Issue: Administrative Review of Hearing Officer's Decision in Case No. 8764; Ruling Date: May 28, 2008; Ruling #2008-1967; Agency: Department of General Services; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of General Services
Ruling Number 2008-1967
May 28, 2008

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8764. For the reasons set forth below, this Department will not disturb the hearing decision.

FACTS

This case concerns a grievance challenge to a Group III Written Notice that the grievant received from the Department of General Services (the agency) for absence in excess of three days without proper authorization.[1] The facts of this case, as set forth in the February 5, 2008 hearing decision, are recounted below.[2]

> The Department of General Services employed Grievant as a Scientist at its Facility until her removal effective September 20, 2007. She had been employed by the Agency for approximately 23 years.
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> Grievant stopped reporting to work on July 24, 2007. Grievant called her Supervisor on July 24, 2007 and said she had an appointment with a counselor on August 1, 2007 and would not return to work until after that appointment. The Supervisor told Grievant that Grievant did not have any available leave and would need to submit written documentation of the reasons for her absence.
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> Grievant spoke with the Deputy Director on July 30, 2007 and told him that she had a note from her doctor.
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> On August 2, 2007, Dr. K drafted a note regarding Grievant saying that, "[Grievant] [w]as seen in the office today and should be excused from [work] from 7/24/07 to unknown."

[1] Decision of Hearing Officer, Case No. 8764, February 5, 2008 ("Hearing Decision"), at 1.
[2] Some footnotes and portions of the "finding of facts" from the original decision have been omitted for the sake for brevity.

On August 3, 2007, the Human Resources Generalist sent Grievant a letter with the subject line entitled "Important Notice Regarding Family and Medical Leave (FML)". This letter stated, in part:

> The Human Resources Office has been notified of your need to take family and medical leave due to a serious health condition that makes you unable to perform the essential functions of your job. This leave began on July 24, 2007. ***
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> You will be required to furnish medical certification of a serious health condition. If you initiate a VSDP claim (which may be done by calling [Third Party Administrator] at [telephone number], your physician must provide medical certification to [Third Party Administrator], which will fulfill this requirement. If you do not submit a VSDP claim, or your claim is not approved by [Third Party Administrator], you will be required to provide medical certification to the agency. **If medical certification is not provided to the agency within 14 days of the date your leave begins, you will be considered absent without proper authorization and be subject to disciplinary action, up to and including dismissal.** (Emphasis Added). ***

Attached to the August 3, 2007 letter was a form entitled "Certification of Health Care Provider" which is also known as OMB NO. 1215-0181.

On August 13, 2007, Dr. K completed an "Attending Physician Statement" requested by the Third Party Administrator. Dr. K wrote about Grievant that she had, "Depression causing problems [with] concentration, productivity." On August 29, 2007, Dr. K completed a "Return to Work Certification" required by the Department of General Services. Dr. K wrote about Grievant, "I certify that on 8/29/07, I examined [Grievant], and on the basis of my examination, this employee is able to return to full-time work and is able to perform the functions of his/her position with no restrictions, effective 9/4/07.

On August 21, 2007, the Human Resources Director sent Grievant a letter stating:

> You were advised by certified mail dated August 3, 2007 that if your Virginia Sickness and Disability Plan (VSDP) claim was not approved by [Third Party Administrator], you were required to provide medical certification to the agency. Additionally, you were advised that if medical certification was not provided to the agency within 14 days of the date you leave began, you'll be considered absent without proper authorization and be subject to disciplinary action, up to and including dismissal. It has been 28 days since the date your leave began, and it has been 18 days since you were notified of your responsibilities under the Family and

> Medical Leave (FML) Act. This is the final request for medical certification that you will receive.
>
> Unless acceptable FML certification or VSDP authorization is received in our office by close of business, August 29, 2007, it is our intent to issue a Group II Written Notice for unauthorized absence. Because of previous disciplinary actions, upon the issuance of the Group II, your employment will be terminated, in accordance with DHRM Standards of Conduct Policy 1.60. If you do supply the required certifications and authorizations by this deadline, you will be eligible to return to work only after we receive a Return To Work certification from your treating physician.

Grievant called the Supervisor on August 29, 2007. She asked him if she was scheduled to work on September 3, 2007 which was Labor Day. He told her "no". Grievant responded that she would return to work on September 4, 2007.

On August 29, 2007, Grievant traveled to the Agency's building and went to the Human Resource office. She spoke with HR Generalist C and presented the completed Return to Work Certification signed by Dr. K authorizing Grievant to return to work effective September 4, 2007. HR Generalist C told Grievant that she was not sure if the document satisfied the requirements stated in the letter Grievant had received since the HR Generalist C was not involved with Grievant's claim. Grievant said she would be back to work on September 4, 2007. Grievant failed to bring the Certification of Health Care Provider form that the Agency mailed to her and expected her to return to the Agency.

Grievant did not return to work on September 4, 2007 as she had stated she would do. Grievant called her Supervisor and informed him that she would not be at work that day and that she would try to schedule a doctor's appointment. On September 5, 2007, Grievant called the Supervisor and left a message on his answering machine saying that she was unable to get a doctor's appointment on September 4, 2007 but that she had an appointment on September 5, 2007, and that she would contact staff in the Human Resource division to update them. Grievant also said that she will report to work on September 6, 2007.

Grievant was hospitalized from September 6, 2007 until September 11, 2007. Grievant's daughter called the Human Resource Manager and told her that Grievant had been hospitalized. In response to the daughter's call, the Human Resource Generalist sent Grievant a letter on September 7, 2007. The letter stated:

> The Human Resources Office has been notified of your need to take family and medical leave due to a serious health condition that makes you unable to perform the essential functions of your job. This leave began on September 4, 2007.

> You will be required to furnish medical certification of a serious health condition. If you initiate a VSDP claim (which may be done by calling [Third Party Administrator] at [telephone number], your physician must provide medical certification to [Third Party Administrator], which will fulfill this requirement. If you do not submit a VSDP claim, or your claim is not approved by [Third Party Administrator], you will be required to provide medical certification to the agency. **If medical certification is not provided to the agency within 14 days of the date your leave begins, you will be considered absent without proper authorization and be subject to disciplinary action, up to and including dismissal.** (Emphasis Added). ***
>
> While on leave, you will be required to contact your supervisor periodically to provide information regarding your status and intent to return to work. If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you should contact your supervisor immediately to schedule your return date. If you are on disability leave, your physician needs to provide medical certification to [Third Party Administrator].
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> You will be required to furnish re-certification relating to a serious health condition if circumstances described by the previous certification change (such as duration of absence or severity of the condition) or if you are still on leave 30 days from the previous certification. If you are on disability leave, your physician needs to provide re-certification to [Third Party Administrator] which will fulfill this requirement.

Attached to the September 7, 2007 letter was a form entitled "Certification of Health Care Provider" which is also known as OMB NO. 1215-0181.

Grievant called the Human Resource Manager on September 17, 2007 at approximately 9 a.m. and said that she had a doctor's appointment that day and intended to return to work the following day. The Human Resource Manager told Grievant she had to have a Return to Work Certification form and a FML Certification form completed in order for her absence from September 4, 2007 to be authorized. The Human Resource Manager told Grievant that these forms were mailed to her on September 7, 2007. Grievant said that she had not received the forms but that she would look around and let the Human Resource Manager know if she could not find them. The Human Resource Manager offered to fax the forms to Grievant's doctor's office so that the doctor would be able to complete the forms while Grievant was at her appointment later that day.

Grievant called the Human Resource Manager later in the day on September 17, 2007. Grievant said she did not receive the FML certification form nor the Return to Work form that was mailed to Grievant on September 7, 2007.

The Human Resource Manager again offered to send the forms to Grievant's doctor's office directly and Grievant said "no" because the doctor's office staff said the doctor was out of the office until September 24 and the doctor was the only one who could complete the forms. The Human Resource Manager confirmed that Grievant was talking about Dr. K. The Human Resource Manager told Grievant that whatever doctor she was seeing that day could at least complete the Return to Work form. Grievant said "no" my appointment today is with a different doctor. Grievant stated that she would come to Agency's Human Resource office around 2 p.m. to pick up the forms. Grievant did not go to the Agency's offices to pick up the forms.

On September 17, 2007, the Human Resources Director sent Grievant a letter stating:

> You were advised in a letter dated September 7, 2007 that you were required to furnish medical certification of your serious health condition on the FML Certification form for your absence that began on September 4, 2007. Additionally, you were advised that if medical certification was not provided to the agency within 14 days of the date your leave began, you would be considered absent without proper authorization and be subject to disciplinary action, up to and including dismissal.
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> If VSDP authorization or Family & Medical Leave Certification (using the U.S. Department of Labor FML Certification form) is not received in our office by 5 p.m. on Wednesday, September 19 (15 days since your leave began) certifying your absence beginning September 4 through the return date, it is our intent issue you a Group III Written Notice for absence in excess of three days without proper authorization. Because of previous disciplinary actions, upon the issuance of the written notice, your employment will be terminated, in accordance with DHRM Standards of Conduct Policy 1.60.

On September 20, 2007, Grievant's Supervisor sent her a letter stating:

> You were advised in a letter dated September 17, 2007 that if VSDP authorization or Family & Medical Leave Certification (using the U.S. Department of Labor FML Certification form) was not received in our office by 5 p.m. on Wednesday, September 19 (15 days since your leave began) certifying your absence beginning September 4, 2007 you would be issued a Group III Written Notice for absence in excess of three days without proper authorization and that because of previous disciplinary actions, upon issuance of the written notice, your employment will be terminated, in accordance with DHRM Standards of Conduct Policy 1.60.

> You were also asked to provide any other information that the agency should consider regarding the contents of that correspondence. Since you have not contacted management in [the Division] nor Human Resources with additional information to be considered, your employment is being terminated effective September 20, 2007. ***

On September 21, 2007, Grievant called the Supervisor and asked if he had a confidential letter for her. He said "no" and Grievant hung up the telephone.

On September 24, 2007, Grievant called the Human Resources Director and said "I got the letter this morning." Grievant was referring to the September 20, 2007 letter from the Supervisor informing Grievant that her employment was terminated.

Grievant's last day of work was July 24, 2007. She did not report to work on any day prior to her removal from employment effective September 20, 2007.

On October 31, 2007, Grievant met with the Second Step Respondent as part of her grievance. She presented to him a form entitled "Certification of Health Care Provider" which is also known as OMB NO. 1215-0181. Dr. K completed the form on August 29, 2007. She did not deliver the form to the Agency when she went to the Human Resource office and spoke with the Human Resource Generalist C on August 29, 2007. She forgot to take the form with her.

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The hearing officer upheld the disciplinary action and termination finding that "[a]s of September 20, 2007, Grievant has been absent from work more than three days without proper authorization and without a satisfactory reason," and therefore "the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice."[3] The hearing officer found that the action was consistent with the Commonwealth's disability and family medical leave policies as well as the Americans with Disabilities Act. The hearing officer concluded:

> The Agency sent Grievant several letters advising her of her obligation to inform her supervisor of her leave status. The Agency sent Grievant several letters advising her that if she did not provide medical certification to the agency within 14 days of the date her leave began, she would be considered absent without proper authorization and be subject to disciplinary action, up to and including dismissal. Grievant did not fully inform her supervisor or the Third Party Administrator of her leave status. She did not provide the Third Party Administrator with all of the necessary documents to continue her VSDP short term disability benefits. Grievant did not provide either the Agency or the Third Party Administrator with the necessary medical certification to enable her to

[3] Hearing Decision, at 9.

> obtain FMLA leave prior to her removal. In short, Grievant did not comply with the State requirements under the VSDP program and FMLA policy.[4]

The grievant sought administrative review from the hearing officer, who affirmed his earlier decision in a March 3, 2008 Reconsideration Decision.[5]

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."[6] 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.[7]

New Evidence

The grievant seeks to have this Department consider several documents that she characterizes as "new evidence."

1. The Attending Physician Statement and Certification of Health Care Provider

First, the grievant requests consideration of a third-party provider "Attending Physician Statement" completed August 13, 2007 and a "Certification of Health Care Provider" (form OMB NO. 1215-0181) completed August 29, 2007. For the reasons, discussed below, we conclude that these documents do not constitute "newly discovered evidence."

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the trial ended.[8] Here, as the reconsideration decision correctly notes, "[t]hese documents were either submitted as exhibits in the original hearing and/or discussed as part of the evidence in the original hearing," and are thus "not newly discovered." Moreover, the hearing officer expressly found that the "[g]rievant's assertion that she forgot to take one of the documents [Certification of Health Care Provider] to the Human Resource office, but was told she did not need to return to her car to get the document she forgot is contrary to the Agency's credible evidence."[9]

Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the

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[4] Id. at 13.
[5] Reconsideration Decision, Case No. 8764-R, March 3, 2008 ("Reconsideration Decision"). The grievant raised the same objections in her appeal to this Department that she raised with the hearing officer in her administrative request for reconsideration.
[6] Va. Code § 2.2-1001(2), (3), and (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).
[9] Reconsideration Decision, at 1.

hearing officer with respect to those findings. In this case, there is record evidence that an agency representative told the grievant that she did not know whether the third-party provider "Attending Physician Statement" could serve as a substitute for the "Certification of Health Care Provider."[10] Given the record evidence to support the hearing officer's finding regarding the grievant's purported confusion over these documents, this Department cannot substitute its judgment for that of the hearing officer with respect to these findings.

II. Statement Regarding Vacation of Health Care Provider

The grievant has provided a statement from the office of one of her health care providers, dated February 12, 2008, which indicates that the grievant contacted the office "the week of September 17 to request the completion of Attending Physician forms; however, [Dr. C] was on vacation and not available." In the reconsidered decision, the hearing officer observed that the grievant testified to this fact during the original hearing and, thus, the statement is cumulative. A review of a recording of the hearing confirms that the grievant did testify regarding Dr. C's unavailability because of vacation.[11] Thus, we cannot conclude that the hearing officer erred in his characterization of this document as cumulative as opposed to newly discovered evidence.

III. Doctor Statements Regarding Ability to Return to Work

Finally, the grievant seeks to offer various statements from her health care providers that as of February 18-19, 2008, the grievant was able to return to work.[12] In his Reconsideration Decision, the hearing officer responded to these statements as follows:

> Grievant's medical condition in February 2008 is not at issue in this grievance. On the day of the hearing, Grievant testified that she had not been released by her medical professionals to return to work and did not indicate she was able to do so at that time. Grievant's medical condition in February 2008 is not material. At most, her evidence may raise an issue with respect to the Americans with Disabilities Act. The ADA [Americans with Disabilities Act] sets forth a basis for accommodation for qualified individuals with a disability. The ADA does not prohibit employers from enforcing conduct rules. Assuming for the sake of argument that Grievant was a qualified individual with a disability as of the date of her removal and as of the date of the hearing, the outcome of this case would not change.[13]
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> In the original hearing decision, the hearing officer had concluded that:
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> Grievant is not a qualified individual with a disability. At the time of the hearing, Grievant had not been released by her doctor to return to work. Grievant's mental health concerns were ongoing. She continues to take prescription medication as part of her treatment. Based on the evidence presented, there is no reason to

[10] Agency Exhibit 8.
[11] Hearing recording at 2:18-2:20.
[12] Three statements were provided, one dated February 18, 2008, the other February 19, 2008. The third statement, also dated February 19, 2008, states that she has been treating the grievant since October 11, 2007, and that throughout this period, the grievant had no symptoms that would impede her ability to perform her job.
[13] Reconsideration Decision, p. 2. (footnote omitted).

> believe Grievant could perform the duties of her former position or any other position at the Agency. A reasonable accommodation would not enable Grievant to perform the essential functions of the position with the Agency. The Americans with Disabilities Act [ADA] does not provide a basis to grant relief to Grievant in this case.[14]

Under the particular facts of this case, we cannot conclude the hearing officer erred in holding that the grievant was not a qualified individual with a disability. However, the mere fact that the grievant had not been cleared to return to work on the date of the hearing does not exclude her from being a qualified individual with a disability under the ADA. In determining whether an employee is disabled, the initial inquiry is whether she has a physical or mental impairment, a record of such impairment, or has been regarded as having such impairment.[15] The next question is whether any actual or past impairment substantially limits a major life activity, or whether the agency perceived her as having such an impairment.[16] In determining whether an impairment is substantially limiting, courts may consider the "nature and severity of the impairment," the "duration or expected duration of the impairment," and the "permanent or long term impact" of the impairment.[17]

A qualified individual is defined as an individual with a disability, who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.[18] As a general rule, if an employee is disabled under the ADA, an employer must make "reasonable accommodations" unless the employer can demonstrate that the accommodation "would impose an undue hardship on the operation of the business [or government]."[19] Many circuits and the Equal Employment Opportunity Commission have concluded that, in some circumstances, a leave of absence (unpaid) can be a reasonable accommodation under the ADA.[20] Thus, the mere fact that an individual cannot work at a particular point in time, does not, by itself, mean that such individual is not a qualified individual with a disability. However, it is also well-settled law that leave of an indefinite duration is not a reasonable accommodation.[21]

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[14] Hearing Decision, pp. 13-14. (footnote omitted)

[15] Physical or mental impairment is defined to include "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. §1630.2(h)(2).

[16] Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 CFR § 1630.2(i). To be "substantially limited" in a major life activity, the grievant must be significantly restricted in performing that activity. Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 196-98, 122 S. Ct. 681, 691 (2002).

[17] Pollard v. High's of Balt., Inc. 281 F.3d 462, 467-468 (4th Cir. 2002); 29 C.F.R. § 1630.2(j)(2).

[18] 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

[19] 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business").

[20] *See, e.g.*, Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1135-36 (9th Cir. 2001); Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 649-50 (1st Cir. 2000); Cehrs v. NE Ohio Alzheimer's Research Ctr., 155 F.3d 775, 781-83 (6th Cir. 1998); Haschmann v. Time Warner Entm't Co., 151 F.3d 591, 601 (7th Cir. 1998); *see also* 29 C.F.R. pt. 1630, app. at 356 (providing that a reasonable accommodation could include "unpaid leave for necessary treatment").

[21] "A reasonable accommodation does not require [an employer] to wait indefinitely for [an employee's] medical condition to be corrected." McNeil v. Scotland County, 213 F. Supp. 2d 559, 569 (M.D.N.C. 2002)(citing Myers v.

Based on the facts here, the hearing officer did not err in concluding that the grievant is not a qualified individual with a disability. While there is record evidence that the grievant has a mental impairment, and that the probable duration of the grievant's impairment is lifelong, there was no evidence presented establishing that the impairment substantially limits a major life activity. Because the grievant did not offer evidence to establish that her impairment substantially limits a major life activity, the hearing officer was correct in concluding that the grievant was not disabled under the ADA. Because the grievant did not establish that she has a disability as defined by the ADA, the question of whether she was a "qualified individual," that is, able to perform the essential functions of her job with an accommodation such as additional time off from work, did not have to be resolved in this case.[22]

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, we find no reason to disturb the hearing decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[23] 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.[24] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[25]

Claudia T. Farr
Director

Hose, 50 F.3d 278, 283 (4th Cir. 1995)); *see also* Starnes v. Gen. Elec. Co., 201 F. Supp. 2d 549, 560 (M.D.N.C. 2002)("[T]o the extent that Plaintiff requests an accommodation of indefinite time off work, such would not be a reasonable accommodation."); Peltier v. Greyhound Lines, Inc., No. C/A2:00-1726-18AJ, 2001 WL 34681748, at *4 (D.S.C. Aug. 6, 2001)("[A]n indefinite leave of absence . . . is not a reasonable accommodation under the ADA."). Rather, a reasonable accommodation is one "which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question." Myers, 50 F.3d at 283.

[22] We are compelled to comment on the hearing officer's conclusion that "Assuming for the sake of argument that Grievant was a qualified individual with a disability as of the date of her removal and as of the date of the hearing, the outcome of this case would not change," presumably, because the "ADA does not prohibit employers from enforcing conduct rules." While it is true that the ADA does not prohibit employers from enforcing conduct rules, we note that the conduct rule violated in this case (providing Family Medical Leave Act certification within 15 days) corresponds to a federal regulation under the Family Medical Leave Act that contains an equitable tolling provision excusing delay in certain circumstances. The Code of Federal Regulations, 29 CFR 825.305, requires that certification be provided within 15 days "unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts." It would seem possible that, in certain exceptional circumstances, a mental impairment might be so severe and debilitating as to toll the 15 day requirement. Here, however, while the grievant's representative seemed to suggest a tolling argument, she never presented any evidence to support the argument that the grievant's delay in providing certification was linked to her impairment. *See also EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* at http://www.eeoc.gov/policy/docs/psych.html for more information on enforcing conduct rules in cases where the misconduct is related to a psychiatric disability.

[23] *Grievance Procedure Manual* § 7.2(d).

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

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