

# *Grievance Procedure Manual*

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# Grievance Procedure Manual

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## §1 Workplace Dispute Resolution/General Grievance Provisions

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NOTE: Words **bolded** appear in the definition section.

### ***§1.1 General Information***

Complaints arising in the workplace should be resolved fairly and promptly. In selecting a suitable alternative to resolve a workplace issue or concern, employees and agency management may obtain information and guidance from the Office of Equal Employment and Dispute Resolution<sup>1</sup> (“EEDR”) and the Human Resources Office at their agency. While EEDR consultants do not provide legal advice, they can help to identify relevant policies and can discuss various options for addressing workplace concerns.

For specific questions about the grievance procedure and its requirements, it is advisable to contact EEDR. EEDR is located in the Monroe Building: 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, VA 23219 and can be reached by telephone at 786-7994 from Richmond, or toll free at 1-888-23-ADVICE (232-3842). Additional information is available on EEDR’s website, [www.dhrm.virginia.gov/edr](http://www.dhrm.virginia.gov/edr). Agencies should contact their assigned counsel at the Office of the Attorney General with any legal questions.

Absent extraordinary circumstances, relying on erroneous grievance information provided by anyone other than EEDR will NOT excuse noncompliance with this Manual or the Rules for Conducting Grievance Hearings, both of which are available on EEDR’s website.

Many workplace issues can be resolved, even prevented, through effective interpersonal communication and problem-solving at the lowest possible level and earliest opportunity. Other options include the following:

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### ***§1.2 Informal Discussion with Management***

It is the policy of the Commonwealth that an employee shall be able to discuss freely and without retaliation work-related concerns with his/her supervisor and/or other members of management in an attempt to resolve problems informally. Prior to initiating a grievance, employees are encouraged to raise work-related concerns with their immediate supervisor. Even when such discussions are ongoing, however, a written grievance must be initiated within 30 calendar days of the date that the employee knew, or should have known, of the management action or inaction that formed the basis of the complaint. This 30-day requirement may be extended only if the parties agree. **TO BE ENFORCEABLE, SUCH AN AGREEMENT MUST BE IN WRITING.**

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<sup>1</sup> The Office of Equal Employment and Dispute Resolution is the combination of the Offices of Equal Employment Services (“OEES”) and Employment Dispute Resolution (“EDR”) following the merger of those two units within DHRM effective January 1, 2017. EEDR continues the role of the former EDR as the administrator of the grievance procedure.

### ***§1.3 Mediation***

One alternative for resolving disputes is the statewide **mediation** program administered by EEDR. Mediation is a voluntary process through which neutral third persons (mediators) assist people in conflict to explore their differences and develop their own solutions to these concerns. A decision to mediate a dispute does not prevent an employee from initiating a **grievance** later. Similarly, an agency cannot make the closure of an existing grievance a condition to participate in mediation. Where the parties have entered into an agreement to mediate, the time requirements of the grievance procedure may be extended by mutual agreement. **TO BE ENFORCEABLE, THIS AGREEMENT MUST BE IN WRITING.**

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### ***§1.4 Grievance Procedure***

EEDR administers the grievance procedure under which most workplace disputes can be grieved through levels of agency management. Agencies must designate, in writing, their management step-respondents and submit the list to EEDR for approval. Once the list is approved by EEDR, the agency must make it readily accessible to all employees. If the employee disagrees with agency management's resolution of the grievance, the employee may seek to have the grievance resolved by an independent hearing officer. Only certain types of grievances, however, will qualify for such a hearing. The grievance procedure has strict rules that must be followed by all parties. State law prohibits **retaliation** against employees for using or participating in the grievance process.

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### ***§1.5 Retaliation Investigation***

An employee who is covered by the grievance procedure may ask EEDR to investigate allegations of retaliation as the result of the use of or participation in the grievance procedure or for reporting, in good faith, an allegation of fraud, waste or abuse to the State Employee Fraud, Waste and Abuse Hotline. Where EEDR determines that the request merits further review, EEDR's statutory authority is limited to investigating the complaint and advising the **agency head** of its findings. EEDR is authorized to provide no other relief. An employee may not pursue both a retaliation investigation and a grievance on the same management action or omission alleged to be retaliatory.

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### ***§1.6 Equal Employment Services***

If an employee thinks that he or she has been discriminated against, he or she may file a formal complaint of discrimination with the Department of Human Resource Management ("DHRM") through its Equal Employment Services. Complaints of employment **discrimination** are investigated in accordance with applicable Governor's Executive Order(s) and state and federal laws. An employee may use either the formal discrimination complaint process or the grievance procedure to resolve perceived discriminatory acts or to present related concerns for investigation.

An employee may not simultaneously use the grievance process and a formal complaint of discrimination with DHRM to address the same work-related action. However, if an employee has initiated a grievance based on one of the forms of discrimination covered by state policy or the Governor's Executive Order prohibiting discrimination, he or she

may terminate the grievance and initiate a formal complaint of discrimination under the following conditions:

- 1) The grievance must be concluded by the employee prior to the employee's response to the agency head's qualification decision, and
- 2) The formal complaint of discrimination must be initiated with DHRM within 180 days of the alleged act(s) of discrimination.

Similarly, an employee who has timely filed a formal complaint of discrimination with DHRM may request that the complaint be withdrawn and initiate a grievance regarding the complained action under the following conditions:

- 1) The employee must request to withdraw the formal complaint of discrimination prior to a final decision being issued by DHRM; and
- 2) The formal complaint of discrimination must have been initiated within 30 calendar days of the challenged action(s).

Once an employee has switched from one process to the other, he or she may not revert to the original process.

Questions about formal complaints of discrimination can be addressed by calling 804-225-2136 from Richmond, or toll free at 1-800-533-1414 from elsewhere in Virginia.

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### ***§1.7 Other Agency Resources***

Other resources may be available for resolving workplace disputes. These resources may include: agency human resources or equal employment opportunity officers, ombudsmen, or the services of other agencies and organizations. However, for answers to questions regarding the grievance procedure, the appropriate source for information is EEDR.

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### ***§1.8 Agency Requirements***

By law, each agency in the executive branch is required to (1) familiarize employees with their grievance rights and promote the services of the Department of Human Resource Management, and (2) recognize the right of employees to fully participate in the grievance process without retaliation. Va. Code § 2.2-3000(B)(2) & (6). In addition, each executive branch agency is required to ensure supervisory personnel are trained in the grievance procedure, personnel policies, and conflict resolution. Va. Code § 2.2-3000(B)(1).

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### ***§1.9 Code of Conduct and Civility***

Parties and party advocates shall treat all participants in the grievance process in a civil and courteous manner and with respect at all times and in all communications.

Parties and advocates shall not engage in conduct that offends the dignity and decorum of grievance proceedings, including, but not limited to, the second step fact-finding meeting and the grievance hearing.

Parties and advocates shall not engage in conduct that undermines the integrity of the grievance process including, but not limited to, behavior that unnecessarily delays the process or unfairly prejudices the opposing party.

Parties and advocates shall comply with all rulings and orders issued by the Department of Human Resource Management, EEDR, and Hearing Officers, unless a formal objection is raised and sustained.

Parties and advocates shall avoid *ex parte* communications with Hearing Officers on matters related to the hearing unless authorized by the Hearing Officer for simple procedural issues.

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## §2 Grievance Procedure Overview

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NOTE: Words **bolded** appear in the definition section.

### ***§2.1 Stages of the Grievance Procedure***

The grievance procedure contains four phases:

1. Management Resolution Steps
  2. Qualification for Hearing
  3. Hearing
  4. Review of Hearing Decisions
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### ***§2.2 Time Requirements for Filing a Grievance***

An employee's grievance must be presented to management **within 30 calendar days** of the date the employee knew or should have known of the management action or omission being grieved.<sup>2</sup> Failure to timely initiate the grievance will typically result in the grievance being administratively closed and such failure will be excused only in extraordinary cases where just cause is found. If the 30<sup>th</sup> calendar day by which a grievance must be filed falls on a Saturday, Sunday, or legal holiday or on any day or part of a day on which the state office where the grievance is to be filed is closed during normal business hours, the grievance may be filed on the next business day that is not a Saturday, Sunday, legal holiday, or day on which the state office is closed.<sup>3</sup>

If this time requirement is not met, management may notify the employee, using the Grievance Form A, that the grievance will be administratively closed due to **noncompliance**. (See "Grievance Initiation Noncompliance," § 6.2). The agency must

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<sup>2</sup> An employee who wishes to appeal a disciplinary action must file a grievance within 30 calendar days of receipt of the Written Notice.

<sup>3</sup> Cf. Va. Code § 1-210(E).

also notify the employee on the Grievance Form A that the employee has the right to request a compliance ruling from EEDR to overturn the closing of the grievance. Any such ruling request must be made within 5 workdays of the notice of closure and be accompanied by a copy of the Grievance Record, complete with all attachments. (The original Grievance Record should be kept by the agency). The agency may raise the issue of timeliness at any point through the agency head's qualification decision.

The employee bears the burden of establishing the date that the grievance was initiated. Thus, employees are strongly encouraged to document the initiation date, for instance, by using certified mail or requesting a date-stamped photocopy of the Grievance Form A. (Note: for purposes of establishing when a mailed grievance was initiated, the postmark date is considered the initiation date).

The agency bears the burden of establishing the date the employee knew or should have known of the management action or omission being grieved, if the agency contests the timeliness of the grievance on that basis. If the management action is sent to the grievant by regular mail, evidence of proper mailing presented by the agency will create a presumption that the action was received seven calendar days from the mailed date. The presumption may be rebutted by clear and convincing evidence of a different receipt date.

Note: An employee's time on extended sick or disability leave will not automatically extend the time period for filing a grievance. An agency may properly allow such a leave period to extend the time period, but the employee should be so advised.

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### ***§2.3 Access to the Grievance Procedure***

To access the grievance procedure, an employee must meet each of the following three criteria:

1. Must not be listed as exempt from the Virginia Personnel Act under § 2.2-2905 of the Code of Virginia;<sup>4</sup>
2. Must have been a non-probationary employee of the Commonwealth at the time the management action or omission that formed the basis of the dispute occurred; and,
3. Must not have voluntarily concluded his/her employment with the Commonwealth prior to initiating the grievance.

Agency management may deny an employee access to the grievance procedure on any of these grounds at any point following receipt of a written grievance. If management denies the employee access to the grievance procedure, the employee may ask the agency head to grant him/her access. The employee must make a written request to the agency head within 5 **workdays** of receiving notification that access has been denied. The agency head must determine within 5 workdays of receiving the request whether to grant the

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<sup>4</sup> There are some Colleges and Universities that have restructured under various "Restructuring Acts." At these Colleges and Universities, certain employees, largely based on their date of hire, are now exempt from the Virginia Personnel Act. However, those employees still generally have access to the grievance procedure under the provisions of the applicable Restructuring Act and management agreement.

employee access to the grievance procedure and provide a written response stating the determination. The agency head's response must notify the employee of his/her procedural options.

The employee may appeal to EEDR the agency head's decision to deny access. This appeal must be made within 5 workdays of the employee's receipt of the agency head's decision. To appeal to EEDR, the employee must submit the Grievance Form A to the agency's Human Resources Office within 5 workdays of receiving notice that access to the grievance procedure has been denied. Within 5 workdays of receipt of the appeal request, the agency's Human Resources Office must forward a copy of the **Grievance Record**, complete with all **attachments**, to EEDR. (The original **Grievance Record** should be kept by the agency). EEDR's access ruling is final. NOTE: All access rulings may be published on EEDR's website in a manner that seeks to preserve personal privacy. (See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," § 8.1).

If the employee is ultimately determined to have access to the grievance procedure, the grievance is returned to the appropriate resolution step for a response on the merits.

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#### ***§2.4 Initiating a Grievance***

An employee must initiate a grievance on a fully completed "Grievance Form A." The "Grievance Form A" should be available at all state Human Resources Offices and is also available on EEDR's website. The "Grievance Form A" must state the management action(s) or omission(s) being grieved, the facts in support of the grievance, and the relief requested. If there is not enough space on the "Grievance Form A" for a complete statement, attachments may be used. To initiate the grievance, the employee should submit the Grievance Form A and any attachments to the employee's agency, generally to the appropriate management step-respondent.

Once the grievance is initiated, challenges to additional management actions or omissions cannot be added.<sup>5</sup> When initiating a grievance, and after initiation, an employee may request from the agency documents related to the actions or omissions grieved. (See "Documentation Relating to a Grievance," § 8.2.)

Assuming an employee has access to the grievance procedure, *any* management actions or omissions may be grieved, at least through the management steps, so long as the grievance:

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<sup>5</sup> To challenge a new management action or omission occurring after the initiation of a grievance, an employee would need to file a new grievance. For example, if an agency denies an employee a transfer for what he/she believes is an improper reason, the employee must initiate his/her grievance within 30 calendar days of the denial. If the employee is subsequently discharged, the grievant must nevertheless initiate a new grievance contesting his/her termination within 30 calendar days of the discharge, if he/she intends to challenge it.

1. Is presented to management within 30 calendar days of the date the employee knew or should have known of the management action or omission being grieved (see “Time Requirements for Filing a Grievance,” § 2.2);
2. Arises in the agency in which the employee works;
3. Pertains directly and personally to the employee’s own employment in a position with access to the grievance procedure;
4. Is not used to **harass** or otherwise impede the efficient operations of government;
5. Is not pursued through another state process (for example, see “Equal Employment Services,” § 1.6);
6. Is not challenging the same management action or omission challenged by another grievance.
7. Is not challenging the agency’s implementation of or failure to implement a hearing officer’s decision. To raise these issues, an employee must petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final decision of a hearing officer. (See “Judicial Review of Final Hearing Decisions,” § 7.3(c)); and
8. Is not seeking relief from alleged agency noncompliance with the grievance procedure. (Noncompliance matters must be raised through the process established in “Noncompliance,” § 6 below.)

If any of these requirements are not met, management may notify the employee, using the Grievance Form A, that the grievance will be administratively closed due to **noncompliance**. (See “Grievance Initiation Noncompliance,” §6.2). The agency must also notify the employee on the Grievance Form A that the employee has the right to request a compliance ruling from EEDR to overturn the closing of the grievance. Any such ruling request must be made within 5 workdays of the notice of closure and be accompanied by a copy of the **Grievance Record**, complete with all attachments. (The original **Grievance Record** should be kept by the agency). The agency may raise noncompliance at any point through the agency head’s qualification decision.

To promote improved employee relations, management may allow a grievance to proceed through the resolution steps, even if the grievance does not comply with the above requirements. If the agency intends to allow the grievance to proceed through the management steps but plans to deny a hearing due to noncompliance, management should inform the employee of that intention as soon as it becomes aware of the noncompliance.

As a general rule, an employee must initiate a grievance with the **first-step respondent**, who is usually his/her immediate supervisor. However, under the following circumstances, the grievance is initiated with someone other than the immediate supervisor:

1. A grievance alleging discrimination or retaliation by the immediate supervisor may be initiated with the next level supervisor;
2. A grievance challenging a selection process (hiring) may be initiated with the appointing authority or appropriate member of management who made the

selection decision. If so initiated, the grievance will then proceed through the remaining grievance steps, to the extent applicable, in that member of management's reporting line.

3. A grievance involving a separation not considered a "dismissal" (*see* "Dismissal Grievances," § 2.5), demotion, suspension without pay, or any other action that results in an actual loss of wages may be initiated with the **second-step respondent**, as the single management step. *See* "Expedited Process," § 3.4.;

4. In grievances involving formal discipline (**Written Notices**) issued by someone other than the employee's immediate supervisor, the employee may initiate the grievance with the person who issued the discipline; and

5. In agencies that have elected to utilize the Expedited Process for certain grievances, *see* "Expedited Process," § 3.4, the grievance is initiated with the single management step-respondent.

6. Dismissal grievances are initiated directly with EEDR. *See* "Dismissal Grievances," § 2.5.

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### ***§2.5 Dismissal Grievances***

"Dismissals" are terminations due to formal discipline or unsatisfactory job performance. A grievance involving such a dismissal shall proceed directly to a formal hearing, omitting the management resolutions steps and the agency head's qualification determination. Dismissal grievances shall be initiated directly with EEDR by submitted a fully completed Grievance Form A – Dismissal Grievance. The grievant's former employing agency will be notified by EDR of receipt of the grievance by transmitting a copy of the materials received. EEDR may request documents concerning the subject-matter of the grievance from the agency to provide a sufficient appointment packet to the hearing officer. Within five workdays of receiving notice of the filing of the grievance, the agency must submit a fully completed Grievance Form B to EEDR as well as anything in response to the grievance to be included with the appointment packet. Before appointing a hearing officer, EEDR shall review the grievance to determine whether the grievant has access to the grievance procedure and the grievance was initiated in a timely manner. Either party may also request a ruling from EEDR to address questions of access and compliance. If the grievance meets these requirements and otherwise complies with the grievance procedure, EEDR will proceed with the appointment of a hearing officer consistent with its practices in other cases. In appointing the hearing officer, EEDR will determine whether the grievance qualifies for hearing in full or in part.

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## **§3 Management Resolution Steps**

NOTE: Words **bolded** appear in the definition section.

### ***§3.1 First Resolution Step***

The first-step respondent must:

1. Accept the grievance;
2. Enter the date of receipt on the Grievance Form A; and,
3. Notify the agency's Human Resources Office of the grievance.

After receiving the written grievance, the first-step respondent should identify the issues, gather information and review the facts. A meeting may be held to discuss the issues in dispute, but such a meeting is not required. Within 5 workdays of receiving the grievance, the first-step respondent must provide a written response on the Grievance Form A or an attachment. The response must address the issues and the relief requested and should notify the employee of his/her procedural options.

Within 5 workdays of receiving the first-step response, the employee must:

1. Indicate on the Grievance Form A his/her intention to continue to the second-step meeting and submit the form to the second-step respondent; or
  2. Indicate on the Grievance Form A his/her intention to conclude the grievance and submit the form to the Human Resources Office.
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### ***§3.2 Second Resolution Step Meeting***

The second-step respondent must:

1. Accept the grievance;
2. Enter the date of receipt on the Grievance Form A; and,
3. Advise the agency's Human Resources Office that the grievance has advanced.

Within 5 workdays of the second-step respondent's receipt of the grievance, the second-step meeting must be held. The persons who may be present at this meeting are the employee, an individual selected by the employee, the second-step respondent and an individual selected by the second-step respondent.

The role of the selected individual is essentially one of supporter and counselor. The selected individual is not entitled to be an active participant in the second-step meeting, although an agency is certainly free to allow such participation if it chooses. Unless permitted by the agency, the selected individual may not directly ask questions of the witnesses, make opening or closing arguments, answer questions on behalf of a grievant or in any other way directly participate in the meeting. (If the second-step respondent allows one party's selected individual to participate, the other party's selected individual may also participate in the meeting to the same extent allowed for the other selected individual.)

For a party's right to be accompanied by a person of his or her choice to be meaningful, the selected individual cannot be required to act merely as a silent observer. Rather, the individual selected by the party must be allowed the opportunity to interact with the party during the second-step meeting, provided the interaction is not unduly disruptive or disrespectful of others present. Examples of appropriate interaction include conferring quietly or exchanging notes.

Either party may call witnesses. These witnesses must not be present except while providing information.

The purpose of the second-step meeting is fact finding and should include open discussion of the grievance issues to promote understanding of the other party's position

and possible resolution of the workplace issues. Accordingly, the parties are encouraged to present information relevant to the grievance at this meeting. While the parties may question one another regarding disputed facts and issues, the meeting should not be adversarial or treated as a hearing. The second-step respondent is charged with presiding over the meeting and must do so in an even-handed manner. Thus, for example, while the second-step respondent could limit the introduction of repetitive information, he/she should not prohibit an employee from disclosing relevant information not previously provided. The meeting must not be recorded unless one of the parties has a disability that would be accommodated by recording the meeting, or if both parties mutually agree to recording the meeting (such an agreement must be in writing). If recorded, the other party may request a copy, provided that duplication expenses are paid by the requesting party.

For more information about the second step meeting, see *Grievance FAQs*, available at EEDR's website.

Within 5 workdays of the second-step meeting, the second-step respondent must provide a written response on the Grievance Form A or an attachment. The response must address the issues and the relief requested and should notify the employee of his/her procedural options.

Within 5 workdays of receiving the second-step response, the employee must:

1. Indicate on the Grievance Form A his/her intention to continue to the third-step and submit the form to the **third-step respondent**; or
2. Indicate on the Grievance Form A his/her intention to conclude the grievance and submit the form to the Human Resources Office.

In the event that an employee alleges retaliation or discrimination by an individual who would otherwise serve as the agency's second-step respondent, the employee may:

1. Request that the agency designate another second-step respondent; or
  2. Waive the face-to-face meeting with the original second-step respondent and receive only a written second-step response to the grievance. If the employee elects to waive the face-to-face meeting with the original second-step respondent, the employee must be allowed to meet with the third-step respondent.
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### ***§3.3 Third Resolution Step***

The third-step respondent must:

1. Accept the grievance;
2. Enter the date of receipt on the Grievance Form A; and,
3. Advise the agency's Human Resources Office that the grievance has advanced.

A meeting may be held to discuss the issues in dispute, but such a meeting is not required. Within 5 workdays of receiving the grievance, the third-step respondent must provide a written response on the Grievance Form A or an attachment. The response must address the issues and the relief requested and should notify the employee of his/her procedural options.

Within 5 workdays of receiving the third-step response, the employee must:

1. Request on the Grievance Form A that his/her grievance be qualified for a hearing\* and submit the form to the agency head; or
2. Indicate on the Grievance Form A his/her intention to conclude the grievance and submit the form to the Human Resources Office.

\* NOTE: If the grievance is qualified for a hearing, the hearing decision will be published on EEDR's website in a manner that seeks to preserve personal privacy. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," § 8.1.

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### ***§3.4 Expedited Process***

If a grievance involves a separation not considered a "dismissal" (*see* "Dismissal Grievances," § 2.5), demotion, suspension without pay, or any other action that results in an actual loss of wages, the grievant may elect to initiate an expedited grievance, using the Grievance Form A – Expedited Process. In addition, if both the agency and the grievant agree, the expedited process may be utilized in any other grievance that would not otherwise be eligible for the expedited process. In designating its step-respondents (*see* "Grievance Procedure," § 1.4; "Identifying Step Respondents," § 8.9), an agency may also elect to utilize the expedited process for all or certain categories of grievances.

The Expedited Process involves a single management step. The procedures that normally apply to the second resolution step (*see* "Second Resolution Step Meeting," § 3.2) apply to the single management step in an expedited grievance. To initiate an expedited grievance, the employee should submit the completed Grievance Form A to the second step-respondent, or, for agencies who utilize the expedited process for all or certain categories of grievances, the single designated management step-respondent.

Within 5 workdays of receiving the written response, the employee must:

1. Request on the Grievance Form A that the grievance be qualified for a hearing\* and submit the form to the agency head; or
2. Indicate on the Grievance Form A his/her intention to conclude the grievance and submit the form to the Human Resources Office.

\* NOTE: If the grievance is qualified for a hearing, the hearing decision will be published on EEDR's website in a manner that seeks to preserve personal privacy. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," §8.1.

In the event that an employee alleges retaliation or discrimination by an individual who would otherwise serve as the agency's single management step-respondent, the employee may:

1. Request that the agency designate another single management step-respondent; or
  2. Waive the face-to-face meeting with the original single management step-respondent, and be allowed to meet with the person designated as the agency's third step-respondent or alternate single management step-respondent. The substitute/alternate will then serve in the role of the single management step-respondent.
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## §4 Qualification for a Hearing

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NOTE: Words **bolded** appear in the definition section.

### *§4.1 Qualifying Actions*

Not all grievances proceed to a hearing. Only grievances that challenge certain actions qualify for a hearing.

#### *§4.1(a) Actions Which AUTOMATICALLY Qualify*

1. Formal discipline (a Written Notice); and
2. Dismissal for unsatisfactory performance.

#### *§4.1(b) Actions Which May Qualify*

The grievance should qualify for a hearing if (i) it claims, and (ii) the facts, taken as a whole, raise a sufficient question as to whether an **adverse employment action** has occurred as a result of one or more of the following:

1. Unfair application or misapplication of state and agency personnel policies, procedures, rules, and regulations;
2. Discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin, or sex;
3. **Arbitrary or capricious** performance evaluation;
4. Retaliation for participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law; or
5. Informal discipline – for example, terminations, transfers, assignments, demotions, and suspensions – that are not accompanied by formal discipline (a Written Notice) but which are taken primarily for disciplinary reasons.

#### *§4.1(c) Actions Which DO NOT Qualify*

Claims that relate solely to the following issues do not qualify for a hearing:

1. Establishment or revision of wages, salaries, position classifications, or general benefits;
2. Contents of statutes, ordinances, personnel policies, procedures, rules, and regulations;
3. Means, methods, and personnel by which work activities are undertaken;
4. Hiring, promotion, transfer, assignment, and retention of employees;
5. Termination, layoff, demotion, or suspension from duties because of lack of work, reduction in workforce, or job abolition;
6. Work activity accepted by an employee as a condition of employment or which reasonably may be expected to be a part of the content of the job;
7. Relief of employees from duties in emergencies; or
8. Informal supervisory actions – for example, interim evaluations, counseling memoranda (including “Formal (Written) Counseling” under the *Standards of Conduct*), and oral reprimands.

The fact that the claim challenges an action under this section does not preclude it from qualifying if it would otherwise qualify under § 4.1(b).

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#### ***§4.2 Agency Head's Determination***

Within 5 workdays of receiving the employee's hearing request, the agency head must determine whether the grievance qualifies for a hearing. The agency head must provide a written response on the Grievance Form A or an attachment. The response should also notify the employee of his/her procedural options. Because this is the last opportunity to resolve the grievance within the agency, the agency head may address the issues and the relief requested by the employee.

If the agency head qualifies the grievance for hearing in full, the agency's Human Resources Office must request the appointment of a hearing officer using the "Form B," within 5 workdays of the qualification decision. The Grievance Form A need not be returned to the grievant for further response. For hearing scheduling purposes, the agency must provide on the "Form B" the contact information of its party representative and/or party advocate.

If the agency head does not qualify the grievance for a hearing or partially qualifies the grievance for hearing, the written response and Grievance Form A must be returned to the grievant. In partial qualification cases, the agency need not request the appointment of a hearing officer using the "Form B" until a response from the grievant is received to determine whether the grievant will appeal the partial qualification (*see* "Appeal to EEDR", § 4.3) or choose to proceed to hearing on those management actions or inactions qualified. The grievant must provide such a response within 5 workdays of receiving the agency head's qualification decision.

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#### ***§4.3 Appeal to EEDR***

If the agency head does not qualify the grievance for a hearing, the employee may appeal to EEDR. EEDR's qualification ruling is final.

If the employee appeals to EEDR, the employee must submit his/her Grievance Form A to the agency's Human Resources Office within 5 workdays of receiving the agency head's qualification decision. Within 5 workdays of receipt of the appeal request, the agency's Human Resources Office must forward a copy of the **Grievance Record**, complete with all attachments, to EEDR. (The original **Grievance Record** should be kept by the agency.)

If the employee does not submit his/her Grievance Form A to the agency within 5 workdays of receiving the agency head's qualification decision denying a hearing, the agency should provide the employee with a notice of noncompliance. *See* § 6.3, "Party Noncompliance." If the employee does not submit the Grievance Form A to appeal the agency head's denial of qualification or conclude the grievance within 5 workdays of receiving the notice of noncompliance, the agency may consider the grievance as concluded. If the employee later seeks to appeal the agency head's denial of

qualification, EEDR will consider whether just cause exists to consider the employee's request for a qualification ruling.

If the agency head qualifies some but not all the grieved issues, the employee may ask EEDR to qualify any remaining unqualified issues. A request to EEDR for qualification of any such issues temporarily stops the grievance process until EEDR issues its ruling.

A hearing officer is not bound by factual determinations in EEDR qualification rulings. The hearing officer must determine the facts based on the evidence admitted and testimony of witnesses presented under oath at the hearing.

NOTE: EEDR rulings on qualification will be published on EEDR's website in a manner that seeks to preserve personal privacy. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," §8.1.

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## §5 The Hearing

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NOTE: Words **bolded** appear in the definition section.

### §5.1 General

Most qualified grievances proceed to a hearing before a hearing officer appointed by EEDR.\* Within 5 workdays of the qualification of the grievance, the agency must request the appointment of a hearing officer from EEDR, using a "Form B." For hearing scheduling purposes, the agency must provide on the "Form B" the contact information of its party representative and advocate. With the "Form B," the agency must also provide a copy of the **Grievance Record**<sup>6</sup> and, in cases involving formal discipline, a copy of the Written Notice(s) at issue. See also *Rules for Conducting Grievance Hearings*, available on EEDR's website, which addresses in more detail the hearing officer's duties and authority under the grievance procedure. The hearing officer, advocates, and parties must comply with the *Rules for Conducting Grievance Hearings*, as well as the provisions of this *Manual*.

\*Certain qualified grievances with the Department of Corrections or the Department of Juvenile Justice, are heard by a circuit court. See "Exception for Hearings on Certain Qualified Grievances with the Departments of Corrections and Juvenile Justice," §5.10.

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### §5.2 Scheduling the Hearing

It is the responsibility of the hearing officer to notify the parties, either in writing or at a prehearing conference, of the date, time, and place of the hearing.

The hearing must be held in the locality where the employee is or has been employed unless the parties and hearing officer mutually agree to another site. The agency must arrange a place for the hearing unless the hearing officer chooses to make the arrangements.

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<sup>6</sup> If the **Grievance Record** is voluminous, the Hearings Program Director should be contacted to determine the pertinent records to submit with the "Form B."

### ***§5.3 Prehearing Conference***

A prehearing conference is required to be held. This conference must be conducted by telephone or other equivalent means. This conference provides an opportunity to improve the management of the hearing by addressing procedural and evidentiary issues. If a party desires to have a particular individual testify at hearing, or to have a particular document produced prior to hearing, the party may request the hearing officer to order the appearance of the individual, or the production of the document. The agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness.<sup>7</sup>

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### ***§5.4 Length of Hearing***

A hearing is to last no more than one day, unless the hearing officer determines that the time is insufficient for a full and fair presentation of the evidence by both sides.

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### ***§5.5 Absence from the Hearing***

The parties must appear at the hearing or request a postponement. The hearing officer has the discretion to grant or deny a request for a postponement.

At the hearing officer's discretion, a hearing may proceed in the absence of one of the parties; a hearing so conducted will be decided on the record and the evidence presented at the hearing.

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### ***§5.6 Recording the Hearing***

The hearing must be recorded **verbatim** to create a record should there be an administrative or judicial review of the hearing decision. Hearing officers will provide their own recording equipment. It is the hearing officer's responsibility to record the hearing.

Either party may receive a copy of the recording, if requested, for the cost of reproduction. A court reporter is not required. If a party requests a court reporter, that party is responsible for the costs.

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### ***§5.7 Authority of the Hearing Officer***

A hearing officer's authority derives from Va. Code §§ 2.2-3000 et seq., this *Manual*, and the *Rules for Conducting Grievance Hearings*. Hearing officers have the authority to:

1. Hold a prehearing conference;
2. Require the parties to exchange a list of witnesses and documents;
3. Issue orders for the appearance of witnesses at hearing and the production of documents;
4. Decide whether non-parties may attend the hearing (however, a representative of EEDR may attend any hearing);
5. Record the hearing verbatim;
6. Administer oaths;

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<sup>7</sup> See *Rules for Conducting Grievance Hearings* § V(B) for a hearing officer's authority to take an adverse inference against an agency for failing to make an agency employee available for the hearing.

7. Admit evidence and exclude evidence, including but not limited to evidence in mitigation or aggravation of any offense charged by agency,
  8. Accept offers of proof of excluded evidence;
  9. Rule on procedural requests;
  10. Render written decisions on qualified grievances and provide appropriate relief; and
  11. Take other actions as necessary or specified in the grievance statutes, this *Manual*, or the *Rules for Conducting Grievance Hearings*.
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### ***§5.8 Rules for the Hearing***

Hearing officers are bound by the provisions of Va. Code §§ 2.2-3000 et seq., the *Rules for Conducting Grievance Hearings*, and this *Manual*.

Hearings are to proceed as follows:

1. Parties may represent themselves or may be represented by an individual of choice; this advocate does not have to be an attorney;
  2. In disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and must show by a **preponderance of the evidence** that the action was warranted and appropriate under the circumstances. *The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline;*
  3. In all other actions, the employee must present his/her evidence first and must prove his/her claim by a preponderance of the evidence;
  4. Each party may make opening and closing statements;
  5. Formal rules of evidence do not apply;
  6. Testimony and exhibits may be admitted into evidence and made part of the record;
  7. Non-party witnesses are not to be present at the hearing except to give testimony and be **cross-examined**; and
  8. The hearing is closed to the public.
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### ***§5.9 Hearing Officer's Decision***

A hearing officer's decision must be in writing.\* The decision must contain findings of fact on the material issues and the grounds in the record for those findings. A copy of the decision must be provided to the grievant, the parties' advocates, and the individuals identified on the Form B. The hearing officer should send the decision by e-mail or fax, if accessible by the parties and advocates so long as proof of receipt is established. If a party or advocate does not have access to e-mail or fax, the hearing decision must be sent by certified mail, return receipt requested, and regular mail.

Hearing officers may order appropriate remedies but may not grant relief that is inconsistent with law, policy, or the grievance procedure. In granting relief, the hearing officer should consider the relief requested in the written grievance.

In hearings contesting formal discipline, if the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless under the record

evidence, the agency's discipline exceeds the limits of reasonableness (see also *Rules for Conducting Grievance Hearings*).

\*NOTE: Hearing decisions will be published on EEDR's website in a manner that seeks to preserve personal privacy. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," §8.1.

***§5.9(a) Examples of relief which may be available to the grievant***

Relief may include, but is not limited to:

1. Reinstatement to the employee's former position or, if occupied, to an equivalent position;
2. Reduction or rescission of disciplinary actions;
3. An award of full, partial, or no **back pay**, from which **interim earnings** must be deducted;
4. The restoration of full benefits and seniority;
5. An order that the agency comply with applicable law and policy, and,
6. Attorneys' fees in discharge grievance hearings where the hearing officer orders reinstatement and the employee is represented by an attorney, unless special circumstances would make an award unjust. See "Special Rules for Discharge Hearings," § 7.2(e).

***§5.9(b) Examples of relief which are not available***

The following forms of relief may not be ordered by a hearing officer:

1. Damages;
  2. Attorneys' fees in grievance hearings not challenging discharge;
  3. Establishing or revising policies, procedures, rules, or regulations;
  4. Taking any adverse action against an employee (other than upholding or reducing the disciplinary action challenged by the grievance);
  5. Directing the methods, means or personnel by which work activities are to be carried out; or,
  6. Any other relief that is inconsistent with the grievance statutes, this *Manual*, the *Rules for Conducting Grievance Hearings*, or state policy.
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***§5.10 Exception for Hearings on Certain Qualified Grievances with the Departments of Corrections and Juvenile Justice***

Pursuant to Va. Code § 2.2-3007, employees of the Departments of Corrections or Juvenile Justice, whose employment was terminated for (i) client, inmate, or resident abuse, (ii) a criminal conviction, or (iii) being placed on court probation under the provisions of Va. Code § 18.2-251, may file a dismissal grievance directly with EEDR, omitting the grievance resolution steps. See "Dismissal Grievances," § 2.5. Upon receipt of a dismissal grievance that is determined to be subject to this section, EEDR will review the submission to determine whether the grievance is timely and otherwise complies with the grievance procedure. See, for example, above §§ 2.2-2.5.

As provided in Va. Code § 2.2-3007, dismissal grievances to which this section applies do not proceed to a formal hearing appointed by EEDR pursuant to Va. Code § 2.2-3005,

but rather proceed to a de novo hearing on the merits of the termination before the circuit court in the jurisdiction in which the employee had been employed. If the grievance is properly filed and meets the compliance requirements, EEDR will return the original grievance paperwork to the grievant with instructions to proceed to a hearing in the appropriate circuit court.

In its discretion, the court may refer the matter to a lawyer who serves as a commissioner in chancery to take such evidence as may be proper and to make a report to the court. Parties may represent themselves or be represented by an individual of choice; this representative does not have to be an attorney. Such representatives may examine, cross-examine, question, and present evidence before the court. The court, sitting without a jury, must hear the evidence. The agency's action is to be upheld unless shown to have been unwarranted by the facts or contrary to law or policy. The decision of the court may be appealed by either party to the Court of Appeals pursuant to Virginia Code § 17.1 - 405.

NOTE: Court decisions may be published in full on EEDR's website. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," §8.1.

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#### ***§5.11 Withdrawal of Grievance***

When an employee withdraws the grievance prior to the issuance of a hearing decision, or when the parties agree to a settlement of the grievance, the employee must submit to the hearing officer a statement clearly stating that he or she is withdrawing the grievance. Such a withdrawal statement terminates the grievance process. It is not necessary for the parties to send a copy of the settlement agreement to the hearing officer. The hearing officer shall issue an Order of Dismissal solely to document that the employee has withdrawn the grievance and that the grievance has been dismissed.

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## **§6 Noncompliance with the Grievance Procedure**

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NOTE: Words **bolded** appear in the definition section.

### ***§6.1 General***

From the time that a grievance is initiated until the hearing decision becomes final, a party or a hearing officer may fail to comply with a provision of the grievance procedure. A party may challenge such noncompliance to EEDR, who is authorized to issue final, nonappealable rulings on compliance challenges.

A challenge to EEDR will normally stop the grievance process temporarily. The grievance process will resume when EEDR issues its ruling on the challenge.

NOTE: EEDR rulings on compliance will be published on EEDR's website in a manner that seeks to preserve personal privacy. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," §8.1.

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### ***§6.2 Grievance Initiation Noncompliance***

The employee's Grievance Form A must comply with the requirements for initiating a grievance. See "Time Requirements for Filing a Grievance," § 2.2 and "Initiating a Grievance," § 2.4.

If the Grievance Form A does not comply:

1. Management may notify the employee, using the Grievance Form A, that the grievance will be administratively closed due to noncompliance and that the employee may seek a compliance ruling from the EEDR.
  2. The employee may request, within 5 workdays of receiving notice that the grievance will be closed, that the EEDR decide whether the grievance is in compliance and can proceed. Any such ruling request must be accompanied by a copy of the **Grievance Record**, complete with all attachments. (The original **Grievance Record** should be kept by the agency).
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### ***§6.3 Party Noncompliance***

Parties must comply with the requirements of the grievance procedure. All claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time. To remedy noncompliance, a party must:

1. Notify the other party in writing of the noncompliance<sup>8</sup> (if the agency is out of compliance, written notice of noncompliance must be made to the agency head or designee<sup>9</sup>);
2. Allow the other party 5 workdays after receipt of the written notice to correct the noncompliance;
3. If the noncompliance is corrected within the 5 workdays, the party is considered in compliance and no relief will be available from EEDR;
4. If the noncompliance is not corrected within the 5 workdays, the party may request a ruling from EEDR (providing the other party with a copy of that request); the request must identify the specific requirement of the grievance procedure that has not been followed.
5. If EEDR finds that a party has failed to correct the noncompliance within the 5 workdays, EEDR may (i) order the party to correct the noncompliance, or (ii) where a substantial **procedural requirement** of the grievance procedure was violated without just cause, render a decision against the noncomplying party on any qualifiable issue.

Once a grievance has been qualified for hearing, any claims of party noncompliance occurring during the hearing phase should be raised in writing with the hearing officer appointed to hear the grievance. If a party disagrees with a hearing officer's decision or

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<sup>8</sup> The written notice of noncompliance may be sent by any means, including regular mail, facsimile, and/or e-mail. There is no requirement that such communications be sent by certified mail. For instance, the mailing of correspondence, properly addressed and stamped, raises a presumption of receipt of the correspondence by the addressee. *E.g.*, *Washington v. Anderson*, 236 Va. 316, 322, 373 S.E.2d 712, 715 (1988).

<sup>9</sup> *See* Va. Code § 2.2-604. If the agency head has delegated this authority to a designee, EEDR must be notified of the delegation.

order on a matter of compliance, an objection should be made to the hearing officer, and a ruling from EEDR must be requested in writing and **received by EEDR** within 15 calendar days of the date of the hearing decision.

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#### ***§6.4 Hearing Officer Noncompliance***

In presiding over the hearing process and in rendering hearing decisions, hearing officers must comply with the requirements of the grievance statutes, this *Manual*, and the *Rules for Conducting Grievance Hearings* promulgated by EEDR. If the hearing decision is out of compliance, a party may challenge the decision to EEDR. (See “Administrative Review of Hearing Decisions,” §7.2). If the noncompliance arises in pre-hearing matters or in the conduct of the hearing, the hearing officer’s noncompliance may be remedied as follows:

1. An objection should be made to the hearing officer at the time the noncompliance occurs;
  2. A ruling from EEDR must be requested in writing and **received by EEDR** within 15 calendar days of the date of the hearing decision; and,
  3. If EEDR finds that the hearing officer has failed to comply with the grievance procedure, the sole remedy is an order by EEDR that the hearing officer correct the noncompliance.
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## **§7 Review of Hearing Decisions**

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NOTE: Words **bolded** appear in the definition section.

### ***§7.1 General***

A hearing decision must be consistent with law, policy, and the grievance procedure (including this *Manual* and the *Rules for Conducting Grievance Hearings*). A hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

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### ***§7.2 Administrative Review of Hearing Decisions***

A hearing officer’s decision is subject to administrative review (appeal) based on the request of a party to EEDR. Requests for review may be initiated by electronic means such as facsimile or e-mail. *See* § 8.10. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests for administrative review must be provided to the other party, EEDR and the Hearing Officer.

#### ***§7.2(a) Requesting Administrative Review***

Requests for administrative review must be in writing and **received by EEDR** within 15 calendar days of the date of the original hearing decision. **Received by** means delivered to, not merely postmarked or placed in the hands of a delivery service. If the 15<sup>th</sup> calendar day by which a request for administrative review must be filed falls on a Saturday, Sunday, or legal holiday or on any day or part of a day on which the state office

where the request for administrative review is to be filed is closed during normal business hours, the appeal may be filed on the next business day that is not a Saturday, Sunday, legal holiday, or day on which the state office is closed.<sup>10</sup>

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance.<sup>11</sup> A challenge that the hearing decision is not in compliance with the grievance procedure (including this Manual and the *Rules for Conducting Grievance Hearings*),<sup>12</sup> as well as a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

EEDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with written policy and the grievance procedure.

In response to any request for administrative review, the opposing party may submit a written challenge (rebuttal) to EEDR. If the opposing party chooses to submit a rebuttal, it must be **received by** EEDR within 10 calendar days of the conclusion of the original 15-day appeal period. A copy of any such rebuttal must also be provided to the appealing party and the hearing officer.

NOTE: All administrative review rulings or decisions may be published on EEDR's website in a manner that seeks to preserve personal privacy. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," § 8.1.

### ***§7.2(b) Transcripts of the Hearing***

A party may elect to produce a transcript to support its position on appeal. The party that elects to have a transcript produced is responsible for the costs of producing the transcript.

1. If the employee elects to provide a transcript, the agency may obtain a copy directly from the entity producing the transcript at the agency's expense.
2. If the agency elects to provide a transcript, the employee must be allowed, upon request, reasonable access to the agency's copy of the transcript in order to respond to the agency's case. The employee may also obtain a copy of the transcript from the entity producing the transcript at the employee's expense.

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<sup>10</sup> See, e.g., EDR Ruling No. 2013-3541; cf. Va. Code § 1-210(E).

<sup>11</sup> Section 2.2-3006(A) of the Code of Virginia provides "[u]pon the request of a party to a grievance hearing for an administrative review of the hearing decision, the Director of [DHRM] shall determine ... whether the hearing decision is consistent with policy." Parties should direct such requests for review to EEDR pursuant to this section of the *Manual* and/or to the Director of DHRM.

<sup>12</sup> While EEDR does not have authority to address questions of law with finality, the grievance procedure requires that the hearing decision comply with law. See, e.g., § 7.1. Accordingly, a hearing decision that does not comply with law also does not comply with the grievance procedure, which is within EEDR's authority to address. However, there is no requirement that a party raise such a legal question with EEDR prior to proceeding to a Circuit Court Review. See § 7.3(a). The courts have ultimate authority to determine questions of law.

***§7.2(c) Administrative Review Decisions***

Administrative review decisions are final and nonappealable. If the hearing officer is ordered to reconsider the hearing decision, the hearing officer must do so. Administrative reviews should be issued within 30 calendar days of EEDR's receipt of all briefing submissions.

***§7.2(d) Final Hearing Decisions***

A hearing officer's original decision becomes a final hearing decision, with no further possibility of administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if ordered to do so, the hearing officer has issued a revised decision.\*

\*See §7.2(e) below for special rules regarding final hearing decisions in discharge hearings where the hearing officer orders reinstatement of an employee represented by an attorney.

***§7.2(e) Special Rules for Discharge Hearings Where the Hearing Officer Orders Reinstatement of an Employee Represented by an Attorney***

Attorneys' fees are not available under the grievance procedure, **with one exception:** an employee who is represented by an attorney licensed by the Virginia State Bar, and who substantially prevails on the merits of a grievance challenging his/her discharge is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust. For such an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee to his/her former (or an equivalent) position.<sup>13</sup> The amount of recoverable attorneys' fees shall not exceed the maximum amounts provided on EEDR's website. A separate maximum amount will be established for attorneys located in Northern Virginia.

In such a case, counsel for the grievant shall ensure that the hearing officer receives, within 15 calendar days of the issuance of the initial decision ordering reinstatement, counsel's petition for reasonable attorneys' fees. The petition shall include an affidavit itemizing services rendered, time billed for each service, and the hourly rate charged in accordance with the *Rules for Conducting the Grievance Hearings*. A copy of the fees petition must be provided to the opposing party at the time it is submitted to the hearing officer. The agency may contest the fees petition by providing a written rebuttal to the hearing officer.

If neither party timely requests an administrative review, the hearing officer must issue an addendum to the decision denying or awarding, in part or in full, the fees requested in the petition, and should do so no later than 15 days from the date of the initial decision.

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<sup>13</sup> An employee who may not be reinstated to his or her previous position due to its abolishment through the layoff process may still be entitled to attorneys' fees

If either party has timely requested an administrative review as described in §7.2(a), all administrative reviews must be issued (including any reconsidered decision by the hearing officer) before the hearing officer issues the fees addendum. The hearing officer should issue the fees addendum within 15 calendar days of the issuance of the last of the administrative review decisions, or, if ordered, any related revised hearing decision.

Within 10 calendar days of the issuance of the fees addendum, either party may petition EEDR or a decision solely addressing whether the fees addendum complies with this *Manual* and the *Rules for Conducting Grievance Hearings*. Once EEDR issues a ruling on the propriety of the fees addendum, and if ordered by EEDR, the hearing officer has issued a revised fees addendum, the original decision becomes “final” as described in §7.2(d) and may be appealed to the Circuit Court in accordance with §7.3(a). The fees addendum shall be considered part of the final decision.

Like all final hearing decisions, a final decision rendered by a hearing officer under this subsection (7.2(e)) shall not be enforceable until the conclusion of any judicial appeals.

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### ***§7.3 Judicial Review of Final Hearing Decisions***

#### ***§7.3(a) Circuit Court Review***

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. Neither the hearing officer nor the Department of Human Resource Management (or any employee thereof) shall be named as a party in such an appeal.

An employee does not need EEDR’s approval before filing a notice of appeal. However, an agency must request and receive approval from EEDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EEDR and must specify the legal basis for the appeal, in other words, the basis for its position that the hearing decision is “contradictory to law.” The request for approval to appeal must be **received by** EEDR within 10 calendar days, which means delivered to, not merely postmarked or placed in the hands of a delivery service. The agency may make its request by e-mail or fax. The agency must provide a copy of its appeal request to the employee. EEDR will provide a response within 10 calendar days of the agency’s request.

A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.<sup>14</sup> At the time of filing, a copy of the notice of appeal must be provided to the other party and EEDR.

Within 10 calendar days of receiving notice of an appeal being filed, the agency must forward a copy of the **Grievance Record** and **Hearing Record**, complete with all attachments, to the circuit court in the jurisdiction in which the grievance arose. (The

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<sup>14</sup> Questions about such appeals should be directed to the clerk of the applicable circuit court.

original **Grievance Record** should be kept by the agency.) To receive the **Hearing Record**, the agency must provide a written request to EEDR.

If the agency does not forward the **Grievance and Hearing Records** to the court, the employee may request the court to issue an order requiring the agency to transmit the record.

Within 30 days of receipt of the **Grievance and Hearing Records**, the court, sitting without a jury, shall hear the appeal on the record. The court may affirm, reverse, or modify the final hearing decision. The court's decision shall be rendered within 15 days of the court hearing, which shall be at no cost to the parties. The court shall award reasonable attorney's fees and costs to the employee if the employee substantially prevails on the merits of the appeal.

***§7.3(b) Appeal to the Court of Appeals***

Either party may appeal the final decision of the circuit court to the Court of Appeals pursuant to Virginia Code § 17.1-405.

***§7.3(c) Implementation***

Either party may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring **implementation** of the final hearing decision. *See* Va. Code § 2.2-3006(D). The petitioning party must provide the EEDR Director a copy of the petition. The court shall award reasonable attorneys' fees and costs to the employee if the employee substantially prevails on the merits of the implementation.

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## **§8 Additional Grievance Procedure Rules**

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NOTE: Words **bolded** appear in the definition section.

***§8.1 Publication of Hearing Decisions, Rulings, and Related Court Opinions***

EEDR will publish rulings and hearing decisions on its website in a manner that seeks to preserve privacy. EEDR may also publish related court opinions in full. See also EEDR's Publication Policy on its website.

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***§8.2 Documentation Relating to a Grievance***

Absent just cause, all documents relating to the management actions or omissions grieved shall be made available, upon request from a party to the grievance, by the opposing party. (Once a grievance has been initiated, an employee's request for documents relating to his/her grievance, pursuant to the Freedom of Information Act ("FOIA"), shall also be treated by the agency as a request for documents under the grievance procedure.)

Upon receipt of such a request, a party shall have a duty to search its records to ensure that, absent just cause, all such relevant documents are provided. All such documents must be provided within 5 workdays of receipt of the request. If it is not possible to provide the requested documents within the 5 workday period, the party must, within 5 workdays of receiving the request, explain in writing why such a response is not possible,

and produce the documents no later than 10 work days from the receipt of the document request.

If responsive documents are withheld due to a claim of irrelevance and/or “just cause” (“just cause” may include, but is not limited to, undue burden and legal privilege),<sup>15</sup> the withholding party must provide the requesting party with a written explanation of each claim, no later than 10 workdays from the receipt of the document request. If a document does not exist, the requesting party shall be informed of its nonexistence. The party requesting the documents has the option of demanding, in writing, that the grievance process temporarily halt until the documents are provided. (An employee’s demand shall be presented to the agency’s Human Resources Office or the current member of management with whom the grievance is pending (for example, a step-respondent).)

Documents pertaining to non-parties that are relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance. A party shall not be required to create a document if the document does not exist. The party requesting the documents may be charged a reasonable amount not to exceed the actual cost to retrieve and duplicate the documents.

Documents obtained under the grievance procedure are to be used for grievance purposes only. Improper use of documents by a party could result in disciplinary action under the *Standards of Conduct*.

If a party’s document request is denied by the other party prior to the appointment of a hearing officer, then the requesting party may seek relief from EEDR pursuant to the rules for Party Noncompliance. See “Party Noncompliance,” § 6.3. After a hearing officer is appointed, relief should be sought from the hearing officer. See “Authority of the Hearing Officer,” § 5.7.

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### ***§8.3 Computation of Time***

In computing any period of time required by the grievance procedure, the day of the event from which the designated period of time begins to run shall not be included.

Example: If a step-respondent receives the Grievance Form A from an employee on Tuesday, then Wednesday is considered the first of the 5 workdays in which the step-respondent must respond to the grievance. Assuming a normal workweek (Monday through Friday), then Wednesday is counted as day 1 and the response from the step-respondent will be due on the following Tuesday, day 5.

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<sup>15</sup> In some contexts, “just cause” could also include applicable law, regulation, and/or policy language prohibiting the disclosure of certain records. However, notwithstanding general limitations on the disclosure of selection documentation, see DHRM Policy 2.10, *Hiring*, a grievant may have access to certain relevant selection materials in a grievance about a selection process in which he/she competed. For example, when relevant, a grievant might be able to obtain copies of the results of applicant screening and/or interview notes for the successful applicant, with personally identifying information redacted appropriately. To the extent the parties do not agree on what documents are subject to disclosure under the particular factors in a given grievance, a compliance ruling can be requested from EEDR. See *Grievance Procedure Manual* § 6.3.

For specific rules regarding situations in which the end of a calendar-day period falls on a weekend or holiday, see “Time Requirements for Filing a Grievance,” § 2.2, and “Administrative Review of Hearing Decisions,” § 7.2.

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#### ***§8.4 Extension of Timeframes and Other Modifications***

Upon mutual agreement, parties to a grievance may extend all pre-qualification time limits including, but not limited to, the 30 calendar day grievance initiation requirement. After a hearing officer is assigned, a request for postponement of the hearing must be directed to the hearing officer.

In addition, upon mutual agreement, the parties to a grievance may modify other pre-qualification rules during the management resolution steps. Possible modification could include, but are not limited to: 1) conducting the second step meeting other than in-person; 2) substituting a step-respondent; or 3) eliminating a step in the management resolution steps. To be enforceable, ALL EXTENSION AND MODIFICATION AGREEMENTS BETWEEN THE PARTIES MUST BE IN WRITING.

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#### ***§8.5 Consolidation of Grievances***

Prior to the appointment of a hearing officer, multiple grievances may be treated by the agency in a joint manner, without a ruling from EEDR. For instance, if the agency so elects, the parties would address two or more grievances at any given management step after which the step-respondent could issue a single response that addresses the issues and relief raised in each of the grievances. However, only EEDR can consolidate multiple grievances for a single hearing. Accordingly, if a hearing officer has not yet been appointed and more than one grievance is pending involving the same: (1) factual background and (2) issues or policies, either party may request EEDR consolidate the grievances for hearing purposes. The opposing party must be provided a copy of any such request. EEDR strongly favors consolidation and will grant consolidation for hearing purposes unless there is a persuasive reason to process the grievances individually. EEDR may consolidate grievances for hearing without a request from either party. After a hearing officer has been appointed, EEDR will accept requests for consolidation for hearing only in limited circumstances.

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#### ***§8.6 Leave and Reimbursement***

Employees who are grievants, witnesses, or representatives of grievants in a grievance initiated under the state Grievance Procedure will be granted reasonable time, including reasonable travel time, as Civil and Work-Related Leave to participate in grievance proceedings.

Grievants, witnesses, and representatives of grievants may use Civil and Work-Related Leave to attend management step meetings and all hearings related to the grievance. Whenever possible, agencies should reschedule employees who regularly work the evening or night shift to a day shift schedule during the periods when they are requested to appear in grievance proceedings or related court hearings. Agency management may

establish reasonable limits to Civil and Work-Related Leave for employees representing grievants.

Civil and Work-Related Leave will be granted to employees for the following:

1. To prepare as grievant for the grievance procedure. Agencies may establish reasonable limits for this use of Civil and Work-Related Leave to prevent abuse of state time.
2. To meet with agency Human Resource representatives and/or with EEDR regarding a matter grieved or related to a work matter affecting the employee for which a grievance has not been filed.
3. To meet with the Office of Equal Employment Services of the Department of Human Resource Management for the purpose of discussing work problems related to violations of the state's Equal Employment Opportunity Policy (DHRM Policy 2.05).
4. To participate in activities and proceedings of EEDR's statewide mediation program.

Civil and Work-Related Leave is not available for employees to meet with attorneys.

An employee's reasonable costs for transportation, meals, and lodging are to be reimbursed in accordance with state travel regulations.

*See DHRM Policy 4.05, Civil and Work-Related Leave.*

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#### ***§8.7 Reasonable Accommodations for Disabled Persons***

The agency must provide reasonable accommodations for disabled persons participating in the grievance process.

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#### ***§8.8 Use of Agency Office Equipment***

Grievances are official business. Therefore, in conjunction with a grievance, grievants and advocates who are state employees may make reasonable use of agency office equipment including computers, copiers, fax machines, and telephones.

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#### ***§8.9 Identifying Step Respondents***

Each agency must designate individuals to serve as respondents in the resolution steps and notify EEDR of the designations. If the agency seeks to change the designation of respondents, the agency must make such a request to EEDR. The agency's proposed change will not be effective until approved by EEDR. Step-respondent designations are available at the agency's Human Resources Office and from EEDR.

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#### ***§8.10 Electronic Transmission of Grievance Materials***

Electronic means (for example, facsimile and/or e-mail, including scanned materials) may be utilized by all parties to transmit grievance materials. **While not a requirement, EEDR prefers to receive ruling requests and requests for the appointment of a hearing officer (Form B), including the applicable Grievance Records, by e-mail**

(including scanned materials), with a copy to the other party. E-mail submissions to EEDR should be sent to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov). If a grievant does not have access to e-mail, the agency must provide the grievant with a copy of the agency's e-mailed requests in a form accessible to the grievant.

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### ***§8.11 Facilitation***

EEDR may facilitate a resolution to a grievance and/or the matter(s) related thereto upon the agreement of both parties.

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## **§9 Definitions**

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**Adverse Employment Action** - Any employment action resulting in an adverse effect on the terms, conditions, or benefits of employment.

**Agency Head** - The Director, Commissioner, or other appointed head of the state agency or the individual who has been delegated the authority to act for the agency head.

**Arbitrary or Capricious** - In disregard of the facts or without a reasoned basis.

**Attachments** - Documents joined with the grievance form in the resolution steps and in the qualification decision.

**Back Pay** - Retroactive payment of wages, bonuses, leave or other benefits, overtime (if a requisite of the job) and other forms of fixed compensation, as directed by the hearing officer.

**Cross-Examination** - Questioning by the opposing party to test the truth or further develop the prior testimony of a witness.

**Discrimination** - Different or hostile treatment based on race, color, religion, political affiliation, age, disability, national origin, or sex.

**Employment Dispute Resolution, EDR, or, now EEDR** – The Office of Equal Employment and Dispute Resolution is the result of the January 1, 2017 merger of the Offices of Equal Employment Services and Employment Dispute Resolution within the Department of Human Resource Management. EEDR performs the former duties of the Department of Employment Dispute Resolution following merger of that agency into DHRM on July 1, 2012, and continues the role of the Office of Employment Dispute Resolution.

**Expedited Process** - A shortened process available for grievances challenging separation not considered a “dismissal” (*see* “Dismissal Grievances,” § 2.5), demotions or suspensions without pay, or other actual loss of wages. May also be used in other grievances if both parties agree or if the agency has elected to utilize the process for all or certain categories of grievances.

**Grievance** - Written complaint on the Grievance Form A stating the management actions and omissions being challenged, the facts in support of the grievance, and the relief requested.

**Grievance Record** – Consists of all documents intended to be made a part of the grievance by either party, including, but not limited to, the Grievance Form A; attachments to the Grievance Form A; written responses by the agency during the management steps; compliance related materials; procedural memoranda; and the **Hearing Record**, if applicable.

**Harass** - Action taken to disrupt or impede the operations of government.

**Hearing Record** – Consists of all documents related to the grievance hearing, including, but not limited to, materials that are part of the **Grievance Record**; hearing officer appointment materials and attachments thereto; qualification determinations; recordings of the hearing; exhibits both proffered and received in evidence; hearing officer decisions (original, reconsideration, and/or addenda); and administrative challenges to the hearing decision and decisions on those challenges.

**Implementation** -An order issued by the court directing a party to carry out a final hearing decision.

**Interim Earnings** - Income earned or received in lieu of state salary or other regularly earned compensation including but not limited to unemployment compensation benefits.

**Involuntary Separation** - Separation which is not of free will; resignation obtained through misrepresentation, deception, duress, coercion, or time pressure.

**Just Cause** - A reason sufficiently compelling to excuse not taking a required action in the grievance process.

**Mediation** - Voluntary process through which individuals, with the assistance of mediators, may reach an agreement to resolve work-related issues.

**Noncompliance** - Failure to follow a grievance procedure rule.

**Offers of Proof (also known as “proffers”)** - Documents, testimony and other evidence offered but not admitted into the record.

**Parties** - The employee who initiates the grievance and his/her employing agency.

**Preponderance of the Evidence** - Evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.

**Procedural Requirements** - Formal procedures deemed essential to ensure fairness in the grievance process.

**Retaliation** – Adverse employment actions taken by management or condoned by management because an employee participated in an activity recognized as protected in § 4.1(b).

**Verbatim** - Taken word by word but not necessarily transcribed.

**Workday** - Normal work schedule (excluding authorized leave time) for the individual responsible for taking the required action.

**Written Notice** - Formal written disciplinary action taken under the Standards of Conduct.