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ADMINISTRATIVE REVIEW

In the matter of George Mason University
Ruling Number 2021-5252
June 3, 2021

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11644. For the reasons set forth below, EDR will not disturb the hearing officer’s decision.

FACTS

The relevant facts in Case Number 11644, as found by the hearing officer, are as follows:¹

George Mason University [the “university” or “agency”] employed Grievant as a Police Officer. He had been employed by the University for approximately two and a half years. Except for the facts giving rise to this grievance, Grievant’s work performance was satisfactory to the University. He was considered a “hard worker.” Grievant’s typical shift began at 6 p.m. and ended at 6 a.m. on the following day. No evidence of prior active disciplinary action was introduced during the hearing.

On June 23, 2020, University administrators sent employees including Grievant an email about “Safe Return to Campus Plan Website.” The site included the University’s COVID19 health and safety protocols and other information designed to support the health, safety, and well-being of University employees. Employees were required to complete Safe Return to Campus Training.

On July 24, 2020, the Assistant Vice President sent employees including Grievant an email about COVID testing and Safe Return to Campus. Grievant was informed:

Complete your daily Mason COVID Health Check. ***
Stay home if you feel symptoms consistent with COVID.

¹ Decision of Hearing Officer, Case No. 11644 (“Hearing Decision”), April 28, 2021, at 2-8 (internal citations omitted).

If you display symptoms consistent with COVID

[U]ninsured Mason employees ... will be tested at the Mason On-campus Testing site. ***

All other employees should be tested through their insured health providers. ***

[F]aculty and staff must stay away from campus until they are cleared by a medical professional to return.

On August 10, 2020, the University President sent employees including Grievant an email:

All students, faculty, and staff who come to campus must complete an online health survey every day before arriving on campus. This tool – the Mason COVID Health Check, an online health screening protocol developed by the College of Health and Human Services – will serve as a quick and effective way to track the health conditions of students, faculty, staff and contractors who will work, study, or live on campus.

On August 13, 2020, the Assistant Vice President sent employees including Grievant an email:

So, everyone who plans to come to campus must fill out the Mason COVID Health Check on a daily basis. This is required seven days a week, whether you plan to come just once or every day. It is simple and takes just two minutes each day to fill out, so let's please all do our part to keep our campus healthy and safe. ***

[E]veryone in our community *** will receive a daily reminder email in the morning with a link to the Mason COVID Health Check website.

Based on your responses to the Mason COVID Health Check you will receive one of three automated messages.

Green –

You have no symptoms, testing, or contacts that indicate exposure or illness and therefore you are free to come to campus or participate in face-to-face classes, events, and activities. You must bring a copy of your Green result with you when you come to campus.

Yellow –

You have indicated that you may have one or more COVID-19 symptoms, have been tested and are awaiting results or received a

positive test, or you were in contact with someone with COVID or who tested positive for COVID.

If you receive a Yellow message:
Remain in your residence hall room, if you live on campus.
You will receive specific instructions on what you should do.
Additional information and resources will be emailed to you immediately after completing Mason COVID Health Check.

Red –
Based on your responses, you may be experiencing a medical emergency and should immediately contact your health care provider or emergency services.

Everyone who comes to campus must have a GREEN result and be prepared to show their green status email to supervisors or course instructors who may request to verify that you are cleared to be on campus. Requesting to verify your Mason COVID Health Check™ status is optional for supervisors and instructors.

On August 16, 2020, the Deputy Chief sent an email to Police Department employees including Grievant stating, “an ongoing ‘daily health check’ online journal (Mason COVID Healthcheck) is now required for employees and students to complete seven days a week indefinitely.”

On September 8, 2020, the Deputy Chief sent an email to Police Department employees including Grievant:

If you take the daily Mason COVID HealthCheck Survey and get a “yellow” result – it clearly states you cannot come to campus.

Grievant reported to work on Saturday October 3, 2020 at 6 p.m. He noticed a change in his health during his shift. He left work and went home before midnight.

Grievant completed the daily online health check. On Sunday October 4, 2020 at 4:13 p.m., Grievant received an email regarding “Daily Screening Received” and instructing him:

Your Daily Screening questionnaire is received on October 04, 2020.

DO NOT visit campus or participate in group/social activities.
Based on your responses to Mason COVID Health Check, you reported that you have one or more symptoms NOT explained by allergies or another health condition, or have been in close contact

(within 6 feet for 15 minutes or more) with someone who has/had COVID-19. [The background of this message is yellow]. Please take the following actions:

Take Care of Yourself: Get rest, stay hydrated, take over the counter medications if necessary, and discuss your circumstances with your health care provider. Residential students must contact Student Health Services (703) 993-2831 for additional guidance.

Get Tested: If you have not been tested for COVID-19, discuss testing with a health care provider. Students contact Student Health Services for health information and resources.

Self-Isolate/Quarantine: Remain in your residence and do not visit public places until you are able to return to campus. Residential students, please contact housing@gmu.edu for additional instructions.

Avoid Public Locations: If you must go out for essential items or to receive healthcare, wear a mask, do not use public transportation, and maintain physical distancing.

Notify Your Close/Intimate Contacts: Notify those that you are in close contact with (i.e., within 6 feet for more than 15 minutes, household members, roommates, intimate contacts and close friends) that they may be a risk, should take appropriate precautions, and to consult with a health care provider.

Notify Your Faculty or Supervisor: Notify your faculty or supervisor that you will not be able visit campus. They do not need to take any additional action unless directed to do so by the university or local health department.

Return to Campus: Return to campus only after:

a. If you were in contact with a positive or symptomatic case, 14 days after contact or 10 days after a positive or negative test. A negative test does not allow you to return to campus. If you develop symptoms please see c. below.

b. If you tested positive, 10 days from the test date if you have no symptoms. If you develop symptoms please see c. below.

c. If you have/had symptoms: you may return under the guidance of your healthcare provider, and at least 10 days after the onset of symptoms, AND symptoms have improved AND at least 24 hours after with no fever (without the use of medications).

Please follow these guidelines as they are a critical part of slowing the spread of COVID-19.

Additional information about returning to campus is available at healthcheck.gmu.edu. If you have specific questions about this guidance or need assistance while you are in isolation/quarantine please contact the appropriate resources below.

Students: For questions regarding your medical condition, please contact Student Health Services. To speak with a staff member about navigating your academics and other University resources, please complete this form.

Employees: Contact benefits@gmu.edu for information about leave, work schedules, accommodations, and compensation during isolation/quarantine.

Grievant was scheduled to work on Sunday October 4, 2020 for a 12-hour shift. On Sunday October 4, 2020 at 4:15 p.m., Grievant sent the Sergeant a text message saying he woke up and was “super congested.” Grievant wrote, “I think it is seasonal allergy but the Covid test gave me a yellow. I’m gonna sign up for Covid test tomorrow just to be on the safe side.”

On Monday October 5, 2020, Grievant reported to work for an elective overtime shift. He worked from 12:30 p.m. until 4:47 p.m. at the University’s COVID-19 testing site located at the Mason Global Center. This site was intended to test randomly chosen students, faculty, and staff to identify asymptomatic cases of COVID-19 on-campus. Sergeant B heard Grievant make radio transmissions and believed Grievant sounded sick. The Deputy Chief later listened to those transmissions and found Grievant’s voice “audibly abnormal.”

On Monday, October 5, 2020 at 2:06 p.m., Grievant received an email regarding daily screening received:

Your Daily Screening questionnaire is received October 05, 2020. Based on your responses to Mason COVID Health Check you are approved to participate in on campus classes, events, and activities. Thank you for your continued assistance in helping Mason slow the spread of COVID-19. *** [The background of this message is green.]

On Monday October 5, 2020 at 8:05 p.m., the Sergeant sent Grievant a text, “Did you get tested today? Also did you do check list today?” Grievant replied:

I did the Covid screening which was negative for symptoms but have not been able to get lab tested. My personal doctor and appointments across are filled most of the week. The GMU testing is filled too. That was 100% my bad on a bad relay. I also *** did show up to OT today. I woke up 100% today and completely forgot about not showing up/cancelling it. I came into contact with no one today but I know I messed that up.

On Monday October 5, 2020 at 8:16 p.m., the Deputy Chief sent Grievant an email:

If you are in fact awaiting test results, you may not be at work. If you are symptomatic with or without a test, you may not be at work. Until you are cleared with a negative test or by your physician under the circumstances, you need to remain out of work. I have no communication from you or your supervisor indicating you are currently clear to be at work since your sick call-outs occurred and pending test matter was reported. I was advised you reported to work today to work your elective overtime assignment at the test site. Is this true?

On Monday October 5, 2020 at 9:33 p.m., Grievant sent the Deputy Chief an email stating, "I was able to find an open COVID testing slot at the Globe for 1530 on 10/6. I was not able to find any open spaces until then. *** I attached my COVID screening test from 10/1 – today. I could not find my Friday Screening so I will say that I most likely forgot to do my screening of that day but remember feeling healthy and strong the entire day. I did not start experiencing a change in my health until 10/3/2020 while on shift."

On Monday October 5, 2020 at 11:33 p.m., the Deputy Chief sent Grievant an email, "you may not return to work until you have a negative test and physician's OK, or absent a test, *** 10 days. One thing we have learned about COVID is that it affects everyone differently. Many are asymptomatic or only experience mild symptoms. This very well could be you but we don't know that right now. *** If you need assistance securing a test, please advise, as we do have additional resources to consult with.

On Tuesday October 6, 2020 at 3:31 p.m., the Deputy Chief sent Grievant an email:

I was told today that you have household members who are employees that include [name] and [name]. They too have to remain out of work in quarantine until you have received your test results. Please advise when and where you have scheduled your test and the expected turnaround time.

On Tuesday October 6, 2020 at approximately 6:20 p.m., Grievant called the Deputy Chief and told her that he was tested at the campus Global Center that afternoon but expected the results would take several days. The Deputy Chief offered Grievant the opportunity to take a rapid test through the local Fair Department but Grievant declined saying he was in quarantine in another Virginia City.

On October 7, 2020, Grievant sent the Deputy Chief an email indicating he would be out of work until October 15, 2020 with pre-planned leave.

On October 8, 2020, Grievant travelled to another state without knowing the results of his COVID-19 test. While in the other state that day, he learned he was positive for COVID-19. Grievant was surprised by the results because he felt fine. At 2:32 p.m., Grievant sent the Deputy Chief an email:

I got my results back and I did test positive. I am still in good health and am waiting for a call from the [county] Health Dept. If there is anything else you need, please let me know.

Grievant took a second COVID-19 test while in the other state. He again tested positive for COVID-19.

On October 15, 2020 at 3:30 p.m., Grievant sent the Deputy Chief an email indicating that the local health department told him he could leave isolation. He said he had a doctor's appointment scheduled for the following day.

On December 2, 2020, the university issued to the grievant a Group III Written Notice of disciplinary action with termination for failure to follow instructions and/or policy, safety rule violation, disruptive behavior, and insubordination.² The grievant timely grieved the Written Notice, and a hearing was held on April 8, 2021.³ In a decision dated April 28, 2021, the hearing officer determined that the "University has presented sufficient evidence to justify the issuance of a Group III Written Notice."⁴ The hearing officer further found that the grievant did not prove mitigating factors or retaliation by the university.⁵ Accordingly, the hearing officer upheld the university's disciplinary action.⁶

The grievant has appealed the hearing decision to EDR.

² Agency Ex. 3; *see* Hearing Decision at 1.

³ *See* Hearing Decision at 1.

⁴ *Id.* at 9.

⁵ *Id.* at 9-10.

⁶ *Id.* at 10.

DISCUSSION

By statute, EDR has 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 award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.⁸ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁹ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant objects that, in upholding the Group III Written Notice, the hearing decision failed to address two of the charged offenses: disruptive behavior and insubordination.¹⁰ In doing so, the grievant argues, the decision in effect maintains an employment record indicating that the grievant was separated for all four offenses.¹¹ In addition, the grievant contends that, even if he violated a safety rule as the hearing officer found, his conduct did not pose the level of threat of bodily harm that would normally support a Group III Written Notice under DHRM Policy 1.60, *Standards of Conduct*.¹²

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹³ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁴ 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.¹⁵ 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.¹⁶ Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses’ credibility, and make findings of fact. As long as the hearing officer’s findings are based on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ See *Grievance Procedure Manual* § 6.4(3).

⁹ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁰ Request for Administrative Review at 2-4. In particular, the grievant contends that the hearing officer failed to address the agency’s charges that the grievant engaged in “insubordination” and “disruptive behavior,” as well as the grievant’s defenses against those charges. *Id.*

¹¹ *Id.* at 3-4.

¹² *Id.* at 5-10.

¹³ Va. Code § 2.2-3005.1(C).

¹⁴ *Grievance Procedure Manual* § 5.9.

¹⁵ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁶ *Grievance Procedure Manual* § 5.8.

Sufficiency of Findings

In general, following a grievance hearing, the hearing officer must issue a written decision containing “a statement of the issues qualified; findings of fact on material issues and the grounds in the record for those findings; any related conclusions of law or policy; any aggravating or mitigating circumstances that are pertinent to the decision; and clearly identified order(s) specifying whether the agency’s action has been upheld, reversed, or modified”¹⁷ Where, as here, a formal disciplinary action is one of the issues qualified for hearing, the hearing officer must “determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law . . . and policy (e.g. properly characterized as a Group I, II, or III offense).”¹⁸ These issues center on the alleged acts or omissions by the grievant that gave rise to the Written Notice and how the agency may respond to such acts or omissions under applicable policies.

The hearing decision in this matter complies with these requirements. The hearing officer correctly identified the issues to be decided for a disciplinary grievance.¹⁹ As to whether the grievant “engaged in the behavior described in the Written Notice,” the Written Notice in this case alleges that the grievant “received a yellow status” following his Mason COVID Health Check but nevertheless “returned to campus to work an elective overtime shift”²⁰ The hearing officer found that, as the Written Notice charged, the grievant “received a yellow email” informing him not to return to campus until “at least 10 days after the onset of symptoms”; yet he “reported to work for an elective overtime shift” the following day.²¹ The hearing officer found that this behavior constituted misconduct because it was contrary to the university’s established safety procedures related to the COVID-19 pandemic.²² Moreover, the hearing officer found that the behavior “created a risk of bodily harm by possibly exposing others to COVID-19” – a type of misconduct listed in DHRM policy guidance as an example of a Group III offense.²³

Although the grievant contends these findings were insufficient, nothing in the grievance procedure or the record in this case required the hearing officer to additionally determine whether the grievant’s behavior could also have been disciplined as disruptive behavior or insubordination. For purposes of meeting its burden of proof, an agency’s designation of offense codes on the Written Notice form may often be relevant and instructive as to why it pursued a specific

¹⁷ *Rules for Conducting Grievance Hearings* § V(C).

¹⁸ *Id.* § VI(B)(1).

¹⁹ Hearing Decision at 1-2. In his Request for Administrative Review, the grievant appears to argue that the hearing officer’s identification of the issues did not comply with EDR Ruling Number 2021-5192. In that ruling, we concluded that the grievant could present relevant evidence at the hearing about the issues he identified in his grievance, which we viewed as “a series of alternative theories and claims in support of the grievant’s overall challenge to the Group III Written Notice and his termination.” EDR Ruling No. 2021-5192, at 2. However, in recognizing that the grievance presented a multi-faceted challenge to a formal disciplinary action, our ruling did not expand the material issues in the case. Accordingly, we perceive no grounds to remand the hearing decision as not compliant with our previous ruling.

²⁰ Agency Ex. 3, at 3.

²¹ Hearing Decision at 9.

²² *See id.*

²³ *Id.* (citing DHRM Policy 1.60, *Standards of Conduct*, Att. A: Examples of Offenses Grouped by Level).

disciplinary action consistent with policy. However, the agency's ultimate burden is to prove that its disciplinary action was warranted and appropriate for the behavior cited, not necessarily to prove each offense description of that behavior. Likewise, a hearing officer need not necessarily address each argument asserted where the agency has otherwise met its burden of proof.

Here, acknowledging that the agency had asserted multiple offenses, the hearing officer noted that neither disruptive behavior nor insubordination would normally merit a Group III offense,²⁴ and EDR's review of the record does not suggest that these offenses were decisive in the agency's selection of penalty. Moreover, the Written Notice does not indicate that these offenses referred to conduct beyond what the hearing officer upheld as a violation of safety rules.²⁵ Accordingly, we find no error in the hearing officer's exercise of discretion not to take up the questions of whether the grievant's behavior was disruptive or insubordinate.²⁶

Level of Offense

The grievant further argues that, even if his conduct violated a university safety rule, his offense did not merit a Group III Written Notice.²⁷ The grievant points out that, under DHRM policy guidance, the appropriate level of discipline for violating a safety rule depends on whether a "threat of bodily harm exists."²⁸ He asserts that, because "there was no threat" and "no exposure or spread of COVID-19 due to [his] actions,"²⁹ the hearing decision upholds a "draconian" principle that an "unintentional exposure of others to [an] asymptomatic case of COVID-19 is a violation that should normally warrant termination."³⁰

However, this characterization of the grievant's behavior is at odds with the facts found by the hearing officer. As articulated in the hearing decision, on October 3, the grievant left work early due to a "change in his health during his shift."³¹ On October 4, the grievant's responses to the university's health screening returned a "yellow" message instructing him: "**DO NOT visit campus or participate in group/social activities.**"³² The same day, he reported to his sergeant that he was "super congested."³³ On October 5, the grievant reported to work anyway, and a colleague who heard the grievant's radio transmissions thought he "sounded sick."³⁴ On October

²⁴ Hearing Decision at 9 n.14.

²⁵ See Agency Ex. 3, at 3-5.

²⁶ As a result, and contrary to the grievant's assertions, EDR perceives nothing in the hearing decision that sustains terminable misconduct in the form of disruptive behavior or insubordination, or that upholds the university's disciplinary action on either of those theories. See Request for Administrative Review at 3. Indeed, as the grievant argues, the hearing decision made no findings as to those offenses. Thus, we do not read the hearing decision to compel the grievant, either directly or indirectly, to discuss these charges with potential future employers.

²⁷ See Request for Administrative Review at 5-10.

²⁸ *Id.* at 5; see DHRM Policy 1.60, *Standards of Conduct*, Att. A.

²⁹ Request for Administrative Review at 6.

³⁰ *Id.* at 9 (emphasis omitted).

³¹ Hearing Decision at 4.

³² *Id.* at 4-6.

³³ *Id.* at 6.

³⁴ *Id.*

6, he took a COVID-19 test that returned a positive result.³⁵ Based on these findings of fact³⁶ indicating that the grievant had symptoms of COVID-19 but violated the resulting directive not to report to work, the hearing officer reasonably concluded that this action “created a risk of bodily harm by possibly exposing others to COVID-19.”³⁷

Nevertheless, the grievant contends that his offense did not merit discipline at the Group III level because it lacked intent. Under Policy 1.60, Group III offenses are generally appropriate for “acts of misconduct of a most serious nature that severely impact agency operations,”³⁸ such as acts that “endanger others in the workplace” or constitute “neglect of duty” or “other serious violations of policies, procedures, or laws.”³⁹ Illustrative examples include excessive unauthorized absences, unauthorized use of state records or property, threatening others, and sleeping during work hours.⁴⁰ Although Group III offenses include certain willful or reckless conduct, DHRM Policy 1.60 does not require an element of intent for discipline at this level, which covers a range of serious misconduct. In addition, because DHRM’s policy guidance specifically lists “violating safety rules (where threat of bodily harm exists)” as a Group III offense, conduct fitting this description may be disciplined at the Group III level.⁴¹ As explained above, the hearing officer found that the grievant’s conduct violated a safety rule and posed a threat of bodily harm to others.

For this reason, we also reject the grievant’s contention that the university had no authority to impose discipline for a single violation of its COVID-19 safety protocols.⁴² Although the university’s policy provides that “[r]epeated noncompliance may result in disciplinary action,” it also states that “[t]he applicable Standards of Conduct for faculty and staff may be used to address faculty and staff noncompliance”⁴³ Reading these two provisions together, we cannot conclude that the university’s reference to “repeated” violations would negate the statewide disciplinary framework established by DHRM Policy 1.60, *Standards of Conduct*. Accordingly, we find no error in the hearing officer’s evaluation of the grievant’s behavior under Policy 1.60.

Finally, the grievant argues that this result is contrary to state goals and policies related to the containment of COVID-19, because it will cause other state workers “to hide information or provide false information about symptoms and diagnoses as a matter of protection.”⁴⁴ This argument appears to rely on the grievant’s characterization of his actions as merely a negligent attribution of his initial symptoms to seasonal allergies.⁴⁵ To the extent the grievant suggests he

³⁵ *Id.* at 8.

³⁶ These findings are supported by evidence in the record. *See, e.g.*, Agency Ex. 3, at 32-37; Agency Exs. 6, 9, 10, 13, 15; Hearing Recording at 2:19:40-2:22:15 (testimony of university’s Executive Director for Safety & Emergency Management).

³⁷ Hearing Decision at 9.

³⁸ DHRM Policy 1.60, *Standards of Conduct*, Att. A: Examples of Offenses Grouped by Level.

³⁹ DHRM Policy 1.60, *Standards of Conduct*, at 9.

⁴⁰ DHRM Policy 1.60, *Standards of Conduct*, Att. A.

⁴¹ *See id.*

⁴² *See* Request for Administrative Review at 7-8.

⁴³ Agency Ex. 4, at 22-23. The agency argues that the grievant did commit repeated violations subject to discipline under the policy. Rebuttal at 9. However, only one violation – the grievant’s reporting to campus for the October 5 shift – is reflected in the hearing officer’s findings.

⁴⁴ Request for Administrative Review at 10.

⁴⁵ *See id.* at 9.

was disciplined for providing information about possible COVID-19 infection, this description omits the primary misconduct cited by the Group III Written Notice and sustained by the hearing officer: that the grievant received an explicit directive not to come to campus for safety reasons, pursuant to the agency's COVID-19 policy, and he violated that directive. Under these circumstances, EDR perceives no inconsistency between upholding the agency's disciplinary action and any state or university policy.

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.⁴⁶ 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.⁴⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁴⁸

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⁴⁶ *Grievance Procedure Manual* § 7.2(d).

⁴⁷ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁴⁸ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).