Issue: Administrative Review of Hearing Officer's Decision in Case No. 9537, 9538, 9539; Ruling Date: September 8, 2011; Ruling No. 2012-3050; Agency: Virginia Commonwealth University; Outcome: Hearing Officer in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Virginia Commonwealth University
Ruling Number 2012-3050
September 8, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9537/9538/9539. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The procedural facts of this case as set forth in Case Number 9537/9538/9539 are as follows:

> On November 17, 2010, Grievant filed a grievance alleging that the Agency's evaluation of her work performance was arbitrary or capricious. On November 29, 2010, Grievant received a Group II Written Notice for failure to follow instructions, disruptive behavior, and unsatisfactory work performance. On December 7, 2010, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions. On December 7, 2010, Grievant received another Group II Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions.
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> Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On February 2, 2011, the EDR Director issued Ruling Numbers 2011-2883, 2011-2884, and 2011-2885 consolidating the grievances for one hearing. On March 9, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was originally scheduled for April 7, 2011. The Hearing Officer found just cause to extend the timeframe for issuing a decision the hearing had to be rescheduled for April 15, 2011.[1]

[1] Decision of the Hearing Officer in Case No. 9537, 9538, 9539 ("Hearing Decision"), issued July 11, 2011, at 1.

The relevant substantive facts of this case, as set forth in Case Number 9537/9538/9539, are as follows:

> Virginia Commonwealth University employed Grievant as an Administrative Assistant until her removal effective December 7, 2010. She had been employed by the Agency for approximately 19 years.
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> Grievant reported to the Supervisor who reported to the Director. In July 2010, Grievant continued to report to the Supervisor but received her daily assignments from the Assistant Professor.
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> Grievant had prior active disciplinary action. On March 23, 2010, Grievant received a Group I Written Notice for disruptive behavior. Grievant was instructed by the Supervisor:
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> > My expectations are that you will consistently display good relations with our external and internal associates and your coworkers and that you will convey and demonstrate a positive attitude. In addition, you are expected to follow the competencies and measures listed in your EWP, such as:
> >
> > - Communicates respectively to internal and external customers.
> > - Responds to and resolves day to day issues in a professional manner. Acts as first contact for the department; maintains professional and friendly attitudes in interactions.
> > - Works well with staff through the university and school districts.[2]
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> The Supervisor believed that Grievant was not doing her work adequately. In June 2010 the Supervisor met with Grievant and told Grievant that the Supervisor had written a counseling memorandum about Grievant's work performance. As the Supervisor discussed the counseling memo, Grievant interrupted the Supervisor and demanded specific examples of Grievant's behavior. At some point, Grievant said that she would not take this anymore, left the meeting, and slammed the Supervisor's door. Grievant then complained to the Dean about the Supervisor. The Supervisor and Agency managers concluded that the Supervisor would remain Grievant's supervisor except that the Assistant Professor would supervise Grievant with respect to Grievant's daily work tasks.

[2] Agency Exhibit 7.

In July 2010, Grievant was instructed to call the Assistant Professor and the Supervisor from Grievant's office phone in the morning when Grievant arrived at work. They did not discuss what procedure Grievant was to follow if the Assistant Professor was out of the country. In August 2010, and Grievant stopped calling the Supervisor but continued to call the Assistant Professor. The Assistant Professor was out of the country from November 12 through November 19, 2010. When Grievant arrived at work, she called the Assistant Professor's telephone and left a voice message saying the she was at work. Grievant did not call the Supervisor.

The Supervisor believed that Grievant did not remember things that needed to be done from one year to the next. The Assistant Professor suggested that they put up a white board in the office where Grievant and faculty would see it. In August 2010, the Assistant Professor instructed Grievant to write on the white board recurring faculty events, responsibilities, and deadlines. This included listing conferences that faculty were attending and deadlines relating to the conferences. Grievant was instructed to update the information shown on the white board. By the end of October 2010, the Assistant Professor told the Supervisor that Grievant did not seem to be able to finish writing faculty tasks and deadlines on the white board. Grievant was given until November 3, 2010 to complete the assignment. When Grievant could not complete the assignment by November 3, 2010, she was given until November 12, 2010. On November 12, 2010, Grievant told the Supervisor that she had completed the assignment. The Supervisor looked at the white board and realized that Grievant had not finished the assignment. Information that the Supervisor had asked Grievant to write on the white board had not been written on the white board. The Supervisor instructed Grievant to go to each faculty member's office, ask each faculty member about conference dates and student activities, and then write those dates on the white board. The Supervisor later asked faculty members if Grievant had met with them. The faculty members responded that Grievant had not met with them. On November 29, 2010, the Supervisor asked Grievant if she had met with the faculty. Grievant responded that the faculty were seldom in their offices. The Supervisor knew that this was not true because the department had faculty meetings on Tuesdays. The Supervisor instructed Grievant to meet with faculty the following day, Tuesday, November 30, 2010. All faculty members were working in the office on November 30, 2010. On December 1, 2010, the Supervisor confirmed that Grievant had not met with the faculty on November 30, 2010.

Employees with the Agency received annual performance evaluations. Employees were evaluated regarding their Core Responsibilities and received an overall rating. Possible ratings included: Extraordinary Achiever, High Achiever, Achiever, Fair Performer, and Unsatisfactory Performer.

On October 19, 2010, the Supervisor presented Grievant with a Notice of Improvement Needed.[3]

On October 19, 2010, the Supervisor presented Grievant and annual performance evaluation. For the Core Responsibility of "Assist department chair, faculty, and students", the Supervisor rated Grievant's performance as "Unsatisfactory Performer". The Supervisor listed 26 examples of Grievant's work performance. The Supervisor concluded:

> Over the years, I have worked with [Grievant], trying to explain what I want. After repeated oral discussions with her, I added written details about my expectations, the dimensions of my evaluation of her performance and my assessment of that performance. The combination of oral instruction, written instruction and special, added supervision should have provided [Grievant] with all the assistance an employee can reasonably expect and a clear direction about improvement. In my judgment, the extraordinary investment of SOEA in [Grievant] has not been matched by improvement in her performance.
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> [Grievant] works hard to help students. She is friendly and responsive. Unfortunately, she sometimes gives mis-information and continues to advise students despite having been instructed not to serve as a faculty advisor.

For the Core Responsibility of "Information Manager" the Supervisor rated Grievant's work performance as "Unsatisfactory Performer". The Supervisor gave two examples of Grievant's work performance. For the Core Responsibility of "Customer Service", the Supervisor gave Grievant a rating of "Fair Performer". The Supervisor provided three examples of Grievant's work performance. For the Core Responsibility of "Personnel Manager" the Supervisor gave Grievant a rating of "Unsatisfactory Performer". The Supervisor provided six examples of Grievant's work performance.

The Supervisor gave Grievant an "Overall Rating" of "Unsatisfactory Performer" and provided "Overall Comments":

> This is not performance expected of an employee who is responsible for the clerical and managerial support of a major unit

[3] The Agency's issuance of a Notice of Improvement Needed should have been issued earlier in the performance cycle. Because it was issued on the day of the evaluation, it does not form a basis to permit the Agency to give Grievant an evaluation with an overall rating equivalent to "Below Contributor". Because Grievant received a Group I Written Notice during the performance cycle, however, the Supervisor had a basis to evaluate Grievant's work performance at the equivalent of "Below Contributor".

> within the University. I believe that continuing [Grievant] in the position she occupies is having a deleterious effect on the Department, the faculty, students and likely, the other support personnel. [Dr. M] has been exemplary in her assistance to [Grievant] but the issue is not the relation between [Dr. M] or vice versa. It is instead the effect of continuing [Grievant] in her current behavior. [Grievant's] chronic unresponsiveness, mistakes and inattention to her duties are damaging the work of the Department, its professors and its students.[4]

Grievant appealed the Supervisor's evaluation of her to the Director who was also the Reviewer. The Director obtained documentation from Grievant and from the Supervisor. He spent approximately two days reviewing each of the 37 examples listed by the Supervisor and reviewing the documentation provided by Grievant and the Supervisor to determine whether Grievant was properly evaluated for each Core Responsibility. He received assistance from the Human Resource Director who joined him in conducting the review. The Director also reviewed Grievant's prior evaluations.

For seven of the examples, the Director could not make a decision and believed they were "very close". Of the remaining 30 examples, the Director concluded that 17 were favorable to Grievant and 13 were unfavorable to Grievant. He decided to increase the rating from Unsatisfactory Performer to "Fair Performer". He believed his authority was limited to increasing the rating by only one level.

The Director was not obligated to meet with Grievant to explain his analysis of how he decided to increase the performance rating. He decided to do so as a courtesy to Grievant.

On November 16, 2010, Grievant met with the Director in the Director's office. The office had two doors at opposite ends and a table with chairs in the middle. Grievant and the Director sat in two chairs at the table. They were sitting side by side. The Director showed Grievant his revised draft performance evaluation. The Director explained to Grievant what he had done and how he had reached his decision. Grievant believed that she should be rated a High Achiever. The Director told Grievant that he did not have the authority to raise her rating to that level. Grievant became upset. Grievant alleged that the Director and the Supervisor were engaged in a conspiracy against her. The Director told Grievant that he was not involved in a conspiracy because his rating would enable her to remain employed by the Agency. Grievant refused to accept the Director's decision. She pointed out that she had been an employee of the Agency for 19

[4] Grievant Exhibit 4.

years and had never been given such a low rating. The Director told Grievant that he could not increase her rating any higher. Grievant got up from her seat and backed up against the wall. Grievant began screaming at the Director. She was panting and rubbing her chest. Grievant engaged in this behavior for several minutes. Ms. G was working in her office area on the other side of the door and could hear Grievant shouting. Grievant sat down next to the Director and they continued their discussion. Grievant continued to allege a conspiracy and that the Supervisor lied all the time. Her behavior was "very animated". The Director became concerned that he was within closed doors and did not have a witness regarding Grievant's behavior. He became concerned for his own safety. The Director said for Grievant to sit for a minute while he went next door and brought Ms. G into the room so that Grievant could tell her that she was part a conspiracy against Grievant. Grievant grabbed her papers and walked out the other door. As she was leaving, the Director said that the meeting was not over but Grievant disregarded the Director's comments and left.

The meeting lasted approximately 20 minutes. The Director is soft-spoken and did not raise his voice during the meeting. He did not take any action that would have provoked Grievant's response.[5]

Based on the forgoing facts, the hearing officer reached the following conclusions in his hearing decision:

Group II Written Notice – Disruptive Behavior

The Agency contends that Grievant engaged in inappropriate behavior on November 16, 2010 when she accused the Director of being part of a conspiracy and accused the Supervisor of lying. Grievant's comments, however, constitute protected speech under *Va. Code 2.2-3000* which provides, "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Grievant's other behavior that day was not protected.

Grievant's behavior with respect to panting and rubbing her chest and screaming at the Director was not protected activity. Grievant's behavior was disruptive. Grievant was so loud that she could be overheard by Ms. G in an adjoining room with the closed door. Grievant's behavior was so unusual and animated that Grievant upset the Director and caused him some concern for his own safety. The Agency has presented sufficient evidence to show the Grievant engaged in disruptive behavior on November 16, 2010.

[5] Hearing Decision at 2-6.

DHRM Policy 1.60 provides:

> An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the **same offense** in his/her personnel file.

On March 23, 2010, Grievant received a Group I Written Notice for failure to follow instructions, disruptive behavior, and unsatisfactory work performance. On November 16, 2010, Grievant engaged in disruptive behavior. Because this was her second offense for disruptive behavior, the Agency could elevate the disciplinary action from a Group I offense to a Group II offense.

Group II Written Notice – Meet with Faculty

Failure to follow a supervisor's instruction is a Group II offense.[6] The Supervisor instructed Grievant to go to the office of each faculty member, obtain information from each faculty member regarding significant conference dates and student activities, and then write that information on the white board. Grievant failed to meet with faculty as instructed. On November 29, 2010, Grievant was reminded of the instruction. On November 30, 2010, faculty were in the office but Grievant failed to meet with any faculty. The agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions.

Group II Written Notice – Calling the Supervisor

The Agency contends the Grievant should receive a Group II Written Notice for failing to call the Supervisor during the week of November 12 through November 19, 2010. The Agency contends that Grievant should have called the Supervisor because the Assistant Professor was out of the country. The Agency's argument fails. Although the original instruction may have been for Grievant to call the Assistant Professor and to call the Supervisor, Grievant stopped calling the Supervisor in August 2010 without objection from the Supervisor. In July 2010, Grievant, the Assistant Professor, and the Supervisor did not discuss how Grievant was to respond when the Assistant Professor was out of the country. During the week of November 12 through November 19, 2010, Grievant continued to call the Assistant Professor to leave a voice message to establish the time Grievant had reported to work. Grievant complied with the instruction as she understood it and there is no basis for the Agency to take disciplinary action against her. The Group II Written Notice must be reversed.[7]

[6] See, Attachment A, DHRM Policy 1.60.
[7] Hearing Decision at 6-8.

The hearing officer noted in his decision that upon the accumulation of two Group II Written Notices, an agency may remove an employee. Based on his findings, which supported the two Group II Written Notices, and the lack of any mitigating circumstances, the hearing officer upheld the discipline against the grievant.

The hearing officer also addressed the agency's rating of the grievant's annual performance evaluation. The hearing decision explains:

> State agencies may not conduct arbitrary or capricious performance evaluations of their employees. Arbitrary or capricious is defined as "[i]n disregard of the facts or without a reasoned basis." GPM § 9. If a Hearing Officer concludes an evaluation is arbitrary or capricious, the Hearing Officer's authority is limited to ordering the agency to re-evaluate the employee. GPM § 5.9(a)(5). The question is not whether the Hearing Officer agrees with the evaluation, but rather whether the evaluator can present sufficient facts upon which to form an opinion regarding the employee's job performance.
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> The Supervisor thoroughly reviewed Grievant's work performance during the performance cycle. She relied upon sufficient facts to form a reasoned basis to evaluate Grievant's work performance. The Director reviewed the facts surrounding the Supervisor's assessment of Grievant's work performance. He issued a reevaluation that was based on appropriate facts and a reasoned basis.
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> Although the Director fully evaluated Grievant's work performance he incorrectly concluded that his authority was limited to increasing Grievant's overall rating by one level. The Director increased Grievant's overall rating to "Fair Performer" and disregarded the possibility that her rating could be "Extraordinary Achiever", "High Achiever", or "Achiever".
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> Under DHRM Policy 1.40, a Reviewer is:
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> > The supervisor of an employee's immediate supervisor, or another person designated to review an employee's work description, performance plan, performance rating and who responds to appeals of performance ratings.
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> The Reviewer's role is:
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> > The reviewer must review the performance plan and performance evaluation sections of the evaluation form before they are presented to the employee. If the reviewer does not agree with the evaluation, the reviewer should discuss the disagreements with the supervisor. The reviewer has the authority to change the employee's evaluation. In addition, agencies may determine if higher levels of management may change the evaluation. This

> decision should be documented in the agency's Salary Administration Plan.
>
> If the reviewer is unable to review either section of an employee's evaluation form, the next higher level of management should conduct the review.

DHRM Policy 1.40 describes Appeals as follows:

> If an employee disagrees with an evaluation and cannot resolve the disagreement with the supervisor, the employee may appeal to the reviewer for another review of the evaluation.
>
> Agencies may develop their own appeals process for reconsideration of employee evaluations. The appeals process should be documented within the Agency Salary Administration Plan.
>
> Any appeal process must provide for the appeal to be made in writing to the reviewer within 10 workdays of the initial performance meeting.

A Reviewer's Action on appeal is as follows:

> The reviewer should discuss an employee's appeal with the supervisor and employee. After discussion of the appeal, the reviewer should provide the employee with a written response within five (5) workdays of receiving it.
> The response should indicate one of the following:
> - the reviewer agrees with the evaluation;
> - the supervisor will revise the evaluation;
> - the supervisor will complete a new evaluation;
> - the reviewer will revise the evaluation; or
> - the reviewer will complete a new evaluation.

DHRM Policy 1.40 does not restrict the Reviewer's authority to increasing a rating by only one step. Neither party presented an Agency policy establishing that restriction. Because the Director completed his reevaluation using an incorrect assumption, the reevaluation is arbitrary and capricious. The Agency must repeat the reevaluation without the assumption that the Reviewer is limited to increasing Grievant's rating by one level.[8]

[8] Hearing Decision at 9-11.

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."[9] 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.[10]

Challenge to Hearing Officer's Findings of Fact and Conclusions

The grievant challenges the hearing officer's fact findings and related conclusions. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[11] and to determine the grievance based "on the material issues and grounds in the record for those findings."[12] 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.[13] 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.[14] 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 hearing officer with respect to those findings.

First, the grievant objects to the hearing officer's failure to consider all documents and testimony. The fact that the hearing officer did not recount all testimony or list all documents in his hearing decision does not indicate that he did not consider this evidence. This Department has long held that a hearing officer is not required to include in his decision an inventory of all evidence produced at hearing.

The grievant additionally claims that the hearing officer erred by not finding evidence of a causal link between her protected activity and adverse employment actions, pointing primarily to the close proximity in time between the two. While causation is required to establish a prima facie case of retaliation and temporal proximity can satisfy this requirement,[15] proximity alone is not sufficient to establish a retaliation claim, particularly where the agency provides unrebutted evidence of legitimate business reasons for its actions. The agency has done so here and there is

[9] Va. Code § 2.2-1001(2), (3), and (5).
[10] *See Grievance Procedure Manual* § 6.4(3).
[11] Va. Code § 2.2-3005.1(C).
[12] *Grievance Procedure Manual* § 5.9.
[13] *Rules for Conducting Grievance Hearings* § VI(B).
[14] *Grievance Procedure Manual* § 5.8.
[15] Hockaday v. Brownlee, 370 F.Supp 2d 416, 425 (E.D.Va. 2004).

therefore no reason that the hearing officer should have held differently regarding his retaliation findings.

Deference to the Agency

The grievant asserts that the hearing officer erred by giving deference to the agency's position. The grievant asserts that giving deference to the agency "begs that the decision is made in favor of the agency with little or no consideration of the facts and evidence." This argument is wholly without merit. First, the hearing officer was doing exactly what he was required to do by *the Rules for Conducting Grievance Hearings ("Rules.")* Citing to the decision of DeJarnette v. Corning, 133 F.3d 293 (4th Cir. 1998), the *Rules* require that a "hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy." The proposition that hearing officers should give deference to agency actions is hardly new to jurisprudence. In DeJarnette, the court held that:

> While reviewing the employer's articulated reasons for discharge and the plaintiff's refutation thereof, we must keep in mind that "Title VII is not a vehicle for substituting the judgment of a court for that of the employer." Particularly, this Court "does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination . . . ."[16]

This Department has incorporated its agreement with DeJarnette in the *Rules*. Neither courts nor hearing officers are to second-guess decisions that are consistent with policy and law. Hearing officers are bound to follow the *Rules* and adherence to the *Rules* hardly constitutes any sort of abuse or error.

Performance Evaluation

The grievant asserts that the hearing decision "does not address the fact that the initial grievance regarding the evaluation was based not only on Mr. [B's] decision regarding Grievant appeal of the evaluation, but the evaluation itself." We find no error with the hearing officer's analysis regarding either the initial or revised evaluation. The hearing officer appropriately focused on the revised decision which supplanted the initial decision.[17] The original evaluation essentially became moot through the reviewer's revisions. The hearing officer explained that the reviewer spent approximately two days reviewing the initial decision, with assistance from the Human Resources Director. The reviewer subsequently modified the evaluation, although he imposed a limitation that does not exist under policy—that he could only raise the rating by one level. However, other than this erroneous self-imposed limitation, the hearing officer found no further error with the revised evaluation and we find none with the hearing officer's adjudication of this issue.

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[16] DeJarnette v. Corning, 133 F.3d 298-99 (quotations and citations omitted).
[17] *See* DHRM Policy 1.40. "The reviewer has the authority to change the employee's evaluation."

Inconsistency with Agency Policy

Finally, the grievant's request for administrative review alleges that the hearing officer's decision is inconsistent with policy. DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[18] Accordingly, if she has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise these issues in a request for administrative review to the Director of the Department of Human Resource Management, 101 North 14th St., 12th Floor, Richmond, VA 23219.

CONCLUSION AND APPEAL RIGHTS

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.[19] 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.[20] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[21]

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Claudia T. Farr
Director

[18] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).
[19] *Grievance Procedure Manual* § 7.2(d).
[20] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[21] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).