

Issue: Compliance – Grievance Procedure (other issue); Ruling Date: March 22, 2017; Ruling No. 2017-4508; Agency: Department of Behavioral Health and Developmental Services; Outcome: Grievant in Compliance, Agency in Compliance.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Employment Dispute Resolution<sup>1</sup>**

**COMPLIANCE RULING**

In the matter of the Department of Behavioral Health and Developmental Services  
Ruling Number 2017-4508  
March 22, 2017

The Department of Behavioral Health and Developmental Services has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) regarding the grievant’s December 27, 2016 and January 12, 2017 grievances.

FACTS

On or about December 27, 2016, the grievant initiated a grievance (“Grievance 1”) that appears to challenge the findings of an agency investigation and a related due process meeting. After not receiving his requested relief at the first resolution step, the grievant advanced the grievance to the second step.

Subsequently, on December 30, 2016, the grievant was dismissed from his employment. On January 12, 2017, the grievant initiated two separate dismissal grievances challenging his termination. One of these grievances (“Grievance 2”) was emailed by the grievant to EDR on January 12, 2017, while the other (“Grievance 3”) was sent by mail and received by EDR on January 19, 2017. After receiving Grievance 2 on January 12, EDR advised the agency that a dismissal grievance had been received and inquired about the status of the December 27 grievance. The agency advised EDR that it “object[ed] to the grievant’s request to consolidate the two grievances for hearing” and asked for Grievance 1 to be removed from the record of Grievance 2.<sup>2</sup> The agency has also objected to Grievance 3 as noncompliant with the grievance procedure. The agency has not raised any objection to Grievance 2 proceeding to hearing.

DISCUSSION

*Grievance 1*

The agency asserts that Grievance 1 should “be removed from the record of [Grievance 2]” because the issue raised in Grievance 1 is “unlikely” to qualify for hearing; the challenges to due process contained in Grievance 1 can be addressed in the hearing for Grievance 2; and the

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<sup>1</sup> 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.

<sup>2</sup> EDR is unaware of any express qualification or consolidation request by the grievant as to Grievance 1. The agency appears to have read the grievant’s request for a hearing on his termination as a request for consolidation of Grievance 1 and Grievance 2.

grievance requests relief outside the scope of the hearing officer's authority. Although the agency is correct that the grievant begins the "issues" section of his grievance form with the words "I was assaulted by a client," a further review of the grievance form indicates that the grievant is raising the client assault as a defense to the charge of patient abuse set forth in the Written Notice challenged by Grievance 2. Because the grievant's claims regarding the underlying client conduct form a defense to the Written Notice, independent qualification of these claims is not necessary, and he may raise them at the hearing on Grievance 2. Similarly, the grievant's claims regarding due process are also inextricably intertwined with his challenges to the Written Notice and may properly be addressed at the hearing on Grievance 2, as are his requests for relief.<sup>3</sup>

The agency also asks that Grievance 1 and documents regarding a citation from Virginia Occupational Safety and Health be omitted from the grievance record prior to the record being sent to the hearing officer. As a general rule, grievants may append whatever information they believe is relevant to a grievance. In this case, the documents sought to be removed by the agency appear to be relevant to the grievant's claims, and the agency does not argue that they are otherwise protected from disclosure. Rather, the agency's arguments appear to be about the evidentiary value of the documents in question. As judgments regarding evidence are in the discretion of the hearing officer, EDR will not intervene by removing the documents and will instead direct the parties to raise their concerns to the hearing officer. Further, inclusion of such documents in the grievance paperwork through the hearing officer appointment process does not mean that the documents will be admitted as record evidence by the hearing officer.

### *Grievance 3*

The agency argues that Grievance 3 is duplicative of Grievance 2 and attempts to raise additional claims of retaliation not included in Grievance 2.<sup>4</sup> While the two grievances were received by EDR on different dates due to the method of delivery, it appears Grievances 2 and 3 were initiated on the same date. For this reason, it is impossible for EDR to determine which grievance is duplicative. However, even if Grievance 3 were deemed to have been submitted after Grievance 2, the grievant's claims of retaliation do not constitute additional claims barred under Section 2.4 of the *Grievance Procedure Manual*. Although a grievant may not challenge an additional management action or omission following the initiation of a grievance, a grievant is free to raise additional theories or arguments for the management action being challenged. In this case, the management actions being challenged are the Written Notice and termination, while the allegations of retaliation are merely different theories regarding the management actions. As such, the grievant is free to raise those claims at hearing.

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<sup>3</sup> The ruling does not mean that the various requests for relief included on Grievance 1 are appropriate or relevant to the matters at issue in the dismissal grievance hearing. These determinations are for the hearing officer to assess whether and to what extent, for example, certain of the information identified on Grievance 1 should be a part of the hearing or available to the grievant.

<sup>4</sup> The agency also objects to the grievant's attempt in Grievance 3 to challenge the agency's alleged previous noncompliance during the management resolution steps of Grievance 1. Claims of noncompliance must be raised through the noncompliance process and may not be raised through a grievance. See *Grievance Procedure Manual* §§ 2.4, 6.3. As such, the grievant's claim in Grievance 3 regarding alleged noncompliance in Grievance 1 is not a proper subject for a new grievance and will be disregarded.

CONCLUSION

EDR has reviewed the three grievances initiated by this grievant and concludes that essentially one common management action exists that is being challenged in each grievance: disciplinary action (and the resulting termination) received by the grievant for alleged patient abuse. Accordingly, Grievance 2 will proceed as the “dismissal grievance,” while Grievances 1 and 3 will be considered closed. This ruling does not foreclose the grievant’s ability to raise any arguments regarding his dismissal that were set forth in Grievances 1 and 3 as provided in this ruling. EDR’s rulings on matters of compliance are final and nonappealable.<sup>5</sup>



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Director  
Office of Employment Dispute Resolution

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<sup>5</sup> Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).