

Issue: Compliance/Grievant's issue – administrative closure of grievance, Compliance/Agency's issue – multiple grievances may constitute harassment; Qualification/Retaliation-Other Protected Right; Ruling Date: October 30, 2002; Ruling #2002-107, 115, 119; Agency: Department of Juvenile Justice; Outcome: Administrative closure is proper; Grievances are not harassment; Not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND COMPLIANCE RULINGS OF DIRECTOR

In the matter of Department of Juvenile Justice/ No. 2002-107, 115, 119
October 30, 2002

The grievant has requested a ruling on whether his April 3, 2002 grievance with the Department of Juvenile Justice (DJJ) qualifies for a hearing. Furthermore, the grievant and the agency have requested a compliance ruling on whether his May 13 grievance constitutes harassment.¹ For the following reasons, this Department finds that the April 3 grievance does not qualify for a hearing and the May 13 grievance does not constitute harassment. However, the administrative closure of the May 13 grievance on other grounds was proper.

FACTS

The grievant is employed at DJJ as a Counselor. Another Counselor, and friend of the grievant, received a verbal reprimand from the Superintendent after a court appearance. The co-worker grieved this "hostile" meeting in October 2001. The Department of Employment Dispute Resolution (EDR) did not qualify the co-worker's grievance for hearing and the decision was upheld by the circuit court on March 4, 2002.

Following his co-worker's denial of a hearing, the grievant filed a grievance of his own on April 3 (Grievance 1). The grievant claims that he is working in a hostile work environment. Specifically, he expresses fear that because he is a Counselor at DJJ and because he may be called to testify in court, he may be subject to a hostile meeting as his co-worker allegedly was. He also expresses concern that his association with his co-worker may place him in danger of future acts of harassment. As evidence of a hostile work environment, the grievant points to his co-worker's hostile encounter with the Superintendent, and claims that other employees are "used" by management to relay threatening messages or to spy on co-workers. As relief, the grievant requests a transfer to another position at DJJ and an assurance that his Superintendent will not reprimand him for any future court appearances that do not meet with the Superintendent's approval.

¹ For efficiency, the two grievances will be considered together for purposes of this ruling only. The grievances have not been consolidated.

DJJ did not qualify the April 3 grievance for hearing, claiming that it does not directly pertain to the grievant's employment and that no adverse action had been taken against him. Moreover, the agency stated that the grievant was merely "attempting to preempt any form of corrective action [his] supervisors may take regarding [his] future job performance," which is not relief available under the grievance procedure.²

The grievant initiated a second grievance (Grievance 2) on April 29, 2002 alleging that a co-worker used racially derogatory comments and subjected him to inappropriate physical contact. DJJ determined that this grievance was founded and the second step respondent (Superintendent) stated that "he had taken appropriate action to ensure that it does not reoccur."³ The grievant filed another grievance (Grievance 3) on May 13, challenging the agency's response to Grievance 2.⁴ Grievance 3 specifically claims that the agency did not adequately address the concerns expressed in Grievance 2, and requests a written statement indicating the "standard procedures" used by DJJ for handling complaints like the one raised in Grievance 2. The agency administratively closed Grievance 3, claiming that it duplicated Grievance 2.

The grievant's co-worker has also filed numerous grievances with DJJ, citing similar issues. DJJ claims that the two grievants have collaborated in the filing of their grievances for the purpose of harassing management or otherwise impeding the efficient operations of the agency. Both the grievant and the agency have requested a ruling on whether his May 13 grievance constitutes harassment and whether its administrative closure was in compliance with the grievance procedure.

DISCUSSION

Qualification - Grievance 1 (April 3, 2002)

The grievant claims that the management actions described in his April 3, 2002 grievance constitute harassment and have created a hostile work environment. A claim of workplace harassment or hostile work environment qualifies for a grievance hearing only if an employee presents evidence raising a sufficient question as to whether the challenged actions are based on race, color, religion, political affiliation, age, disability, national origin, or sex.⁵ The grievant does not assert, however, that the alleged harassment was based on any of these factors. Rather, his claim is essentially that his supervisor is, in the general sense, harassing, intimidating and hostile to employees at the workplace.

² Third Step Response, Grievance 1.

³ Letter dated May 23, 2002 to the Director of EDR from DJJ, requesting a ruling on whether the grievant and his co-worker used the grievance procedure to harass management.

⁴ Grievance 2, which is not a subject of this ruling, was administratively closed for noncompliance with the grievance procedure. See letter dated May 23, 2002 to the Director of EDR from DJJ, page 2.

⁵ Va. Code § 2.2-3004 (A)(iii). See also Department of Human Resource Management (DHRM) Policy 2.30, which defines workplace harassment as conduct that "denigrates or shows hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status or pregnancy."

This Department has long held, however, that general supervisory harassment, though unprofessional, does not in and of itself qualify for a hearing.

Whether Grievance 3 Constitutes Harassment of the Agency

The Commonwealth's policy, "as an employer, [is] to encourage the resolution of employee problems and complaints."⁶ To that end, the General Assembly has determined that "the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between state agencies and those employees who have access to the procedure."⁷ However, "[e]mployees' rights to pursue grievances shall not be *used to harass or otherwise impede* the efficient operations of government."⁸ Accordingly, an employee who uses his grievance or grievances to harass or impede the operations of an agency is out of compliance with the grievance procedure.⁹

A finding of harassment may be supported by direct or circumstantial evidence, but may be inferred only when the surrounding facts and circumstances would compel a reasonable fact-finder to reach such a conclusion with substantial certainty. While neither the number, timing, frivolous nature of the grievances, nor the related burden to the agency are controlling factors in themselves, those factors could, in some cases, support an inference of harassment cumulatively or in combination with other factors. Accordingly, whether an employee has used the grievance procedure to harass or impede an agency's operations must be determined on a case-by-case basis.

In this case, the grievances filed by the grievant and his co-worker are numerous and undoubtedly impose additional administrative work upon the agency. However, DJJ presents insufficient evidence that the grievant and his co-worker have used the grievance procedure for purposes of harassing or otherwise impeding its operations. Accordingly, this Department cannot conclude with substantial certainty from the surrounding facts and circumstances that the grievant used the grievance procedure to harass or otherwise impede the efficient operations of DJJ.

Whether the Administrative Closure of Grievance 3 was Proper on Grounds of Duplication

Grievance 3, merely challenges DJJ's management step response to Grievance 2, which the grievant found to be inadequate. Grievance 3 simply reiterates the concerns stated in Grievance 2, and does not assert any new issues. Therefore, this grievance is duplicative of Grievance 2 and is out of compliance with the grievance procedure.

⁶ Va. Code § 2.2-3000(A).

⁷ *Id.*

⁸ Va. Code § 2.2-3003(C)(emphasis added).

⁹ *Grievance Procedure Manual* § 2.4, pages 6-7.

Moreover, under the grievance procedure, the conduct of parties during the resolution steps is ordinarily a matter of procedural compliance that should be addressed through compliance procedures and not through the filing of another grievance. Similarly, if a grievant disagrees with a management step response, he may elect to advance his grievance further along the process. In this case, the grievant did neither; instead he incorrectly filed a new grievance. This practice is not in compliance with the grievance procedure. Therefore, Grievance 3 will remain administratively closed.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification determination for Grievance 1 (April 3, 2002) to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify Grievance 1, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

Furthermore, this Department finds that Grievance 3 (May 13, 2002) is out of compliance with the grievance procedure, and may remain administratively closed by the agency. This Department's rulings on matters of compliance are final and nonappealable.¹⁰

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¹⁰ Va. Code § 2.2-1001(5).