

Issues: Compliance – Grievance Procedure (other issue), and Consolidation; Ruling
Date: January 19, 2017; Ruling No. 2017-4467; Agency: Department of Corrections;
Outcome: Grievant in Compliance, Consolidation Denied.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

COMPLIANCE RULING

In the matter of the Department of Corrections
Ruling Number 2017-4467
January 19, 2017

The Department of Corrections (the “agency”) has requested a ruling regarding the grievant’s November 28, 2016 dismissal grievance initiated with the Office of Employment Dispute Resolution¹ (“EDR”) at the Department of Human Resource Management (“DHRM”).

FACTS

On or about November 28, 2016, the grievant initiated a dismissal grievance directly with EDR to challenge his separation from employment on November 9, 2016. Following the appointment of a hearing officer to this matter, the agency has asserted that the grievant is not entitled to an administrative hearing with EDR, as the case involves a termination for alleged abuse of an offender. Accordingly, it requests a ruling that the case be closed and heard in the Circuit Court of the jurisdiction in which the grievance occurred. In addition, if the grievance proceeds to an EDR-appointed grievance hearing, the agency seeks consolidation with other similar grievances.

DISCUSSION

Jurisdiction

If a Grievance Form A does not comply with the requirements for initiating a grievance, the agency may notify the employee, using the Grievance Form A, that the grievance will be administratively closed.² Here, because dismissal grievances are initiated directly with EDR,³ the agency is essentially unable to follow this process as outlined. Thus, the agency requests a ruling from this Office regarding the issue of alleged noncompliance.

The *Grievance Procedure Manual* states that “[p]ursuant to Va. Code § 2.2-3007, employees of the Departments of Corrections or Juvenile Justice, whose employment was

¹ Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as “EDR” in this ruling to alleviate any confusion. EDR’s role with regard to the grievance procedure remains the same post-merger.

² *Grievance Procedure Manual* § 2.4.

³ *Id.* § 2.5.

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 EDR, omitting the grievance resolution steps.”⁴ However, dismissal grievances initiated under this section “do not proceed to a formal hearing appointed by EDR, but rather, 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.”⁵ Pursuant to this section, EDR’s practice is to review such a grievance and, if timely initiated and compliant with the other requirements of the grievance procedure, EDR will return the original grievance to the grievant with instructions to proceed in the appropriate Circuit Court.⁶

In this instance, the Written Notice indicates that the grievant allegedly:

“facilitate[d] an offender’s head being struck against a wall while carrying the offender into B-3 pod on August 28, 2016, after the offender assaulted a staff member. Due care was not used by the officer while escorting the offender. [Grievant’s] conduct is a violation of DOP 420.1, *Use of Force*, which states that ‘Force shall not be used for vindictive or retaliatory purposes’ and DOP 135.2, *Rules of Conduct Governing Employee Relationships with Offenders*, which states that ‘Offenders shall be treated humanely . . . Physical conduct with offenders shall be conducted in a professional manner using the minimum amount of force necessary to provide appropriate apprehension, intervention, and control as needed to protect the offender, staff, and the general public, and to maintain a safe and secure environment.’”

The only mention of abuse is under the “Circumstances considered” section of the Written Notice, where the agency mentions that “135.1 states that ‘physical abuse or other abuse, either verbal or mental, which constitutes recognized maltreatment of offender, normally warrants a Group III with termination.’”

The Code of Virginia does not define the word “abuse” as used in section 2.2-3007. Absent such a definition, EDR must look to the plain meaning of the statute, and in so doing, finds that abuse of an inmate must be specifically cited on a Written Notice as the misconduct charged in order for the grievance to fall under the provisions of this statute. A plain reading of the language used on the Written Notice in this case states that the grievant was terminated for use of excessive force against an inmate and a failure to exercise due care, a charge which does not necessarily imply that “abuse” of an inmate has occurred. EDR must find a specific charge of inmate abuse cited under Section II of the Written Notice, which details the offense, before rendering a determination that jurisdiction of the case lies with the Circuit Court, rather than interpreting the implicit meaning of a charge or the agency’s intent behind a Written Notice. Therefore, this grievance does not fall under section 2.2-3007 of the Code of Virginia and, accordingly, must be allowed to proceed to a hearing with an EDR-appointed hearing officer.

⁴ *Id.* § 5.10.

⁵ *Id.*

⁶ *Id.*

Consolidation

The agency also requests consolidation of this matter with three other dismissal grievances, initiated by three separate grievants, allegedly involved with the same incident for which this grievant was terminated. Each grievant, via counsel, objects to consolidation. While EDR generally favors consolidation and will consolidate grievances when they involve the same parties, legal issues, policies, and/or factual background,⁷ in this instance, there are compelling reasons not to grant the consolidation request.

First, the grievances involve different employees. While the grievances of separate employees can still be consolidated, EDR does so cautiously due to the personnel issues inherently involved in grievances and the potential for discovery of and involvement in confidential matters about a co-worker. Consequently, if there is an objection made by any party to the grievances, EDR is reluctant to grant a consolidation request in the grievances of separate employees. Here, all four employees have objected.

In addition, although the disciplinary actions at issue in these grievances appear to arise out of the same course of events, the grievants may wish to raise separate defenses, each potentially implicating the other grievant(s). As such, the agency's request for consolidation of the four November 28, 2016 grievances is denied. These grievances will proceed to separate hearings. A hearing officer will be appointed in each case in forthcoming letters to the applicable parties.

EDR's rulings on matters of compliance are final and nonappealable.⁸



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⁷ *Grievance Procedure Manual* § 8.5.

⁸ See Va. Code §§ 2.2-1202.1(5); 2.2-3003(G).