provided EDR with a copy of a telework agreement signed by the grievant on September 29, 2021 and by her supervisor on November 30, 2021. If the agency has not given the grievant a copy of the final version of that document, it should do so as soon as possible.
[5] *See Grievance Procedure Manual* § 4.1.
[6] Va. Code § 2.2-3004(B).

discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[7]

Further, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."[8] Typically, then, the threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[9] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[10] Workplace harassment rises to this level if it includes conduct that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[11]

Compensation

The grievant first argues that agency management has effectively misapplied or unfairly applied policy by declining to approve her request for in-band adjustment in June 2020, citing several factors that she alleges justify a salary increase. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

In particular, the grievant contends that, before she was reassigned in June 2020, a comparator employee received a salary increase whereas the grievant did not. The grievant asserts that she and the comparator employee were employed in the same Role and had the same job responsibilities at that time. The grievant states that, although the agency did not respond to her request for a compensation review prior to her reassignment in September 2020, the data supported her position that an in-band adjustment was warranted. However, she alleges that the agency withheld this information until she was reassigned, at which point the outcome of the review was different because she was no longer similarly situated to the comparator who received a salary increase.

DHRM Policy 3.05, *Compensation*, allows agencies to grant an employee an in-band adjustment, which is a "non-competitive pay practice that allows agency management flexibility to provide potential salary growth and career progression within a Pay Band or to resolve specific salary issues."[12] Like all pay practices, in-band adjustments are intended to emphasize merit rather

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[7] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[8] Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).
[9] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[10] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[11] Strothers v. City of Laurel, 895 F.3d 317, 331 (4th Cir. 2018) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)).
[12] DHRM Policy 3.05, *Compensation*, at 7.

than entitlements, such as across-the-board increases, while providing management with great flexibility and a high degree of accountability for justifying their pay decisions.[13] Although DHRM Policy 3.05 reflects the intent that similarly situated employees should be comparably compensated, it also invests agency management with broad discretion to make individual pay decisions in light of 13 enumerated pay factors: (1) agency business need; (2) duties and responsibilities; (3) performance; (4) work experience and education; (5) knowledge, skills, abilities and competencies; (6) training, certification and licensure; (7) internal salary alignment; (8) market availability; (9) salary reference data; (10) total compensation; (11) budget implications; (12) long term impact; and (13) current salary.[14] Because agencies are afforded great flexibility in making pay decisions, EDR has repeatedly held that qualification is warranted only where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[15]

There appears to be no dispute in this case that the grievant is a competent and valued employee who effectively performs her job responsibilities to the agency's satisfaction.[16] Having reviewed the information in the grievance record, however, EDR finds insufficient evidence to demonstrate that the agency's failure to approve the grievant's request for an in-band adjustment violated a specific mandatory policy provision or was outside the scope of the discretion granted to the agency by the applicable compensation policies. The agency has represented to EDR that it did not complete a review of the grievant's compensation prior to her reassignment in September 2020.[17] It is unclear why this was the case, but the agency's representation appears to be consistent with communications the grievant received at the time indicating that the review had not occurred prior to her reassignment. Even though the grievant disputes the agency's account of events, she has not presented evidence to support her position that the agency intentionally withheld information that would have supported her request for a salary increase in June 2020.

The agency has further confirmed to EDR that there are distinctions between the comparator and the grievant such that they are not similarly situated for compensation review purposes. According to the agency, the grievant and the comparator were previously classified in the same Role. However, the comparator was laterally reclassified into a different Role in the same pay band because they were responsible for supervision of two employees. The comparator's classification change was accompanied by a salary increase, which appears to have prompted the grievant's initial concern about her salary in relation to the comparator's. Although the grievant's EWP appears to have consistently reflected her responsibility for management of contract employees, the agency has clearly indicated that it views this responsibility differently from supervision of classified staff.

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[13] *See* DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.
[14] DHRM Policy 3.05, *Compensation*, at 22.
[15] *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); *see also*, *e.g.*, EDR Ruling No. 2008-1879 (and authorities cited therein).
[16] The grievant has offered evidence regarding her performance evaluations for several years, up to 2020, all of which appear to have had an overall rating of "Extraordinary Contributor" or "Contributor."
[17] The agency considered the grievant's request no later than August 2021, apparently concluding that no compensation review was warranted based on the grievant's salary in relation to statewide data for employees in her Role.

As a result, it appears that the comparator employee cited by the grievant is not sufficiently similarly situated to her such that the agency's consideration of the relevant pay factors could be considered inconsistent here. Though we understand the grievant's salary-related concerns, she has not offered evidence that the agency's assessment of her compensation at the present time is inconsistent with DHRM Policy 3.05 or otherwise improper. Considering the totality of the circumstances, an analysis of many of the individual pay factors—for example, job duties and responsibilities, performance, and internal salary alignment—does not support a conclusion that the agency's existing salary structure violates any specific policy requirement.

As stated above, DHRM Policy 3.05 is intended to grant the agency flexibility to address issues such as changes in an employee's job duties, performance, internal salary alignment, and retention.[18] The policy is not intended to entitle employees to across-the-board salary increases or limit the agency's discretion to evaluate whether an individual pay action is warranted. The grievant argues that certain pay factors support her request for an in-band adjustment, but the agency's position that its consideration of the relevant pay factors does not substantiate the need for a salary increase is valid. An employee's work performance and job duties represent just several of the many different factors an agency must consider in making the difficult determination of whether, when, and to what extent in-band adjustments should be granted in individual cases and throughout the agency.[19] In cases like this one, where a mandatory entitlement to a pay increase does not exist, agencies are given great discretion to weigh the relevant factors.

For these reasons, EDR cannot find that the agency's failure to approve the grievant's request for an in-band adjustment was improper or otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on these grounds.

Workplace Harassment and Retaliation

Broadly read, the remainder of the grievant's assertions amount to a claim that agency management has engaged in a pattern of harassing and retaliatory conduct that has created a hostile work environment. Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment[20] and bullying,[21] alleged violations must meet certain requirements to qualify for a hearing. Whether discriminatory or non-discriminatory, harassment or bullying may qualify for a hearing as an adverse employment action if the grievant presents evidence that raises a sufficient question whether the conduct was (1) unwelcome; (2) sufficiently severe or pervasive that it alters

[18] *See* DHRM Policy 3.05, *Compensation*.
[19] *Id*. This is not to say that the agency's discretion in determining which employee should receive an in-band adjustment is without limitations. For example, an agency could not deny an employee an in-band adjustment on the basis of unlawful retaliation, discrimination, or some other improper motive.
[20] Traditionally, workplace harassment claims were linked to a victim's protected status or protected activity. However, DHRM Policy 2.35 also recognizes non-discriminatory workplace harassment, defined as "[a]ny targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion towards a person not predicated on the person's protected class."
[21] DHRM Policy 2.35 defines bullying as "[d]isrespectful, intimidating, aggressive and unwanted behavior toward a person that is intended to force the person to do what one wants, or to denigrate or marginalize the targeted person." The policy specifies that bullying behavior "typically is severe or pervasive and persistent, creating a hostile work environment."

the conditions of employment and creates an abusive or hostile work environment; and (3) imputable on some factual basis to the agency.[22] As to the second element, the grievant must show that they perceived, and an objective reasonable person would perceive, the environment to be abusive or hostile.[23]

EDR has reviewed the grievance record in its entirety and interviewed the grievant by phone about her claims. In essence, the grievant argues that, following her request for a compensation review in June 2020, agency management engaged in a series of actions that she argues were improper. In particular, the grievant alleges that her supervisors have modified her EWP, failed to properly evaluate her work performance, withheld support she needs to complete her work, and otherwise prevented her from performing her job in the way she believes is most effective, all of which have, in her assessment, caused her workload to be overwhelming.

The majority of the grievant's claims regarding alleged workplace harassment appear to revolve around matters that occurred following her reassignment to a different team in September 2020. At that time, the grievant's new supervisor made adjustments to her EWP; although the grievant's responsibilities appear to have remained broadly similar, the reassignment prompted some level of modification. At that time, the grievant specifically objected to the apparent removal of responsibility for supervising assigned contract staff that provided support for her program. Seemingly in response to the grievant's concern, her supervisor ultimately included that area of responsibility in the revised EWP. Nonetheless, it appears that there are no contract staff or other employees currently working with the grievant to support her program, a matter about which she also seems to disagree with management. Regarding the agency's assessment of her performance, the grievant alleges that she received "Extraordinary Contributor" ratings in the past but her supervisor would not approve a higher rating than "Contributor" in 2020.[24]

The grievant additionally states that she has consistently been responsible for a variety of manual tasks, specifically mailing program-related letters to clients that she claims she is unable to perform without support, and disagrees with her supervisor's decision not to provide assistance

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[22] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

[23] Freeman v. Dal-Tile Corp., 750 F.3d 413, 421 (4th Cir. 2014) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-23 (1993)); *see* DHRM Policy Guide – Civility in the Workplace ("A 'reasonable person' standard is applied when assessing if behaviors should be considered offensive or inappropriate."). "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23 (1993); *see*, *e.g.*, Parker v. Reema Consulting Servs., 915 F.3d 297, 304-05 (4th Cir. 2019) (finding that a false rumor that an employee was promoted for sleeping with a manager altered the conditions of her employment because the employee was blamed for the rumor and told she could not advance in the company because of it); *Strothers*, 895 F.3d at 331-32 (holding that a hostile work environment could exist where a supervisor overruled the employee's bargained-for work hours, humiliated the employee for purportedly violating the dress code, required her to report every use of the restroom, and negatively evaluated her based on perceived slights).

[24] A satisfactory performance evaluation is not an adverse employment action. *E.g.*, EDR Ruling No. 2013-3580; EDR Ruling No. 2010-2358; EDR Ruling No. 2008-1986; *see also* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 377-378 (4th Cir. 2004) (holding that although his performance rating was lower than his previous yearly evaluation, there was no adverse employment action where the plaintiff failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment).

with tasks such as these when the grievant requested it beginning in April 2021. The grievant has also expressed frustration that management continued to request assistance from the grievant with other data reporting projects when she did not feel she had the ability to take on additional responsibilities. Furthermore, the grievant states that management is currently attempting to modify some aspects the project for which she is responsible, with the goal of increasing email communication and decreasing the need for mailing, but the grievant disagrees with these changes and feels they are unfair to her.

Having thoroughly considered the evidence in the grievance record and the information provided by the parties, EDR cannot find that the facts as alleged raise a sufficient question as to whether the grievant has experienced conduct that is so severe or pervasive such that the grievance qualifies for a hearing at this time.[25] DHRM Policy 2.35 and its associated guidance make clear that agencies must not tolerate workplace conduct that is disrespectful, demeaning, disparaging, denigrating, humiliating, dishonest, insensitive, rude, unprofessional, or unwelcome. However, these terms must be read together with agencies' broader authority to manage the means, methods, and personnel by which agency work is performed. Generally, then, the grievant's management has authority to determine, among other things: the grievant's performance expectations, the substance and scope of the grievant's work assignments, the level of communication, support and information necessary to complete those assignments, and the appropriate manner of substantive feedback to address any identified performance deficiencies.

Although the grievant clearly disagrees with the agency's decisions regarding her work assignments, resources, performance, and other related matters, and views the actions described in the grievance as harassing in nature, her belief does not, by itself, render the agency's actions improper.[26] We have carefully reviewed the grievant's allegations and must find that she has not described conduct that rises to the level of an adverse employment action under these circumstances. Without facts that would cause an objective reasonable person to perceive management's exercise of authority in these areas as hostile or abusive, EDR cannot conclude that her failure to meet the grievant's subjective standards constitutes any conduct prohibited by Policy 2.35.

Regarding the events that have occurred after the grievant initiated her grievance – in particular, her dispute about the physical requirements described in her current EWP and her request for reasonable accommodation – the parties seem to agree that the grievant has not yet received a copy of her EWP for the current performance evaluation cycle. It appears that the grievant's concern about physical requirements and her subsequent request for reasonable

[25] *See, e.g.,* EDR Ruling No. 2014-3836; *cf. Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.

[26] We additionally note that many of the grievant's allegations involve employees who are either no longer employed by the agency or are no longer responsible for supervision of the grievant. For example, two of the grievant's former supervisors (one of whom she claims interfered with her original request for a compensation review in June 2020 and the other of whom modified her EWP following her reassignment in September 2020) no longer work for the agency. Even though the September 2020 reassignment modified the grievant's management chain, however, she still ultimately reports to the same assistant commissioner. The grievant has also identified concerns about her current supervisor's behavior that indicate she sees it as a continuation of the overall pattern of alleged harassing conduct she has alleged.

accommodation have led to delays in the finalization of that document. The agency has represented to EDR that it is actively reviewing the grievant's request for accommodation.

In addition, the grievant appears to contend that many of the actions described above were retaliation for her raising concerns about her compensation in June 2020. A claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether (1) they engaged in a protected activity; (2) they suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.[27] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[28] Even assuming that the grievant engaged in protected activity by attempting to address alleged concerns about her compensation,[29] the grievance record does not reflect that she has suffered an adverse employment action as described above. Further, the grievant has not identified acts or omissions that could reasonably be viewed as exceeding managerial discretion or would not have occurred but for a retaliatory motive.[30]

In conclusion, because the grievant has not raised a sufficient question as to the existence of severe or pervasive harassment, bullying, or retaliatory conduct at this time, the grievance does not qualify for a hearing on any of these grounds.[31] If the grievant experiences additional incidents of harassing or retaliatory conduct, she should report the information to the agency's human resources department or another appropriate authority. DHRM Policy 2.35 places affirmative obligations on agency management to respond to credible complaints of prohibited conduct and take steps to ensure that such conduct does not continue.[32] Lastly, this ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.

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[27] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).

[28] *Id.*

[29] *See* Va. Code § 2.2-3000(A).

[30] This ruling determines only that the grievant's claims do not qualify for an administrative hearing under the grievance procedure. It does not address whether there may be some other legal or equitable remedy available to the grievant in relation to these claims.

[31] To the extent this ruling does not address any specific issue raised in the grievance, EDR has thoroughly reviewed the grievance record and determined that the grievance does not raise a sufficient question as to whether the grievant experienced an adverse employment action, whether discrimination, retaliation, or discipline may have improperly influenced any management decision cited in the grievance, or whether the agency may have misapplied and/or unfairly applied state policy that would warrant qualification for a hearing.

[32] Under Policy 2.35(D)(4), "[a]gency managers and supervisors are required to: Stop any prohibited conduct of which they are aware, whether or not a complaint has been made; Express strong disapproval of all forms of prohibited conduct; Intervene when they observe any acts that may be considered prohibited conduct; Take immediate action to prevent retaliation towards the reporting party or any participant in an investigation; [and t]ake immediate action to eliminate any hostile work environment when there has been a complaint of workplace harassment . . . ."

CONCLUSION

For the reasons expressed above, the facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure at this time.[33] EDR's qualification rulings are final and nonappealable.[34]

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[33] *See Grievance Procedure Manual* § 4.1.
[34] *See* Va. Code § 2.2-1202.1(5).