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QUALIFICATION and ACCESS RULING

In the matter of the Virginia Department of Health
Ruling Numbers 2025-5740, 2025-5759
October 7, 2024

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) on whether his April 3, 2024, grievance with the Virginia Department of Health (the "agency") qualifies for a hearing. Additionally, on September 13, 2024, EDR received an expedited grievance that challenged the grievant's resignation from employment at the agency.[1] The agency subsequently requested a ruling from EDR on whether the grievant has access to the grievance procedure due to his resignation. For the reasons discussed below, the April 3 grievance is not qualified for a hearing. EDR further concludes that the grievant does not have access to the grievance process to initiate the September 13 grievance.

FACTS

On or about April 3, 2024, the grievant submitted a grievance seeking resolution for issues related to an alleged hostile work environment (First Grievance). The basis of the First Grievance involves the conduct of Manager A, the Co-Interim Director of the Office in which the grievant was employed (the "Office") at the time of the conduct alleged in the grievance.[2] The grievant's claims against Manager A include, but are not limited to, allegations that Manager A forbade him from attending an external meeting, questioned his work ethic, exhibited biased and rude behavior, showed poor leadership skills and practices, improperly acted as an agency employee despite being a contract employee, engaged in discriminatory behavior, and retaliated against the grievant based on a comment made at an internal meeting. As relief, the grievant requested that Manager A apologize to him, that the agency take "appropriate measures" to ensure that Manager A is properly following state policies, and that the grievant's working environment be protected from the hostilities and bullying outlined in the grievance.

[1] While an expedited grievance is normally initiated with the appropriate agency, in this particular sequence of events, EDR advised the grievant that he could submit the expedited grievance directly to EDR.
[2] According to the agency, Manager A was "not a[n] [agency] employee or contractor, but [was] acting in a consultancy role."

As the grievance proceeded through the management steps, Manager A's involvement with the agency as a consultant was increasingly altered. Eventually, according to the grievant, Manager A no longer served as Co-Interim Director of the Office and was no longer affiliated with the agency. The agency also proposed relief in the form of their Workforce Development and Engagement team being deployed to the Office to conduct a study on "staff morale and engagement." Ultimately, the agency head declined to qualify the grievance for a hearing, and the grievant, asserting that the requested relief has not been sufficiently provided, has now appealed that determination to EDR.

Since the appeal to EDR, on or about August 5, 2024, the grievant was placed on administrative leave with pay, pending an investigation surrounding an alleged civility offense, and was required to meet with his supervisor as soon as possible. According to the grievant, he was told by sources in his department that no investigation or interviews related to the alleged offense took place, that the Agency Commissioner was the one requiring him to come and meet with his supervisor, and that the decision to terminate him was predetermined based on a leadership meeting held by the agency prior to him being placed on administrative leave.

When the grievant finally met with the agency's Human Resources Office, on or about August 16, 2024, he was presented with a Due Process Memorandum, which cited violations of DHRM Policies 1.60, *Standards of Conduct*, and 2.35, *Civility in the Workplace*. The context of the Memorandum involves an Office Advisory Board Meeting on August 2 where the grievant allegedly made certain statements that suggested threats of violence and prompted safety concerns by the agency. The Memorandum stated that the agency was considering the issuance of a Group III Written Notice "up to and including termination." The agency claims it issued the Due Process Memorandum following multiple witness statements about the grievant's comments at the meeting that were perceived as a safety issue.

At the August 16, 2024 meeting, the grievant informed the Human Resources representative that he would likely not be submitting a Due Process response due to his own understanding that the decision to terminate him had already been made. He then inquired about the possibility of resigning in lieu of termination but was instead recommended that he request a "traditional resignation." The grievant opted for a traditional resignation and submitted his letter of resignation shortly thereafter.

The grievant has since relayed to EDR that while Manager A, the primary source of the First Grievance's issues, has left the agency, the Interim Director that replaced Manager A (Manager B) became a new source of prohibited conduct in the workplace. The grievant added that essentially nothing came from the mentioned Workforce Development and Engagement study outside of referring employees to the Employee Assistance Program and PTSD training. As relief for the issues brought forth in the First Grievance, the grievant now wants the agency to alleviate the hostile work environment concerns perpetuated by Manager B and provide more assistance for Office employees outside of the Employee Assistance Program and PTSD training. While the grievant initially did not express a desire to return to the agency, he has since confirmed that he would like to do what is necessary to appeal his resignation.

EDR ultimately gave the grievant the option to file an expedited grievance directly with EDR to contest his resignation. Accordingly, on September 13, the grievant timely filed an expedited grievance ("Second Grievance"), claiming that his resignation was involuntary due to

duress and that the continuing hostile work environment resulted in a constructive discharge. In the Second Grievance, the grievant stated that he had experienced retaliation as a result of filing the First Grievance, primarily by Manager B. Specifically, the grievant has claimed that since the filing of the First Grievance, Manager B ceased all direct communication with him, has exhibited "notably negative" body language, and contributed to the stalling of the grievance process. The grievant adds that in September or October of 2023, he was the subject of discriminatory remarks made by another named agency representative, Manager C, and that this same representative has exhibited poor leadership capabilities. Notably, he cites to an incident in Spring of 2024 where Manager C apparently called upon the grievant's supervisor to reprimand him for an incident of perceived poor work performance. In addition to these workplace factors, the grievant emphasized that the decision to resign was "heavily influenced" by his understanding that termination was a "predetermined decision" and that no proper investigation was conducted. The agency asserts that the grievant does not have access to the grievance procedure due to his voluntary resignation.

DISCUSSION

The General Assembly has provided that "[u]nless exempted by law, all nonprobationary state employees shall be covered by the grievance procedure . . . ."[3] Upon the effective date of a voluntary resignation from state service, a person is no longer a state employee. Thus, to have access to the grievance procedure, the employee "[m]ust not have voluntarily concluded their employment with the Commonwealth prior to initiating the grievance."[4] EDR has long held that once an employee's voluntary resignation becomes effective, they are not covered by the grievance procedure and accordingly may not initiate a grievance.[5] In this case, the grievant has essentially alleged that his resignation was tendered under duress and thus was not voluntary, while also alleging that his resignation constitutes constructive discharge.

EDR is the finder of fact on questions of access.[6] To have access to the grievance procedure to challenge his separation, the grievant must show that the resignation was involuntary[7] or that he was otherwise constructively discharged.[8] The determination of whether a resignation is voluntary is based on an employee's ability to exercise a free and informed choice in making a decision to resign.[9] Generally, the voluntariness of an employee's resignation is presumed.[10] A resignation may be viewed as involuntary only where it was (1) "obtained by the employer's misrepresentation or deception" or (2) "forced by the employer's duress or coercion."[11] In this case, the grievant suggests an allegation that his resignation was procured by duress or coercion.

[3] Va. Code § 2.2-3001(A).
[4] *Grievance Procedure Manual* § 2.3.
[5] *E.g.*, EDR Ruling No. 2005-1043.
[6] *See* Va. Code § 2.2-1202.1(5); *see also Grievance Procedure Manual* § 2.3.
[7] *E.g.*, EDR Ruling No. 2010-2510.
[8] *See* Va. Code § 2.2-1202.1(5); *see also Grievance Procedure Manual* § 2.3.
[9] Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 174 (4th Cir. 1988).
[10] *See* Rosario-Fabregas v. Merit Sys. Prot. Bd., 833 F.3d 1342, 1346 (Fed. Cir. 2016).
[11] *Stone*, 855 F.2d at 174.

Duress

A resignation can be viewed as forced by the employer's duress or coercion if "it appears that the employer's conduct . . . effectively deprived the employee of free choice in the matter."[12] Factors to consider are "(1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice [he was] given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether [he was] permitted to select the effective date of resignation."[13]

Cases that ordinarily implicate this analysis involve situations where the employer presents the employee with the options that they can resign or be dismissed, which is essentially what occurred in this case.[14] "[W]here an employee is faced merely with the unpleasant alternatives of resigning or being subject to removal for cause, such limited choices do not make the resulting resignation an involuntary act. On the other hand, inherent in that proposition is that the agency has reasonable grounds for threatening to take an adverse action. If an employee can show that the agency knew that the reason for the threatened removal could not be substantiated, the threatened action by the agency is purely coercive."[15] Here, although the grievant appears to dispute the agency's charges against him, this case does not appear to be one where the agency *knew* that its plan to terminate the grievant's employment could not be substantiated. To the contrary, there is evidence of some level of reasonably alleged misconduct obtained through the appropriate process.[16] The grievant was presented with a Due Process Memorandum that was apparently substantiated by multiple witness statements. Therefore, considering the first *Stone* factor of whether alternatives to resignation were given, the alternatives apparently available to the grievant in this case do not, in and of themselves, support his claim that his selection of one alternative – resignation – was involuntary.[17]

As to the other factors, EDR is not persuaded that the facts support a conclusion that the grievant's resignation was procured through duress or coercion. After discussions with both the agency Human Resources representative and the grievant, it appears that the grievant understood the nature of the choice he was given. Indeed, the representative apparently expressed hesitance to the grievant opting to not provide a due process response and resign instead, and she apparently made clear to the grievant that resigning would forfeit the right to appeal via a grievance. As to how much time the grievant was given to choose, the record is a bit unclear. The resignation letter is dated the same day as the Due Process Memorandum, and the grievant stated that the Commissioner would allow him to resign if he did so "immediately." However, the agency also claimed that the grievant did not notify Human Resources of his intent to resign until the day after their meeting. Regardless, this discrepancy has little effect on this analysis. While the agency may have required the grievant to make a decision within 24 hours to resign immediately, the grievant

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[12] *Id.*
[13] Benjamin v. Sparks, 986 F.3d 332, 349 (4th Cir. 2021) (citing *Stone*, 855 F.2d at 174) (noting that no single one of the four recognized factors is dispositive of voluntariness); *see, e.g.*, EDR Ruling No. 2013-3564.
[14] The grievant alleges that the alternative presented by the agency was to be fired. The agency claims that the alternative was to proceed with due process, with the "possible outcome" of termination. The differences between these two accounts do not ultimately affect our analysis here, as there is no apparent dispute that the grievant resigned in order to avoid the outcome of termination.
[15] Schultz v. U.S. Navy, 810 F.2d 1133, 1136 (Fed. Cir. 1987).
[16] *See* DHRM Policy 1.60, *Standards of Conduct*.
[17] *See Stone*, 855 F.2d at 174; *see also* EDR Ruling No. 2024-5612.

was still encouraged to respond to the Due Process Memorandum. While the grievant felt that the decision to terminate had already been made, he nonetheless had the option to respond while the discipline was pending. With all of this in mind, EDR cannot find sufficient evidence to suggest that the grievant's resignation was involuntary on the basis of duress or coercion.

Constructive Discharge/Hostile Work Environment

The grievant also alleges that his resignation constituted constructive discharge. Constructive discharge occurs when "an employer deliberately made an employee's working conditions intolerable and thereby forced him to quit his job."[18] When the grievant is making the claim that a hostile work environment led to a forced resignation, they "must show the requirements of both a hostile work environment and a constructive discharge claim."[19] The primary factor to consider in such claims is "intolerability," which is evaluated by "whether there is sufficient evidence that as a result of [the agency's] . . . . conduct, [the grievant] was subjected to circumstances 'so intolerable that a reasonable person would resign.'"[20] Here, the grievant is alleging that there was a hostile work environment where he worked before resigning, and because of this environment, along with the way in which the agency handled the issuance of the Due Process Memorandum, he felt he had no other option except to resign. Thus, for the grievant to prevail in this matter, he must show that there was a hostile work environment, and also show that because of this hostile work environment, there was a constructive discharge that led to the resignation. In the interest of efficiency, EDR will simultaneously analyze the First Grievance's claim of a hostile work environment and the Second Grievance's claim of constructive discharge as the claims stem from related facts.

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[21] The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[22] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action that could be remedied by a hearing officer. An adverse employment action involves an act or omission by the employer that results in "harm" or "injury" to an "identifiable term or condition of employment."[23] Workplace harassment rises to this level if it includes conduct that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[24]

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[18] Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1350 (4th Cir. 1995) (citing Bristow v. Daily Press, Inc. 770 F.2d 1251, 1255 (4th Cir. 1985)).
[19] Evans v. Int'l Paper Co., 936 F.3d 183, 192 (4th Cir. 2019).
[20] EEOC v. Consol Energy, Inc., 860 F.3d 131, 144-45 (4th Cir. 2017) (quoting Green v. Brennan, 578 U.S. 547, 560 (2016)).
[21] *See Grievance Procedure Manual* § 4.1.
[22] *See id.* § 4.1(b); *see* Va. Code § 2.2-3004(A).
[23] *See* Muldrow v. City of St. Louis, 144 S. Ct. 967, 974 (2024) (addressing a required element of a Title VII discrimination claim); *see, e.g.,* Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998) (defining adverse employment actions under Title VII to include "tangible" acts "such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits").
[24] Strothers v. City of Laurel, 895 F.3d 317, 331 (4th Cir. 2018) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)).

Although DHRM Policy 2.35 prohibits workplace harassment[25] and bullying,[26] alleged violations must meet certain requirements to qualify for a hearing. Harassment, bullying, or other prohibited conduct may qualify for a hearing as an adverse employment action if the grievant presents evidence that raises a sufficient question whether the conduct was (1) unwelcome; (2) sufficiently severe or pervasive that it alters the conditions of employment and creates an abusive or hostile work environment; and (3) imputable on some factual basis to the agency.[27] As to the second element, the grievant must show that they perceived, and that an objective reasonable person would perceive, the environment to be abusive or hostile.[28]

DHRM Policy 2.35 and its associated guidance make clear that agencies must not tolerate workplace conduct that is disrespectful, demeaning, disparaging, denigrating, humiliating, dishonest, insensitive, rude, unprofessional, or unwelcome. While these terms must be read together with agencies' broader authority to manage the means, methods, and personnel by which agency work is performed, management's discretion is not without limit. Policy 2.35 also places affirmative obligations on agency management to respond to credible complaints of prohibited conduct and take steps to ensure that such conduct does not continue. Specifically, "[a]gency managers and supervisors are required to: [s]top any prohibited conduct of which they are aware, whether or not a complaint has been made; [e]xpress strong disapproval of all forms of prohibited conduct; [i]ntervene when they observe any acts that may be considered prohibited conduct; [t]ake immediate action to prevent retaliation towards the reporting party or any participant in an investigation; [and t]ake immediate action to eliminate any hostile work environment when there has been a complaint of workplace harassment . . . ."[29] When an agency fails to meet these obligations, such failure may constitute a misapplication or unfair application of Policy 2.35 such that the harassing or bullying behavior is imputable to the agency.

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[25] Traditionally, workplace harassment claims were linked to a victim's protected status or protected activity. However, DHRM Policy 2.35 also recognizes non-discriminatory workplace harassment, defined as "[a]ny targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion towards a person not predicated on the person's protected class."

[26] DHRM Policy 2.35 defines bullying as "[d]isrespectful, intimidating, aggressive and unwanted behavior toward a person that is intended to force the person to do what one wants, or to denigrate or marginalize the targeted person." The policy specifies that bullying behavior "typically is severe or pervasive and persistent, creating a hostile work environment."

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

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

[29] DHRM Policy 2.35, *Civility in the Workplace*.

First Grievance - Conduct of Manager A

EDR has reviewed the information submitted by the grievant and while there may potentially be a sufficient question of severe or pervasive prohibited conduct regarding the initial issues brought forth in the First Grievance (issues relating to Manager A), because Manager A is no longer affiliated with the agency, no effective relief would be available. Indeed, as EDR has held in past rulings, qualification may not be appropriate even if a grievance challenges a management action that might ordinarily qualify for a hearing. For example, an issue may have become moot during the management resolution steps, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.[30] Here, because Manager A is no longer affiliated with the agency, and because he is the primary actor responsible for the grievant's allegations, there is no effective relief available that could be granted by a hearing officer. Therefore, the remaining portion of this ruling will discuss the more recent claims brought forth against Manager B and Manager C.

Second Grievance - Conduct of Manager B and Manager C

After a thorough review of the record, nothing relating to the claims against Manager B and Manager C would rise to the level of a hostile work environment where a reasonable person would feel as if they had no choice but to resign from the agency. Specifically, the grievant mentions that Manager B has not done anything substantial following the results of the Workforce Development and Engagement study to provide a remedy to the alleged hostile work environment. He also mentions that, following the filing of his First Grievance, all direct communication with Manager B ceased, she exhibited negative body language, and caused delays in the grievance process.

While courteous and respectful demeanor throughout the grievance process is encouraged, nothing in these claims suggests that Manager B's behavior was so severe or pervasive as to cause a reasonable person to resign from the agency. Further, after a thorough review of the record and conversing with the grievant, EDR has been unable to find any other specific examples of prohibited conduct alleged against Manager B. While the grievant has noted a general perpetuation of a hostile work environment by Manager B, essentially taking the place of the conduct alleged against Manager A, the grievant has not pointed to any specific incidents outside of those mentioned above. Without more, EDR cannot say that the level of prohibited conduct is so severe or pervasive as to constitute a hostile work environment or, by extension, support a claim of constructive discharge.

Finally, the grievant also mentions at least one instance of alleged discriminatory remarks by Manager C: in September or October of 2023, she allegedly openly discussed the grievant's relationship with another Office coworker (working as a contractor) in a derogatory manner and ultimately dismissed that coworker by canceling the contract.[31] Specifically, the grievant claims that Manager C suggested that she "disapproved of same-sex, mixed-race relationships" by saying

[30] *See*, *e.g.*, EDR Ruling No. 2021-5261; EDR Ruling No. 2017-4477.
[31] While the grievant notes that this one instance was "indicative of a broader culture of prohibited discrimination," the grievant has not provided any other explicit examples of such behavior by this particular agency representative.

something along the lines of, "I just don't like it." Considering Manager C's alleged comments in a light most favorable to the grievant,[32] this example is concerning, if accurate. However, the fact that this incident occurred several months prior to the First Grievance and was not mentioned in the First Grievance, combined with the lack of other similar instances being cited since then, is not consistent with a hostile environment so severe or pervasive that would support a claim of constructive discharge in the case at hand.

The grievant also mentions that on at least one occasion, Manager C has unduly influenced the grievant's chain of command by demanding that they reprimand him for certain work performance. The grievant claims that Manager C "demanded" that the grievant's supervisor reprimand him for an internal email he sent to staff members, suggesting that the email was unprofessional in tone, and that his supervisor ultimately negotiated the punishment down to verbal counseling. Based on the information presented to EDR, the evidence does not support finding such conduct by Manager C as part of an ongoing hostile work environment. While an instance of "demanding" a supervisor to reprimand their subordinate, if accurate, could be done in a more civil manner, this action seems to fall within agencies' broader authority to manage the means and methods by which agency work is performed. However, even if this instance is combined with the issue described above, the allegations do not meet the "severe or pervasive" threshold required to constitute constructive discharge. While the grievant has spent a considerable amount of focus on the actions of Manager B, the conduct of Manager C was infrequent, and no other examples of specific instances by Manager C have been provided to EDR. For the foregoing reasons, EDR does not find that the grievant's claims of a hostile work environment that were impacting the workplace at the time of his resignation were so severe or pervasive as to constitute constructive discharge.

Additionally, there does not appear to be a sufficient nexus between the more recent hostile work environment, retaliation, and discrimination claims, and the issuance of the Due Process Memorandum. All of the instances relating to alleged hostile work environment, retaliation, and discrimination claims are linked to the three named agency representatives: Manager A, Manager B, and Manager C. However, the Due Process Memorandum was brought forward apparently by the Agency Commissioner, and the grievant's supervisor (in coordination with the Human Resources manager). Neither the Commissioner nor the grievant's immediate supervisor were involved in any of the grievant's claims of prohibited conduct. Further, as was stated earlier, the decision to place the grievant on administrative leave and issue a Due Process Memorandum was supported by multiple witness statements. Therefore, because those alleged to have committed prohibited conduct are not involved in the Due Process Memorandum, there is not a sufficient nexus between the pre-disciplinary actions and the grievant's hostile work environment claims, such that the constructive discharge claim can prevail on that basis.

To summarize, the incidents that the grievant claimed led to a constructive discharge cannot be seen to be so intolerable as to cause a reasonable person to resign. The primary actor related to the First Grievance's claims is no longer affiliated with the agency, and the more recent claims brought forth in the Second Grievance do not appear to be so severe or pervasive as to constitute a hostile work environment. Lastly, the agency representatives alleged to have engaged

[32] For instance, for purposes of this ruling, we consider this evidence in the light it is presented by the grievant, i.e., that the comments suggest a discriminatory motive. However, it is also possible that Manager C may have been referring to the existence of a romantic relationship between team members, one of whom was a contractor, potentially introducing problematic workplace dynamics issues and/or conflict of interest related to contracting. EDR has not been presented with any indication that the latter were the actual concerns expressed.

in discrimination and/or retaliation were not the ones who issued the Due Process Memorandum. Given all of this, EDR cannot find that a reasonable person would find these conditions so intolerable to be forced to resign.

Having considered the totality of the circumstances in this particular case, EDR finds that the evidence is insufficient to demonstrate that the agency procured the grievant's resignation by duress or coercion that nullified the grievant's exercise of free choice, or that the agency created working conditions so intolerable as to amount to a constructive discharge of the grievant. Thus, the facts presented do not support a finding of involuntariness in view of the general presumption of a voluntary resignation. Accordingly, we conclude that the grievant's separation from employment was based on a voluntary resignation, and thus he does not have access to the grievance procedure in regard to the expedited grievance. The expedited grievance will not proceed to hearing and EDR's file will be closed. We also cannot say that the First Grievance presents a claim that would be susceptible to relief via a grievance hearing. However, this ruling does not address whether other remedies may be available to the grievant through other processes.

EDR's rulings on qualification and access are final and nonappealable.[33]

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[33] Va. Code § 2.2-1202.1(5).