

Issues: Qualification – Retaliation (Other Protected Right), and Consolidation of grievances for a single hearing; Ruling Date: January 8, 2013; Ruling No. 2013-3480, 2013-3495; Agency: Virginia Department of Transportation; Outcome: Qualified and Consolidation Granted.



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

**QUALIFICATION AND CONSOLIDATION RULING**

In the matter of the Virginia Department of Transportation  
Ruling Numbers 2013-3480, 2013-3495  
January 8, 2013

The grievant has requested a ruling on whether her July 26, 2012 grievance with the Virginia Department of Transportation (the agency) fully qualifies for a hearing. For the reasons discussed below, this grievance is fully qualified and consolidated with the grievant's December 4, 2012 dismissal grievance for a single hearing.

FACTS

In the grievant's July 26, 2012 grievance, she challenges her receipt of a Group I Written Notice for unsatisfactory performance and a Group II Written Notice for failure to follow supervisory instructions. The grievance proceeded through the management resolution steps and was qualified by the agency head's designee except as to the grievant's claim of retaliation. The grievant has appealed that determination to the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management.

DISCUSSION

*Qualification*

Grievances that may be qualified for a hearing include actions related to retaliation.<sup>1</sup> In this case, the grievant's allegations of retaliation appear to be significantly intertwined with her challenges to, for example, the Group I Written Notice and reasons for its issuance. In short, the grievant asserts that due to her reporting alleged procurement issues she was subjected to harsher oversight, treatment, and deadlines, which ultimately, she claims, resulted in the agency's assertions of unsatisfactory performance. Because the grievant will be afforded a hearing to challenge the Group I Written Notice for these issues of unsatisfactory performance, it simply makes sense to allow her claims related to retaliation to proceed to hearing as well.<sup>2</sup> Further, to the extent the grievant's retaliation claim is merely a theory<sup>3</sup> advanced by the grievant to support her challenge to the Written Notices, it cannot be severed from her qualified challenge to the Written Notices,<sup>4</sup> and may be raised at hearing to support her challenge.<sup>5</sup>

<sup>1</sup> See Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

<sup>2</sup> See, e.g., EDR Ruling No. 2008-1955; EDR Ruling No. 2005-957.

<sup>3</sup> As EDR has ruled, the "claims" or "issues" raised by a grievance are the management actions being challenged. See, e.g., EDR Ruling Nos. 2007-1561 & 2007-1587.

<sup>4</sup> See EDR Ruling Nos. 2011-2783, 2011-2784, 2011-2797; EDR Ruling Nos. 2009-2127, 2009-2129, 2009-2130.

Sending these potentially related claims to a single hearing (see consolidation discussion below) will provide an opportunity for the fullest development of what may be interrelated facts and issues. We note, however, that this qualification ruling in no way determines that the actions challenged by the grievant were retaliatory or otherwise improper, but rather only determines that further exploration of the facts by a hearing officer is appropriate.


### *Consolidation*

EDR strongly favors consolidation of grievances for hearing and will grant consolidation when grievances involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.<sup>6</sup> In this case, consolidation of the July 26, 2012, as fully qualified above, with the grievant's dismissal grievance is appropriate. The grievances involve the same parties and share a related factual background. Moreover, consolidation is not impracticable in this instance. Therefore, these two grievances are consolidated for a single hearing for adjudication by a hearing officer to help ensure a full exploration of what could be interrelated facts and issues.

The grievant also is believed to have initiated "other grievances," on or about November 1, 2012 and November 8, 2012, regarding her performance evaluation, performance issues, and other similar matters. EDR is unable to address whether these "other grievances" qualify for a hearing at this time because they have not yet been presented to EDR for a qualification ruling after proceeding through the requisite management resolution steps. It is believed that these "other grievances" are still pending with the agency. As such, EDR cannot address whether the "other grievances" may be consolidated with the grievances at issue in this ruling because it is unknown whether the "other grievances" will be qualified for a hearing. If either party wishes that EDR continue to delay the appointment of the combined matter of the grievant's July 26, 2012 grievance and her dismissal grievance until these issues can be determined, EDR must be notified in writing as soon as possible by mail, fax, or e-mail.

### CONCLUSION

Based on the foregoing, the grievant's July 26, 2012 grievance and December 4, 2012 dismissal grievance are qualified for hearing in full and consolidated for a single hearing. EDR's rulings on qualification and compliance are final and nonappealable.<sup>7</sup> A hearing officer will be appointed in forthcoming correspondence.



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Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

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<sup>5</sup> See EDR Ruling No. 2011-2796.

<sup>6</sup> *Grievance Procedure Manual* § 8.5.

<sup>7</sup> Va. Code § 2.2-1202.1(5).