

20100725D

SENATE BILL NO. 23

Offered January 8, 2020

Prefiled November 18, 2019

A *BILL to amend and reenact §§ 2.2-3004, 2.2-3900 through 2.2-3903, 15.2-853, 15.2-854, 15.2-965, 15.2-1507, 15.2-1604, and 22.1-306 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 2.2-2901.1, 15.2-1500.1, and 22.1-295.2, relating to employment and public accommodations; prohibited discrimination based on sexual orientation or gender identity.*

Patrons—Ebbin, McClellan and Morrissey; Delegate: Kory

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3004, 2.2-3900 through 2.2-3903, 15.2-853, 15.2-854, 15.2-965, 15.2-1507, 15.2-1604, and 22.1-306 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, 15.2-1500.1, and 22.1-295.2 as follows:

§ 2.2-2901.1. Employment discrimination prohibited.

A. For the purposes of this section:

"Gender identity" means the gender-related identity, appearance, or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.

"Sexual orientation" means a person's actual or perceived heterosexuality, bisexuality, or homosexuality.

B. No state agency, institution, board, bureau, commission, council, or instrumentality of the Commonwealth shall discriminate in employment on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, sexual orientation, gender identity, or status as a veteran. This prohibition does not in any way permit or require the lowering of any job requirements, performance standards, or qualifications necessary to successfully perform the duties of the position.

§ 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 to the following adverse employment actions in which the employee is personally involved, including but not limited to (i) formal disciplinary actions, including suspensions, demotions, transfers and assignments, and dismissals resulting from formal discipline or unsatisfactory job performance; (ii) the application of all written personnel policies, procedures, rules and regulations where it can be shown that policy was misapplied or unfairly applied; (iii) discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin, sex, pregnancy, childbirth or related medical conditions, marital status, sexual orientation as defined in § 2.2-2901.1, gender identity as defined in § 2.2-2901.1, or status as a veteran; (iv) arbitrary or capricious performance evaluations; (v) 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; and (vi) retaliation for exercising any right otherwise protected by law.

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

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

D. Except as provided in subsection A of § 2.2-3003, decisions regarding whether a grievance qualifies for a hearing shall be made in writing by the agency head or his designee within five workdays of the employee's request for a hearing. A copy of the decision shall be sent to the employee. The employee may appeal the denial of a hearing by the agency head to the Director of the Department of

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59 Human Resource Management (the Director). Upon receipt of an appeal, the agency shall transmit the
60 entire grievance record to the Department of Human Resource Management within five workdays. The
61 Director shall render a decision on whether the employee is entitled to a hearing upon the grievance
62 record and other probative evidence.

63 E. The hearing pursuant to § 2.2-3005 shall be held in the locality in which the employee is
64 employed or in any other locality agreed to by the employee, employer, and hearing officer. The
65 employee and the agency may be represented by legal counsel or a lay advocate, the provisions of §
66 54.1-3904 notwithstanding. The employee and the agency may call witnesses to present testimony and
67 be cross-examined.

68 **§ 2.2-3900. Short title; declaration of policy.**

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

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

71 1. Safeguard all individuals within the Commonwealth from unlawful discrimination because of race,
72 color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital
73 status, *sexual orientation, gender identity*, or disability; in places of public accommodation, including
74 educational institutions and in real estate transactions;

75 2. *Safeguard all individuals within the Commonwealth from unlawful discrimination in employment*
76 *because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical*
77 *conditions, age, marital status, sexual orientation, gender identity, or disability; preserve*

78 3. *Preserve* the public safety, health, and general welfare; ~~and further~~

79 4. *Further* the interests, rights, and privileges of individuals within the Commonwealth; and

80 ~~2.~~ 5. Protect citizens of the Commonwealth against unfounded charges of unlawful discrimination.

81 **§ 2.2-3901. Definitions.**

82 ~~Conduct that violates any Virginia or federal statute or regulation governing discrimination on the~~
83 ~~basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions,~~
84 ~~age, marital status, or disability shall be an "unlawful discriminatory practice" for the purposes of this~~
85 ~~chapter.~~

86 A. *As used in this chapter:*

87 "*Gender identity*" means the gender-related identity, appearance, or other gender-related
88 characteristics of an individual, with or without regard to the individual's designated sex at birth.

89 "*Sexual orientation*" means a person's actual or perceived heterosexuality, bisexuality, or
90 homosexuality.

91 "*Unlawful discriminatory practice*" includes conduct that violates any Virginia or federal statute or
92 regulation governing discrimination on the basis of race, color, religion, national origin, sex, pregnancy,
93 childbirth or related medical conditions, age, marital status, sexual orientation, gender identity, or
94 disability.

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

100 **§ 2.2-3902. Construction of chapter; other programs to aid persons with disabilities, minors and**
101 **the elderly.**

102 The provisions of this chapter shall be construed liberally for the accomplishment of its policies.
103 Nothing contained in this chapter shall be deemed to repeal, supersede, or expand upon any of the
104 provisions of any other state or federal law relating to discrimination because of race, color, religion,
105 national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, *sexual*
106 *orientation, gender identity*, or disability.

107 Nothing in this chapter shall prohibit or alter any program, service, facility, school, or privilege that
108 is afforded, oriented, or restricted to a person because of disability or age from continuing to habilitate,
109 rehabilitate, or accommodate that person.

110 In addition, nothing in this chapter shall be construed to affect any governmental program, law or
111 activity differentiating between persons on the basis of age over the age of 18 years (i) where the
112 differentiation is reasonably necessary to normal operation or the activity is based upon reasonable
113 factors other than age or (ii) where the program, law or activity constitutes a legitimate exercise of
114 powers of the Commonwealth for the general health, safety and welfare of the population at large.

115 Complaints filed with the Division of Human Rights of the Department of Law (the Division) in
116 accordance with § 2.2-520 alleging unlawful discriminatory practice under a Virginia statute that is
117 enforced by a Virginia agency shall be referred to that agency. The Division may investigate complaints
118 alleging an unlawful discriminatory practice under a federal statute or regulation and attempt to resolve
119 it through conciliation. Unsolved complaints shall thereafter be referred to the federal agency with
120 jurisdiction over the complaint. Upon such referral, the Division shall have no further jurisdiction over

the complaint. The Division shall have no jurisdiction over any complaint filed under a local ordinance adopted pursuant to § 15.2-965.

§ 2.2-3903. Causes of action not created.

A. Nothing in this chapter or in Article 4 (§ 2.2-520 et seq.) of Chapter 5 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, *sexual orientation*, *gender identity*, pregnancy, or childbirth or related medical conditions, including lactation. No employer employing more than five but less than 20 persons shall discharge any such employee on the basis of age if the employee is 40 years of age or older. For the purposes of this section, "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.

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 Division of Human Rights of the Department of Law 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 Division 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 § 6.2-302. 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 attorney 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 chapter 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 Division or of any local human rights or human relations commissions established pursuant to § 15.2-853 or 15.2-965.

§ 15.2-853. Commission on human rights; human rights ordinance.

A. As used in this article:

"Gender identity" means the gender-related identity, appearance, or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.

"Sexual orientation" means a person's actual or perceived heterosexuality, bisexuality, or homosexuality.

B. A county may enact an ordinance prohibiting discrimination in housing, real estate transactions, employment, public accommodations, credit, and education on the basis of race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital status, *sexual orientation*, *gender identity*, or disability. The board may enact an ordinance establishing a local commission on human rights which that shall have the following powers and duties:

1. To promote policies to ensure that all persons be afforded equal opportunity;

2. To serve as an agency for receiving, investigating, holding hearings, processing, and assisting in the voluntary resolution of complaints regarding discriminatory practices occurring within the county; and

3. With the approval of the county attorney, to seek, through appropriate enforcement authorities, prevention of or relief from a violation of any ordinance prohibiting discrimination and to exercise such other powers and duties as provided in this article. However, the commission shall have no power itself to issue subpoenas, award damages, or grant injunctive relief.

For the purposes of this article, "person" means one or more individuals, labor unions, partnerships, corporations, associations, legal representatives, mutual companies, joint-stock companies, trusts, or unincorporated organizations.

§ 15.2-854. Investigations.

Whenever the commission on human rights has a reasonable cause to believe that any person has engaged in, or is engaging in, any violation of a county ordinance which that prohibits discrimination due to race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital status, *sexual orientation*, *gender identity*, or disability, and, after making a good faith effort to obtain the data, information, and attendance of witnesses necessary to determine whether such violation has occurred, is unable to obtain such data, information, or attendance, it may request the county attorney to petition the judge of the general district court for its jurisdiction for a subpoena against any such person refusing to produce such data and information or refusing to appear as a witness, and the

judge of such court may, upon good cause shown, cause the subpoena to be issued. Any witness subpoena issued under this section shall include a statement that any statements made will be under oath and that the respondent or other witness is entitled to be represented by an attorney. Any person failing to comply with a subpoena issued under this section shall be subject to punishment for contempt by the court issuing the subpoena. Any person so subpoenaed may apply to the judge who issued a subpoena to quash it.

§ 15.2-965. Human rights ordinances and commissions.

A. *For the purposes of this section:*

"Gender identity" means the gender-related identity, appearance, or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.

"Sexual orientation" means a person's actual or perceived heterosexuality, bisexuality, or homosexuality.

B. Any locality may enact an ordinance, not inconsistent with nor more stringent than any applicable state law, prohibiting discrimination in housing, employment, public accommodations, credit, and education on the basis of race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital status, sexual orientation, gender identity, or disability.

C. The locality may enact an ordinance establishing a local commission on human rights which shall have the powers and duties granted by the Virginia Human Rights Act (§ 2.2-3900 et seq.).

§ 15.2-1500.1. Employment discrimination prohibited.

A. *As used in this chapter:*

"Gender identity" means the gender-related identity, appearance, or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.

"Sexual orientation" means a person's actual or perceived heterosexuality, bisexuality, or homosexuality.

B. No department, office, board, commission, agency, or instrumentality of local government shall discriminate in employment on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, sexual orientation, gender identity, or status as a veteran. This prohibition does not in any way permit or require the lowering of any job requirements, performance standards, or qualifications necessary to successfully perform the duties of the position.

§ 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 clause (iii) of 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, sexual orientation, gender identity, or status as a veteran; 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~~ that 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, and retention of employees within the local government; and (viii) the relief of employees from duties of the local government in emergencies. In any grievance brought under the exception to clause (vi) of this subdivision, the action shall be upheld upon a showing by the local government that: (i) (a) there was a valid business reason for the action and (ii) (b) the employee was notified of the reason in writing prior to the effective date of the action.

3. Coverage of personnel.

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

- (1) Appointees of elected groups or individuals;
- (2) Officials and employees who by charter or other law serve at the will or pleasure of an appointing authority;
- (3) Deputies and executive assistants to the chief administrative officer of a locality;
- (4) Agency heads or chief executive officers of government operations;
- (5) Employees whose terms of employment are limited by law;
- (6) Temporary, limited term and seasonal employees;
- (7) Law-enforcement officers as defined in Chapter 5 (§ 9.1-500 et seq.) of Title 9.1 whose grievance is subject to the provisions of Chapter 5 (§ 9.1-500 et seq.) of Title 9.1 and who have elected to proceed pursuant to those provisions in the resolution of their grievance, or any other employee electing to proceed pursuant to any other existing procedure in the resolution of his grievance.

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

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

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

5. General requirements for procedures.

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

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

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

6. Time periods.

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

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

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

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

305 7. Compliance.

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

312 b. The chief administrative officer, or his designee, at his option, may require a clear written
313 explanation of the basis for just cause extensions or exceptions. The chief administrative officer, or his
314 designee, shall determine compliance issues. Compliance determinations made by the chief
315 administrative officer shall be subject to judicial review by filing petition with the circuit court within
316 30 days of the compliance determination.

317 8. Management steps.

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

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

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

329 9. Qualification for panel or administrative hearing.

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

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

354 10. Final hearings.

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

357 (1) If the grievance procedure adopted by the local governing body provides that the final step shall
358 be an impartial panel hearing, the panel may, with the exception of those local governments covered by
359 subdivision a (2) of this subsection, consist of one member appointed by the grievant, one member
360 appointed by the agency head and a third member selected by the first two. In the event that agreement
361 cannot be reached as to the final panel member, the chief judge of the circuit court of the jurisdiction
362 wherein the dispute arose shall select the third panel member. The panel shall not be composed of any
363 persons having direct involvement with the grievance being heard by the panel, or with the complaint or
364 dispute giving rise to the grievance. Managers who are in a direct line of supervision of a grievant,
365 persons residing in the same household as the grievant and the following relatives of a participant in the
366 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 Human Resource Management 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 Human Resource Management. 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 10 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.

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

1. To fail or refuse to appoint or hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of appointment or employment, because of such individual's race, color, religion, sex ~~or~~, *pregnancy, childbirth or related medical conditions, sexual orientation as defined in § 15.2-1500.1, gender identity as defined in § 15.2-1500.1*, national origin, or status as a veteran; or

2. To limit, segregate, or classify his appointees, employees or applicants for appointment or employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of the individual's race, color, religion, sex ~~or~~, *pregnancy, childbirth or related medical conditions, sexual orientation as defined in § 15.2-1500.1, gender identity as defined in § 15.2-1500.1*, national origin, or status as a veteran.

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

C. With regard to notices and advertisements:

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

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

D. Complaints regarding violations of subsection A may be made to the Division of Human Rights of the Department of Law. The Division shall have the authority to exercise its powers as outlined in Article 4 (§ 2.2-520 et seq.) of Chapter 5 of Title 2.2.

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

§ 22.1-295.2. Employment discrimination prohibited.

A. For the purposes of this section:

"Gender identity" means the gender-related identity, appearance, or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.

"Sexual orientation" means a person's actual or perceived heterosexuality, bisexuality, or homosexuality.

B. No school board or any agent or employee thereof shall discriminate in employment on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, sexual orientation, gender identity, or status as a veteran. This prohibition does not in any way permit or require the lowering of any job requirements, performance standards, or qualifications necessary to successfully perform the duties of the position.

§ 22.1-306. Definitions.

As used in this article:

"Business day" means any day that the relevant school board office is open.

"Day" means calendar days unless a different meaning is clearly expressed in this article. Whenever the last day for performing an act required by this article falls on a Saturday, Sunday, or legal holiday, the act may be performed on the next day that is not a Saturday, Sunday, or legal holiday.

"Dismissal" means the dismissal of any teacher during the term of such teacher's contract.

"Grievance" means a complaint or dispute by a teacher relating to his employment, including but not necessarily limited to: (i) disciplinary action including dismissal; (ii) the application or interpretation of: (a) personnel policies, (b) procedures, (c) rules and regulations, (d) ordinances, and (e) statutes; (iii) acts of reprisal against a teacher for filing or processing a grievance, participating as a witness in any step, meeting or hearing relating to a grievance, or serving as a member of a fact-finding panel; and (iv) complaints of discrimination on the basis of race, color, creed, *religion*, political affiliation, ~~handicap~~ *disability*, age, national origin, ~~or~~ sex, *pregnancy, childbirth or related medical conditions, marital status, sexual orientation as defined in § 22.1-295.2, gender identity as defined in § 22.1-295.2, or status as a veteran*. Each school board shall have the exclusive right to manage the affairs and operations of the school division. Accordingly, the term "grievance" shall not include a complaint or dispute by a teacher relating to (1) establishment and revision of wages or salaries, position classifications, or general benefits; (2) suspension of a teacher or nonrenewal of the contract of a teacher who has not achieved continuing contract status; (3) the establishment or contents of ordinances, statutes, or personnel policies, procedures, rules, and regulations; (4) failure to promote; (5) discharge, layoff, or suspension from duties because of decrease in enrollment, decrease in enrollment or abolition of a particular subject, or insufficient funding; (6) hiring, transfer, assignment, and retention of teachers within the school division; (7) suspension from duties in emergencies; (8) the methods, means, and personnel by which the school division's operations are to be carried on; or (9) coaching or extracurricular activity sponsorship.

While these management rights are reserved to the school board, failure to apply, where applicable, the rules, regulations, policies, or procedures as written or established by the school board is grievable.