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HOUSE BILL NO. 1509

Offered January 12, 2011

Prefiled December 17, 2010

A *BILL to amend and reenact §§ 2.2-2639, 2.2-3004, 2.2-3900, 2.2-3901, 15.2-1507, and 15.2-1604 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 2.2-2901.1 and 15.2-1501.1, relating to prohibited discrimination in employment based on sexual orientation.*

Patron—Scott, J.M.

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:1. That §§ 2.2-2639, 2.2-3004, 2.2-3900, 2.2-3901, 15.2-1507, and 15.2-1604 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 2.2-2901.1 and 15.2-1501.1 as follows:

§ 2.2-2639. Causes of action not created.

A. Nothing in this article creates, nor shall it be construed to create, an independent or private cause of action to enforce its provisions, except as specifically provided in subsections B and C.

B. No employer employing more than five but less than 15 persons shall discharge any such employee on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, including lactation, *sexual orientation*, or of age if the employee is 40 years old or older.

For the purposes of this section,:

"~~lactation~~" "*Lactation*" means a condition that may result in the feeding of a child directly from the breast or the expressing of milk from the breast.

"*Sexual orientation*" means a person's actual or perceived heterosexuality, bisexuality, homosexuality, or gender identity or expression. "*Sexual orientation*" shall not include any person whose attraction is toward a person with whom sexual conduct would be illegal due to the age of the parties.

C. The employee may bring an action in a general district or circuit court having jurisdiction over the employer who allegedly discharged the employee in violation of this section. Any such action shall be brought within 300 days from the date of the discharge or, if the employee has filed a complaint with the Council or a local human rights or human relations agency or commission within 300 days of the discharge, such action shall be brought within 90 days from the date that the Council or a local human rights or human relations agency or commission has rendered a final disposition on the complaint. The court may award up to 12 months' back pay with interest at the judgment rate as provided in § 6.1-330.54. However, if the court finds that either party engaged in tactics to delay resolution of the complaint, it may (i) diminish the award or (ii) award back pay to the date of judgment without regard to the 12-month limitation.

In any case where the employee prevails, the court shall award attorneys' fees from the amount recovered, not to exceed 25 percent of the back pay awarded. The court shall not award other damages, compensatory or punitive, nor shall it order reinstatement of the employee.

D. Causes of action based upon the public policies reflected in this article shall be exclusively limited to those actions, procedures and remedies, if any, afforded by applicable federal or state civil rights statutes or local ordinances. Nothing in this section or § 2.2-3900 shall be deemed to alter, supersede, or otherwise modify the authority of the Council or of any local human rights or human relations commissions established pursuant to § 15.2-853 or 15.2-965 or subject to the provisions of § 2.2-2638.

§ 2.2-2901.1. *Employment discrimination prohibited.*

No state agency, institution, board, bureau, commission, council, or instrumentality of the Commonwealth shall discriminate in employment based on race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, sexual orientation, or status as a special disabled veteran or other veteran covered by the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. § 4212).

For the purposes of this section, "*sexual orientation*" means a person's actual or perceived heterosexuality, bisexuality, homosexuality, or gender identity or expression. "*Sexual orientation*" shall not include any person's attraction toward persons with whom sexual conduct would be illegal due to the age of the parties.

§ 2.2-3004. Grievances qualifying for a grievance hearing; grievance hearing generally.

A. A grievance qualifying for a hearing shall involve a complaint or dispute by an employee relating

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59 to the following adverse employment actions in which the employee is personally involved, including
60 but not limited to (i) formal disciplinary actions, including suspensions, demotions, transfers and
61 assignments, and dismissals resulting from formal discipline or unsatisfactory job performance; (ii) the
62 application of all written personnel policies, procedures, rules and regulations where it can be shown that
63 policy was misapplied or unfairly applied; (iii) discrimination on the basis of race, color, religion,
64 political affiliation, age, disability, national origin ~~or~~, sex, *pregnancy, childbirth or related medical*
65 *conditions, sexual orientation as defined in § 2.2-2901.1, or status as a special disabled veteran or other*
66 *veteran covered by the Vietnam Era Veterans' Readjustment Act of 1974, as amended (38 U.S.C.*
67 *§ 4212);* (iv) arbitrary or capricious performance evaluations; (v) acts of retaliation as the result of the
68 use of or participation in the grievance procedure or because the employee has complied with any law
69 of the United States or of the Commonwealth, has reported any violation of such law to a governmental
70 authority, has sought any change in law before the Congress of the United States or the General
71 Assembly, or has reported an incidence of fraud, abuse, or gross mismanagement; and (vi) retaliation for
72 exercising any right otherwise protected by law.

73 B. Management reserves the exclusive right to manage the affairs and operations of state government.
74 Management shall exercise its powers with the highest degree of trust. In any employment matter that
75 management precludes from proceeding to a grievance hearing, management's response, including any
76 appropriate remedial actions, shall be prompt, complete, and fair.

77 C. Complaints relating solely to the following issues shall not proceed to a hearing: (i) establishment
78 and revision of wages, salaries, position classifications, or general benefits; (ii) work activity accepted by
79 the employee as a condition of employment or which may reasonably be expected to be a part of the
80 job content; (iii) contents of ordinances, statutes or established personnel policies, procedures, and rules
81 and regulations; (iv) methods, means, and personnel by which work activities are to be carried on; (v)
82 termination, layoff, demotion, or suspension from duties because of lack of work, reduction in work
83 force, or job abolition; (vi) hiring, promotion, transfer, assignment, and retention of employees within
84 the agency; and (vii) relief of employees from duties of the agency in emergencies.

85 D. Decisions regarding whether a grievance qualifies for a hearing shall be made in writing by the
86 agency head or his designee within five workdays of the employee's request for a hearing. A copy of
87 the decision shall be sent to the employee. The employee may appeal the denial of a hearing by the
88 agency head to the Director of the Department of Employment Dispute Resolution (the "Director").
89 Upon receipt of an appeal, the agency shall transmit the entire grievance record to the Department of
90 Employment Dispute Resolution within five workdays. The Director shall render a decision on whether
91 the employee is entitled to a hearing upon the grievance record and other probative evidence.

92 E. Proceedings for review of the decision of the Director may be made by an employee filing a
93 notice of appeal within five workdays of receipt of the decision. Within five workdays thereafter, the
94 agency shall transmit to the clerk of the circuit court in the jurisdiction in which the grievance arose a
95 copy of the grievance record. The court, on motion of the grievant, may issue a writ of certiorari
96 requiring the Director to transmit the record on or before a certain date. Within thirty days of receipt of
97 such records, the court, sitting without a jury, shall hear the appeal on the record and such additional
98 evidence as may be necessary to resolve any controversy as to the correctness of the record. The court,
99 in its discretion, may receive such other evidence as the ends of justice require. The court may affirm
100 the decision of the Director or may reverse or modify the decision. The decision of the court shall be
101 rendered no later than the fifteenth day from the date of the conclusion of the hearing. The decision of
102 the court shall be final and shall not be appealable. The circuit court hearing shall be at no cost to the
103 Commonwealth or the grievant.

104 F. The hearing pursuant to § 2.2-3005 shall be held in the locality in which the employee is
105 employed or in any other locality agreed to by the employee, employer, and hearing officer. The
106 employee and the agency may be represented by legal counsel or a lay advocate, the provisions of
107 § 54.1-3904 notwithstanding. The employee and the agency may call witnesses to present testimony and
108 be cross-examined.

109 § 2.2-3900. Short title; declaration of policy.

110 A. This chapter shall be known and cited as the Virginia Human Rights Act.

111 B. It is the policy of the Commonwealth to:

112 1. Safeguard all individuals within the Commonwealth from unlawful discrimination because of race,
113 color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital
114 status, or disability, in places of public accommodation, including educational institutions and in real
115 estate transactions; *safeguard all individuals within the Commonwealth from unlawful discrimination*
116 *because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical*
117 *conditions, age, marital status, sexual orientation, or disability* in employment; preserve the public
118 safety, health and general welfare; and further the interests, rights and privileges of individuals within
119 the Commonwealth; and

120 2. Protect citizens of the Commonwealth against unfounded charges of unlawful discrimination.

§ 2.2-3901. Definitions.

Conduct A. As used in this chapter, unless the context requires a different meaning:

"Sexual orientation" means a person's actual or perceived heterosexuality, bisexuality, homosexuality, or gender identity or expression. "Sexual orientation" shall not include any person's attraction toward persons with whom sexual conduct would be illegal due to the age of the parties.

"Unlawful discriminatory practice" means conduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, sexual orientation, age, marital status, or disability shall be an "unlawful discriminatory practice" for the purposes of this chapter.

B. The terms "because of sex or gender" or "on the basis of sex or gender" or terms of similar import when used in reference to discrimination in the Code and acts of the General Assembly include because of or on the basis of pregnancy, childbirth or related medical conditions. Women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all purposes as persons not so affected but similar in their abilities or disabilities.

§ 15.2-1501.1. Employment discrimination prohibited.

No locality shall discriminate in employment based on race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, sexual orientation as defined in § 2.2-2901.1, or status as a special disabled veteran or other veteran covered by the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. § 4212).

§ 15.2-1507. Provision of grievance procedure; training programs.

A. If a local governing body fails to adopt a grievance procedure required by § 15.2-1506 or fails to certify it as provided in this section, the local governing body shall be deemed to have adopted a grievance procedure which is consistent with the provisions of Chapter 30 (§ 2.2-3000 et seq.) of Title 2.2 and any regulations adopted pursuant thereto for so long as the locality remains in noncompliance. The locality shall provide its employees with copies of the applicable grievance procedure upon request. The term "grievance" as used herein shall not be interpreted to mean negotiations of wages, salaries, or fringe benefits.

Each grievance procedure, and each amendment thereto, in order to comply with this section, shall be certified in writing to be in compliance by the city, town or county attorney, and the chief administrative officer of the locality, and such certification filed with the clerk of the circuit court having jurisdiction in the locality in which the procedure is to apply. Local government grievance procedures in effect as of July 1, 1991, shall remain in full force and effect for 90 days thereafter, unless certified and filed as provided above within a shorter time period.

Each grievance procedure shall include the following components and features:

1. Definition of grievance. A grievance shall be a complaint or dispute by an employee relating to his employment, including but not necessarily limited to (i) disciplinary actions, including dismissals, disciplinary demotions, and suspensions, provided that dismissals shall be grievable whenever resulting from formal discipline or unsatisfactory job performance; (ii) the application of personnel policies, procedures, rules and regulations, including the application of policies involving matters referred to in subdivision 2 (iii) below; (iii) discrimination on the basis of race, color, creed, religion, political affiliation, age, disability, national origin or sex, pregnancy, childbirth or related medical conditions, marital status, sexual orientation as defined in § 2.2-2901.1, or status as a special disabled veteran or veteran covered by the Vietnam Era Veterans Readjustment Act of 1974, as amended (38 U.S.C. § 4212); and (iv) acts of retaliation as the result of the use of or participation in the grievance procedure or because the employee has complied with any law of the United States or of the Commonwealth, has reported any violation of such law to a governmental authority, has sought any change in law before the Congress of the United States or the General Assembly, or has reported an incidence of fraud, abuse, or gross mismanagement. For the purposes of clause (iv) there shall be a rebuttable presumption that increasing the penalty that is the subject of the grievance at any level of the grievance shall be an act of retaliation.

2. Local government responsibilities. Local governments shall retain the exclusive right to manage the affairs and operations of government. Accordingly, the following complaints are nongrievable: (i) establishment and revision of wages or salaries, position classification or general benefits; (ii) work activity accepted by the employee as a condition of employment or work activity which may reasonably be expected to be a part of the job content; (iii) the contents of ordinances, statutes or established personnel policies, procedures, rules and regulations; (iv) failure to promote except where the employee can show that established promotional policies or procedures were not followed or applied fairly; (v) the methods, means and personnel by which work activities are to be carried on; (vi) except where such action affects an employee who has been reinstated within the previous six months as the result of the final determination of a grievance, termination, layoff, demotion or suspension from duties because of lack of work, reduction in work force, or job abolition; (vii) the hiring, promotion, transfer, assignment

182 and retention of employees within the local government; and (viii) the relief of employees from duties
183 of the local government in emergencies. In any grievance brought under the exception to clause (vi) of
184 this subdivision, the action shall be upheld upon a showing by the local government that: (i) there was a
185 valid business reason for the action and (ii) the employee was notified of the reason in writing prior to
186 the effective date of the action.

187 3. Coverage of personnel.

188 a. Unless otherwise provided by law, all nonprobationary local government permanent full-time and
189 part-time employees are eligible to file grievances with the following exceptions:

190 (1) Appointees of elected groups or individuals;

191 (2) Officials and employees who by charter or other law serve at the will or pleasure of an
192 appointing authority;

193 (3) Deputies and executive assistants to the chief administrative officer of a locality;

194 (4) Agency heads or chief executive officers of government operations;

195 (5) Employees whose terms of employment are limited by law;

196 (6) Temporary, limited term and seasonal employees;

197 (7) Law-enforcement officers as defined in Chapter 5 (§ 9.1-500 et seq.) of Title 9.1 whose grievance
198 is subject to the provisions of Chapter 10.1 and who have elected to proceed pursuant to those
199 provisions in the resolution of their grievance, or any other employee electing to proceed pursuant to
200 any other existing procedure in the resolution of his grievance.

201 b. Notwithstanding the exceptions set forth in subdivision 3 a above, local governments, at their sole
202 discretion, may voluntarily include employees in any of the excepted categories within the coverage of
203 their grievance procedures.

204 c. The chief administrative officer of each local government, or his designee, shall determine the
205 officers and employees excluded from the grievance procedure, and shall be responsible for maintaining
206 an up-to-date list of the affected positions.

207 4. Grievance procedure availability and coverage for employees of community services boards,
208 redevelopment and housing authorities, and regional housing authorities. Employees of community
209 services boards, redevelopment and housing authorities created pursuant to § 36-4, and regional housing
210 authorities created pursuant to § 36-40 shall be included in (i) a local governing body's grievance
211 procedure or personnel system, if agreed to by the department, board, or authority and the locality or (ii)
212 a grievance procedure established and administered by the department, board or authority which is
213 consistent with the provisions of Chapter 30 (§ 2.2-3000 et seq.) of Title 2.2 and any regulations
214 promulgated pursuant thereto. If a department, board or authority fails to establish a grievance procedure
215 pursuant to clause (i) or (ii), it shall be deemed to have adopted a grievance procedure which is
216 consistent with the provisions of Chapter 30 (§ 2.2-3000 et seq.) of Title 2.2 and any regulations
217 adopted pursuant thereto for so long as it remains in noncompliance.

218 5. General requirements for procedures.

219 a. Each grievance procedure shall include not more than four steps for airing complaints at
220 successively higher levels of local government management, and a final step providing for a panel
221 hearing or a hearing before an administrative hearing officer upon the agreement of both parties.

222 b. Grievance procedures shall prescribe reasonable and specific time limitations for the grievant to
223 submit an initial complaint and to appeal each decision through the steps of the grievance procedure.

224 c. Nothing contained in this section shall prohibit a local government from granting its employees
225 rights greater than those contained herein, provided such grant does not exceed or violate the general
226 law or public policy of the Commonwealth.

227 6. Time periods.

228 a. It is intended that speedy attention to employee grievances be promoted, consistent with the ability
229 of the parties to prepare for a fair consideration of the issues of concern.

230 b. The time for submitting an initial complaint shall not be less than 20 calendar days after the event
231 giving rise to the grievance, but local governments may, at their option, allow a longer time period.

232 c. Limits for steps after initial presentation of grievance shall be the same or greater for the grievant
233 than the time which is allowed for local government response in each comparable situation.

234 d. Time frames may be extended by mutual agreement of the local government and the grievant.

235 7. Compliance.

236 a. After the initial filing of a written grievance, failure of either party to comply with all substantial
237 procedural requirements of the grievance procedure, including the panel or administrative hearing,
238 without just cause shall result in a decision in favor of the other party on any grievable issue, provided
239 the party not in compliance fails to correct the noncompliance within five workdays of receipt of written
240 notification by the other party of the compliance violation. Such written notification by the grievant shall
241 be made to the chief administrative officer, or his designee.

242 b. The chief administrative officer, or his designee, at his option, may require a clear written
243 explanation of the basis for just cause extensions or exceptions. The chief administrative officer, or his

designee, shall determine compliance issues. Compliance determinations made by the chief administrative officer shall be subject to judicial review by filing petition with the circuit court within 30 days of the compliance determination.

8. Management steps.

a. The first step shall provide for an informal, initial processing of employee complaints by the immediate supervisor through a nonwritten, discussion format.

b. Management steps shall provide for a review with higher levels of local government authority following the employee's reduction to writing of the grievance and the relief requested on forms supplied by the local government. Personal face-to-face meetings are required at all of these steps.

c. With the exception of the final management step, the only persons who may normally be present in the management step meetings are the grievant, the appropriate local government official at the level at which the grievance is being heard, and appropriate witnesses for each side. Witnesses shall be present only while actually providing testimony. At the final management step, the grievant, at his option, may have present a representative of his choice. If the grievant is represented by legal counsel, local government likewise has the option of being represented by counsel.

9. Qualification for panel or administrative hearing.

a. Decisions regarding grievability and access to the procedure shall be made by the chief administrative officer of the local government, or his designee, at any time prior to the panel hearing, at the request of the local government or grievant, within 10 calendar days of the request. No city, town, or county attorney, or attorney for the Commonwealth, shall be authorized to decide the question of grievability. A copy of the ruling shall be sent to the grievant. Decisions of the chief administrative officer of the local government, or his designee, may be appealed to the circuit court having jurisdiction in the locality in which the grievant is employed for a hearing on the issue of whether the grievance qualifies for a panel hearing. Proceedings for review of the decision of the chief administrative officer or his designee shall be instituted by the grievant by filing a notice of appeal with the chief administrative officer within 10 calendar days from the date of receipt of the decision and giving a copy thereof to all other parties. Within 10 calendar days thereafter, the chief administrative officer or his designee shall transmit to the clerk of the court to which the appeal is taken: a copy of the decision of the chief administrative officer, a copy of the notice of appeal, and the exhibits. A list of the evidence furnished to the court shall also be furnished to the grievant. The failure of the chief administrative officer or his designee to transmit the record shall not prejudice the rights of the grievant. The court, on motion of the grievant, may issue a writ of certiorari requiring the chief administrative officer to transmit the record on or before a certain date.

b. Within 30 days of receipt of such records by the clerk, the court, sitting without a jury, shall hear the appeal on the record transmitted by the chief administrative officer or his designee and such additional evidence as may be necessary to resolve any controversy as to the correctness of the record. The court, in its discretion, may receive such other evidence as the ends of justice require. The court may affirm the decision of the chief administrative officer or his designee, or may reverse or modify the decision. The decision of the court shall be rendered no later than the fifteenth day from the date of the conclusion of the hearing. The decision of the court is final and is not appealable.

10. Final hearings.

a. Qualifying grievances shall advance to either a panel hearing or a hearing before an administrative hearing officer, as set forth in the locality's grievance procedure, as described below:

(1) If the grievance procedure adopted by the local governing body provides that the final step shall be an impartial panel hearing, the panel may, with the exception of those local governments covered by subdivision a (2) of this subsection, consist of one member appointed by the grievant, one member appointed by the agency head and a third member selected by the first two. In the event that agreement cannot be reached as to the final panel member, the chief judge of the circuit court of the jurisdiction wherein the dispute arose shall select the third panel member. The panel shall not be composed of any persons having direct involvement with the grievance being heard by the panel, or with the complaint or dispute giving rise to the grievance. Managers who are in a direct line of supervision of a grievant, persons residing in the same household as the grievant and the following relatives of a participant in the grievance process or a participant's spouse are prohibited from serving as panel members: spouse, parent, child, descendants of a child, sibling, niece, nephew and first cousin. No attorney having direct involvement with the subject matter of the grievance, nor a partner, associate, employee or co-employee of the attorney shall serve as a panel member.

(2) If the grievance procedure adopted by the local governing body provides for the final step to be an impartial panel hearing, local governments may retain the panel composition method previously approved by the Department of Employment Dispute Resolution and in effect as of the enactment of this statute. Modifications to the panel composition method shall be permitted with regard to the size of the panel and the terms of office for panel members, so long as the basic integrity and independence of

panels are maintained. As used in this section, the term "panel" shall include all bodies designated and authorized to make final and binding decisions.

(3) When a local government elects to use an administrative hearing officer rather than a three-person panel for the final step in the grievance procedure, the administrative hearing officer shall be appointed by the Executive Secretary of the Supreme Court of Virginia. The appointment shall be made from the list of administrative hearing officers maintained by the Executive Secretary pursuant to § 2.2-4024 and shall be made from the appropriate geographical region on a rotating basis. In the alternative, the local government may request the appointment of an administrative hearing officer from the Department of Employment Dispute Resolution. If a local government elects to use an administrative hearing officer, it shall bear the expense of such officer's services.

(4) When the local government uses a panel in the final step of the procedure, there shall be a chairperson of the panel and, when panels are composed of three persons (one each selected by the respective parties and the third from an impartial source), the third member shall be the chairperson.

(5) Both the grievant and the respondent may call upon appropriate witnesses and be represented by legal counsel or other representatives at the hearing. Such representatives may examine, cross-examine, question and present evidence on behalf of the grievant or respondent before the panel or hearing officer without being in violation of the provisions of § 54.1-3904.

(6) The decision of the panel or hearing officer shall be final and binding and shall be consistent with provisions of law and written policy.

(7) The question of whether the relief granted by a panel or hearing officer is consistent with written policy shall be determined by the chief administrative officer of the local government, or his designee, unless such person has a direct personal involvement with the event or events giving rise to the grievance, in which case the decision shall be made by the attorney for the Commonwealth of the jurisdiction in which the grievance is pending.

b. Rules for panel and administrative hearings.

Unless otherwise provided by law, local governments shall adopt rules for the conduct of panel or administrative hearings as a part of their grievance procedures, or shall adopt separate rules for such hearings. Rules which are promulgated shall include, but need not be limited to the following provisions:

(1) That neither the panels nor the hearing officer have authority to formulate policies or procedures or to alter existing policies or procedures;

(2) That panels and the hearing officer have the discretion to determine the propriety of attendance at the hearing of persons not having a direct interest in the hearing, and, at the request of either party, the hearing shall be private;

(3) That the local government provide the panel or hearing officer with copies of the grievance record prior to the hearing, and provide the grievant with a list of the documents furnished to the panel or hearing officer, and the grievant and his attorney, at least ten days prior to the scheduled hearing, shall be allowed access to and copies of all relevant files intended to be used in the grievance proceeding;

(4) That panels and hearing officers have the authority to determine the admissibility of evidence without regard to the burden of proof, or the order of presentation of evidence, so long as a full and equal opportunity is afforded to all parties for the presentation of their evidence;

(5) That all evidence be presented in the presence of the panel or hearing officer and the parties, except by mutual consent of the parties;

(6) That documents, exhibits and lists of witnesses be exchanged between the parties or hearing officer in advance of the hearing;

(7) That the majority decision of the panel or the decision of the hearing officer, acting within the scope of its or his authority, be final, subject to existing policies, procedures and law;

(8) That the panel or hearing officer's decision be provided within a specified time to all parties; and

(9) Such other provisions as may facilitate fair and expeditious hearings, with the understanding that the hearings are not intended to be conducted like proceedings in courts, and that rules of evidence do not necessarily apply.

11. Implementation of final hearing decisions.

Either party may petition the circuit court having jurisdiction in the locality in which the grievant is employed for an order requiring implementation of the hearing decision.

B. Notwithstanding the contrary provisions of this section, a final hearing decision rendered under the provisions of this section which would result in the reinstatement of any employee of a sheriff's office, who has been terminated for cause may be reviewed by the circuit court for the locality upon the petition of the locality. The review of the circuit court shall be limited to the question of whether the decision of the panel or hearing officer was consistent with provisions of law and written policy.

§ 15.2-1604. Appointment of deputies and employment of employees; discriminatory practices by certain officers; civil penalty.

367 A. It shall be an unlawful employment practice for a constitutional officer:

368 1. To fail or refuse to appoint or hire or to discharge any individual, or otherwise to discriminate
369 against any individual with respect to his compensation, terms, conditions or privileges of appointment
370 or employment, because of such individual's race, color, religion, sex ~~or~~, national origin, *or sexual*
371 *orientation as defined in § 2.2-2901.1*; or

372 2. To limit, segregate, or classify his appointees, employees or applicants for appointment or
373 employment in any way which would deprive or tend to deprive any individual of employment
374 opportunities or otherwise adversely affect his status as an employee, because of the individual's race,
375 color, religion, sex or national origin.

376 B. Nothing in this section shall be construed to make it an unlawful employment practice for a
377 constitutional officer to hire or appoint an individual on the basis of his sex or national origin in those
378 instances where sex or national origin is a bona fide occupational qualification reasonably necessary to
379 the normal operation of that particular office. The provisions of this section shall not apply to
380 policy-making positions, confidential or personal staff positions, or undercover positions.

381 C. With regard to notices and advertisements:

382 1. Every constitutional officer shall, prior to hiring any employee, advertise such employment
383 position in a newspaper having general circulation or a state or local government job placement service
384 in such constitutional officer's locality except where the vacancy is to be used (i) as a placement
385 opportunity for appointees or employees affected by layoff, (ii) as a transfer opportunity or demotion for
386 an incumbent, (iii) to fill positions that have been advertised within the past 120 days, (iv) to fill
387 positions to be filled by appointees or employees returning from leave with or without pay, (v) to fill
388 temporary positions, temporary employees being those employees hired to work on special projects that
389 have durations of three months or less, or (vi) to fill policy-making positions, confidential or personal
390 staff positions, or special, sensitive law-enforcement positions normally regarded as undercover work.

391 2. No constitutional officer shall print or publish or cause to be printed or published any notice or
392 advertisement relating to employment by such constitutional officer indicating any preference, limitation,
393 specification, or discrimination, based on sex or national origin, except that such notice or advertisement
394 may indicate a preference, limitation, specification, or discrimination based on sex or national origin
395 when sex or national origin is a bona fide occupational qualification for employment.

396 D. Complaints regarding violations of subsection A of this section may be made to the Virginia
397 Council on Human Rights. The Council shall have the authority to exercise its powers as outlined in
398 § 2.2-2634.

399 E. Any constitutional officer who willfully violates the provisions of subsection C shall be subject to
400 a civil penalty not to exceed \$2,000.