Issue: Administrative Review of Hearing Officer’s Decision in Case No. 8567; Ruling Date: October 15, 2007; Ruling #2007-1680; Agency: Department of Mines, Minerals and Energy; Outcome: Hearing Decision In Compliance.

*COMMONWEALTH of VIRGINIA*
***Department of Employment Dispute Resolution***

## ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Mines, Minerals & Energy
Ruling Number 2007-1680
October 15, 2007

The Department of Mines, Minerals & Energy (the agency) has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8567. For the reasons set forth below, there is no reason to disturb the hearing officer's decision.

### FACTS

The hearing officer found the facts in this case as follows:

> *Grievant filed a grievance from a Group III Written Notice for failing to notify the agency that he was engaged in outside employment and for falsification of Conflict of Interest forms. As part of the disciplinary action, grievant was removed from state employment effective January 22, 2007. At the second resolution step grievant provided evidence that he had not been engaged in outside employment and the agency removed that alleged offense from the Written Notice. The agency upheld the falsification of records charge and its decision to terminate grievant's employment. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing. The Department of Mines, Minerals and Energy (Hereinafter referred to as "agency") has employed grievant as a mineral specialist for 22 years.*
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> *In July 2006, grievant learned of a recruitment notice for a mineral mine inspector position and submitted his application. The only employment he listed in his application other than his agency position was two summer jobs with a coal mining company before he had been hired by the agency. The law requires that mine inspectors shall hold a certificate as a mine foreman and, a certificate as a mine inspector issued by the Board of Mineral Mining Examiners. In order to be either a foreman or a mine inspector, the law also requires that Board of Mineral Mining Examiners may require certification of the applicant. Applicants for a foreman certificate shall have had at least five years of experience at mineral mining or other experience deemed appropriate by the Board of Mineral Mining Examiners. The Code further provides that applicants for certification as a surface foreman shall possess five years mining experience, at least one year at a*

*surface mineral mine, or equivalent experience approved by the agency's Division of Mineral Mining (DMM).*

*During an initial interview for the position, and in discussions with the agency's certification program manager, grievant learned that his work experience would be insufficient to meet the five-year certification requirement. Grievant told the certification manager that he had performed unpaid work and observed his father at a mine in West Virginia. The manager advised grievant to submit work experience forms for <u>all</u> work experience, whether paid or unpaid, so that the agency could evaluate his actual experience and knowledge. Grievant followed the advice and filled out work experience forms for summer jobs he had with a trucking company in which his father was a part owner, and for a coal company at which his father was a foreman; both of these jobs were prior to grievant being employed by the agency. Grievant also submitted an experience form stating that he was intermittently assistant superintendent at a golf course for a total of 19 months from 2004-2006. Grievant submitted a fourth work experience form stating that he had been employed on three occasions for a total of eight months between 2001 and 2006 as an equipment operator at a surface mine in West Virginia where his father was then foreman. Even though grievant was not paid at either the golf course or the West Virginia mine, he put in his time at those jobs only on weekends, holidays, or when using annual leave.*

*Because both of the latter two jobs appeared to be outside employment while grievant was employed with the agency, the forms were referred to the director of grievant's current division to determine whether there was anything improper. The agency then contacted the surface mine company and was advised by letter that a person with grievant's name had been employed there since 1990. Based on that letter, the division director concluded that grievant had performed outside employment without permission and confronted grievant with the information on January 22, 2007. Grievant explained that the person who had been employed since 1990 at the coal mine was his father, who has the same first name as grievant. Notwithstanding this explanation, the division director immediately issued the disciplinary action and discharged grievant.*

*Subsequent to the termination of grievant's employment, the agency decided to check out grievant's explanation. It again contacted the coal company and learned that grievant was correct. The initial letter sent by the coal company had provided information about the employment record of grievant's father – not about grievant. The coal company verified that it had no record of grievant, that it was unaware of grievant's existence, and that he had never been employed by the company. At the second step resolution meeting on February 5, 2007, grievant confirmed what the coal company's letter stated. Four days later, the division director wrote to grievant acknowledging that he had made an error. He accepted the fact that grievant had not been employed by the coal company and was not in violation of the outside employment section of Policy 1.60. However, the division director decided that termination of grievant's employment should stand because the work experience form stated that grievant was "employed as an equipment operator." Since grievant was, in fact, not "employed" because he*

> *was not paid, the director determined that the assertion was a falsification of a state document.*
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> *Grievant has two inactive disciplinary actions – a Group I Written Notice for a conviction of improper driving in a state vehicle, and a Group III Written Notice for failure to report damage to a state vehicle and attempting to repair the damage without permission.*[1]

The hearing officer ultimately determined that the agency had not shown by a preponderance of the evidence that the grievant intentionally falsified the work experience form at issue, or indeed any of his work experience forms or applications for certification.[2] The hearing officer rescinded the Group III Written Notice and ordered that the grievant be reinstated.[3] The agency now requests administrative review from this Department.[4]

## DISCUSSION

By statute, this Department 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."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

The agency presents two arguments for consideration on administrative review. First, the agency asserts that the hearing officer erred by refusing to admit evidence of prior incidents in the grievant's personnel file. Second, the agency alleges that the hearing officer "attempted to act as a 'super-personnel officer' and has failed to give the appropriate level of deference to the agency's actions." Through this fact-based argument, the agency claims that no rational trier of fact could find for the grievant in this case.[7]

*Evidence of Prior Incidents*

The agency contends that the hearing officer erred by refusing to admit evidence of prior incidents in the grievant's personnel file. The agency's argument is without merit. The hearing officer actually admitted agency documents regarding "prior incidents" into evidence. Agency Exhibits 20, 21, and 24 were all received in evidence.[8] These documents reflect disciplinary

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[1] Decision of Hearing Officer, Case No. 8567, Apr. 26, 2007 ("Hearing Decision"), at 1-3 (footnotes omitted).
[2] *Id.* at 5-6.
[3] *Id.* at 7.
[4] The agency also requested administrative review from the hearing officer and the Department of Human Resource Management. Both the hearing officer and DHRM have issued their respective rulings in this matter, and both refused to disturb the original hearing decision.
[5] Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] The agency also alleged in Section I of its brief that the hearing officer's decision was contrary to the facts in the record. This Department will not address the specific arguments contained in that section of the brief because they were presented to the hearing officer, not EDR. However, to the extent the agency asserts generally that the hearing decision is not supported by the record evidence, that argument will be addressed below.
[8] Hearing Tape 2, Side B, at Counter Nos. 224-90; Hearing Tape 3, Side A, at Counter Nos. 485-507.

actions taken against the grievant twelve and twenty-two years ago respectively. The first was a Group III Written Notice for failing to report accidents with a state vehicle and attempting to repair the damage without permission. The second disciplinary action was a Group I Written Notice for a traffic violation in a state vehicle.

Because these documents were entered into evidence, the agency would appear to be arguing that the hearing officer refused to admit the documents at tabs 22, 23, 25, and 26 in the agency's binder of potential exhibits. However, at the end of the hearing, the hearing officer went over each of the agency's documents that had not been admitted into evidence already. Potential exhibit 22 appears to be an accident report concerning incidents in which the grievant was allegedly involved with state vehicles. The hearing officer stated that there was some evidence of the related disciplinary action resulting from this conduct in the record already and ruled that the evidence was redundant.[9] This conclusion appears reasonable and well within the hearing officer's discretion. "The hearing officer may exclude evidence that is irrelevant, immaterial, insubstantial, privileged, or repetitive."[10] The hearing officer had already admitted evidence in support of the agency's allegations that the grievant had attempted to deceive the agency about the accidents. The information contained in potential exhibit 22 was repetitive of the information already in the record.[11] The hearing officer did not abuse his discretion in excluding this evidence.

Additionally, it is unclear whether the agency ever formally offered potential exhibit 22 or potential exhibit 23. When the hearing officer addressed potential exhibit 23, which appears to contain documentation of the investigation of the facts of one of the grievant's accidents with a state vehicle, the agency's advocate stated that the documents were "more or less the same" as potential exhibit 22.[12] It is not clear based on a review of the record whether the agency simply chose not to offer this evidence, whether it waived any complaint over its exclusion, or whether the hearing officer excluded the documents, similar to potential exhibit 22, because they were redundant.[13] However, there is no indication that the hearing officer abused his discretion in refusing to admit these documents into evidence, as they could appropriately be viewed as repetitive and thus subject to exclusion similar to potential exhibit 22.

The final two exhibits that appear to relate to "prior incidents" were potential exhibits 25 and 26. When the hearing officer asked about these documents, the agency indicated that they would not be needed in evidence.[14] These documents were not even proffered. Therefore, the agency has no basis to contend that the hearing officer refused to admit these documents. The agency waived any such argument by failing to offer the documents into evidence.[15]

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[9] Hearing Tape 3, Side A, at Counter Nos. 550-95.
[10] *Rules for Conducting Grievance Hearings* § IV.D.
[11] Indeed, it was the fact that the grievant attempted to deceive the agency (i.e., failing to report the incidents) that was relevant to the claims in the hearing. Whether the grievant had been involved in incidents with state vehicles was not relevant to the grievant's alleged falsification at issue in this grievance. Therefore, the hearing officer appropriately admitted the evidence whereby the agency had disciplined the grievant for his alleged deception, but he did not admit the evidence detailing the underlying accidents.
[12] Hearing Tape, Side A, at Counter Nos. 550-95.
[13] *See id.*
[14] *Id.*
[15] Additionally, potential exhibit 26 was an agency-rescinded disciplinary action. Hearing Decision at 3 n.18.

Moreover, contrary to the agency's argument, the hearing officer did not exclude any exhibits regarding "prior incidents" from evidence on the basis that the exhibits were inactive Written Notices. Rather, the hearing officer had already included evidence of the inactive Written Notices in the record because they concerned relevant considerations of credibility and past untruthful conduct.[16]

Based on the foregoing, there is no indication that the hearing officer abused his discretion or violated the grievance procedure in refusing to admit the few documents that were actually excluded. The hearing officer applied a rule that is consistent with past EDR precedent, i.e., evidence of inactive written notices may be admissible to show a pattern of prior similar conduct.[17] The hearing officer utilized this rule to admit the agency's exhibits that were non-repetitive and actually proffered for this purpose. In sum, the hearing officer's evidentiary determinations were consistent with the grievance procedure and Rules for Conducting Grievance Hearings. There is no basis to remand the grievance on these grounds.

*Level of Deference/Factual Conclusions*

The agency claims that the hearing officer acted as a "super-personnel officer" and failed to give the appropriate level of deference to the agency's actions.[18] There is no evidence to support the agency's contentions. The hearing officer simply found that the agency had failed to meet its burden of proving by a preponderance of evidence that the grievant had intentionally falsified state documents.[19]

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 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] Hearing Tape 2, Side B, at Counter Nos. 224-90; Hearing Tape 3, Side A, at Counter Nos. 485-507.
[17] *See* EDR Ruling No. 2007-1513.
[18] The agency also claims that the hearing officer was biased. The Virginia Court of Appeals has indicated that, as a matter of constitutional due process, actionable bias can be shown only where a judge has "a direct, personal, substantial [or] pecuniary interest" in the outcome of a case. Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E.2d 451, 460 (1992). While not dispositive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive and has been used by this Department in past rulings. *See, e.g.,* EDR Ruling Nos. 2003-113 and 2004-640. In this case, the agency has not claimed nor presented evidence that the hearing officer had a "direct, personal, substantial or pecuniary interest" in the outcome of the grievance. Accordingly, this Department cannot conclude that the hearing officer showed bias in this case.
[19] *Rules for Conducting Grievance Hearings* § VI(B).
[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, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

The agency argues that the hearing decision was inconsistent with the grievance procedure because the hearing officer did not give the appropriate amount of deference to the agency's actions and acted like a "super-personnel officer." That argument is misplaced. The Rules for Conducting Grievance Hearings ("Rules") specifically provide, as stated above, that a hearing officer's fact-finding in a disciplinary case is *de novo,*[24] without deference to either the agency or the grievant. The provisions of the Rules cited by the agency relating to the deference that should be afforded to an agency only apply during a hearing officer's mitigation analysis, *which occurs only after a finding by the hearing officer* that "(i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy."[25] Thus, deference to the agency is required only when a hearing officer is determining whether to mitigate a disciplinary action where an agency has successfully proven that the charged offense occurred.[26] In this case, the hearing officer reversed the disciplinary action because the agency did not sustain its burden of proof, not because of mitigating factors.[27] Therefore, the agency's discussion of the amount of deference is inapposite because the hearing officer simply found that the agency's evidence did not support the Written Notice.

The agency appears to argue further that "as a matter of law" no reasonable fact finder could have ruled in the way the hearing officer did in this case. The agency contends that the grievant's conduct could fall in only one of two scenarios: 1) the grievant worked outside his state employment at the mine in West Virginia ("WFE") without prior approval as required by agency policy and in violation of conflict of interest statutes, OR 2) the grievant did not work outside his state employment but falsified his work experience forms by stating that he worked for WFE. The agency argues that there can be no other third alternative, and that, therefore, the hearing officer's decision should be reversed. The agency's analysis is misguided.

First, the actual charge in the Written Notice before the hearing officer was that the grievant, in conjunction with his application for employment, falsified a state record by submitting documentation indicating employment at WFE.[28] The charge in the Written Notice before the hearing officer was not that the grievant had worked outside his state employment in violation of policy and conflict of interest statutes or that the grievant had falsified his conflict of interest forms.[29] Secondly, there are certainly more than two reasonable alternatives to describe the conduct that is the subject of this grievance. The hearing officer determined that the forms can reasonably be read several ways, and concluded that the agency did not prove by a

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[24] *Rules for Conducting Grievance Hearings* § VI(B).
[25] *Id.*
[26] If the hearing officer finds that the employee engaged in the charged behavior, the behavior constituted misconduct, and the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated unless under the record evidence, the discipline exceeds "the limits of reasonableness." Examples of mitigating circumstances that could exceed the limits of reasonableness include lack of notice, inconsistent application of discipline, and improper motive. See *Rules for Conducting Grievance Hearings* § VI(B).
[27] Hearing Decision at 5-6.
[28] Hearing Decision at 5, Agency Ex. 18.
[29] *Id.*

preponderance of evidence either one of its two scenarios.[30] There is substantial evidence in the record to support the hearing officer's findings in this regard, as discussed below.

The agency asserts in its amended Written Notice that the grievant falsified a work experience form by claiming he was "employed" by a particular employer, WFE, when he actually was not employed, but, as an unpaid observer, simply watched his father working.[31] The hearing officer determined that nothing on the work experience form specified that it should be used for documenting only paid work experience.[32] Moreover, the hearing officer found that the grievant was told by the agency to submit all work experience, and was not instructed to use a different unpaid work experience form.[33] Indeed, based on the testimony at hearing, the agency wanted to review actual work experience, regardless of whether the work was paid or unpaid.[34] As such, the hearing officer found that the grievant should not be held accountable for the limitations of the agency's form, and that the grievant had not intended to falsify the document by indicating that he had gained experience at WFE.[35] The record evidence supports the hearing officer's finding that the grievant used the work experience form to document work he had performed and observed, and that the purpose of the form was to capture such experience, not just paid employment. In sum, there would appear to be substantial evidence in the record to support the hearing officer's conclusion that the agency did not establish by a preponderance of evidence that the grievant intentionally falsified the work experience form.

The agency also claims that the grievant falsified his applications for certification by describing his experience in mining operations as "three years and six months primarily coal."[36] However, as reflected in the amended Written Notice and as the hearing officer found, the agency failed to charge the grievant with falsification of an application for certification. On its face, Agency Exhibit 18, the letter amending the changes in the Group III Written Notice, supports this conclusion. The only form mentioned in the agency's cover letter and in its amended attachment to the Written Notice that the grievant was alleged to have falsified was the WFE work experience form.[37] Consequently, the hearing officer appropriately determined that the grievant was not charged with falsification of the application for certification and that allegation could not be used to support the Written Notice.[38] However, as the hearing officer

[30] Hearing Decision at 5-6.
[31] *See* Hearing Tape 2, Side A, at Counter Nos. 300-45.
[32] Hearing Decision at 5.
[33] *Id.*; *see also* Hearing Tape 1, Side B, at Counter Nos. 402-21; Hearing Tape 2, Side B, at Counter Nos. 037-47; Hearing Tape 3, Side A, at Counter Nos. 100-07.
[34] Hearing Decision at 5.
[35] One of the agency's witness stated that the grievant told him he had additional unpaid work experience with his father in West Virginia. Hearing Tape 1, Side B, at Counter Nos. 435-56; *see also* Hearing Tape 3, Side A, at Counter Nos. 195-207. The record evidence is consistent with the hearing officer's findings that the grievant was forthright about his experience at WFE and was not attempting to deceive the agency.
[36] Hearing Tape 2, Side A, at Counter Nos. 300-45.
[37] Indeed, the argument of agency's counsel on appeal that the agency's revised Written Notice specifically included three applications for certification is belied by the clear language of the cover letter and revised attachment, which expressly states, "You have falsified a state record for employment by submitting documentation to the Division of Mineral Mining that indicates you were employed by [WFE]. The document you submitted was to document and substantiate surface mining experience in order to qualify for employment at the Division of Mineral Mining." Contrary to the agency's contention, the applications for certification are not mentioned. Moreover, all references to the falsified document are in the singular, not plural, meaning a particular single document, i.e., the WFE work experience form.
[38] Hearing Decision at 6.

did, EDR will address the merits of that charge because even if the Written Notice could be interpreted to include falsification of the application for certification, the agency did not meet its burden.[39]

The agency suggests that the grievant's work experience forms reflect nowhere near the three years, six months of mining experience claimed on the application for certification. However, the hearing officer found it was probable that the grievant miscalculated the total amount of time and, therefore, it was more likely than not that it was not a deliberate falsification.[40] This finding is supported by the record evidence. The agency's computation ignores the fact that the grievant included in the three years, six months figure the two years of credit he would receive for obtaining an associate's degree.[41] Indeed, the grievant testified that this figure was used in his calculation.[42] The work experience forms show that the grievant worked for roughly nine months at a trucking company (May – Sept. 1979; May – Sept. 1980)[43] and six months at a coal company (July – Sept. 1982; June – Oct. 1983).[44] When the total of these amounts (one year, three months) is added to the two years for the associate's degree, the sum is just three months short of three years, six months. Indeed, the record reflects that this three years, three months was the amount accepted by the agency as his relevant mining experience in relation to his application for certification.[45] Still remaining is the grievant's observation time at WFE, which the grievant testified occurred during holidays, weekends, and time he was on annual leave in 2001, 2002, 2003, and 2005,[46] thus approaching further the figure of three years, six months. Any remaining amount of time is quite reasonably accountable to mathematical error, as found to be the more probable explanation by the hearing officer,[47] in the absence of any other evidence to the contrary.

In sum, the record evidence is consistent with the hearing officer's finding that it was more probable than not that the grievant unintentionally miscalculated the total. More importantly, the record evidence does not support the agency's manner of computation for purposes of this grievance, which fails to take into account the two years for the grievant's associate's degree. In weighing the evidence, the hearing officer determined that the agency had not met its burden to show that the grievant had intentionally falsified the form. This was not a matter of the hearing officer acting like a "super-personnel officer." Rather, the hearing officer simply held the agency to its burden of proof based on the record evidence.

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[39] The agency also asserts that the grievant falsified his application for employment by stating that he had never been convicted of a violation of law, including moving traffic violations, and misstating the extent to which he supervised employees in his current position. These allegations are not part of the Written Notice at issue in this case because the agency never charged the grievant with falsification of the application for employment. Agency Ex. 18. As such, the hearing officer appropriately considered the evidence only as a potential aggravating circumstance. These considerations did not affect the conclusion that the agency had failed to meet its burden of proof as to the documents the grievant was actually charged with falsifying. Hearing Decision at 6.
[40] Hearing Decision at 6.
[41] *See* Hearing Tape 1, Side B, at Counter Nos. 395-401.
[42] Hearing Tape 3, Side A, at Counter Nos. 218-30, 390-96.
[43] Agency Exhibit 12.
[44] Agency Exhibit 13.
[45] Grievant Ex. 4 (agency letter to grievant confirming three years, three months relevant mining experience) Hearing Tape 1, Side B, at Counter Nos. 552-59.
[46] *See* Agency Exhibit 14; Hearing Tape 3, Side A, at Counter Nos. 195-207. The grievant testified that he estimated the time he worked at WFE. *See* Hearing Tape 3, Side A, at Counter Nos. 510-15.
[47] Hearing Decision at 6.

In arguing that the facts support its contention that the grievant intentionally falsified a state document, the agency appears to contest the hearing officer's findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.[48] Based upon a review of the hearing record, substantial evidence supports the hearing officer's decision. Accordingly, this Department cannot find that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence and the material issues in the case. Consequently, this Department will not disturb the hearing officer's decision.

## APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision is now a final hearing decision.[49] Within 30 calendar days, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[50] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[51]

Claudia T. Farr
Director

[48] *Rules for Conducting Grievance Hearings* § VI(B).
[49] *Grievance Procedure Manual* § 7.2(d).
[50] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a). To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal, in other words, the basis for its position that the hearing decision is "contradictory to law." *Grievance Procedure Manual* § 7.3(a).
[51] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).