

Issue: Compliance/5 day rule-Consolidated; Ruling Date: August 20, 2002, Ruling #2002-148; Agency: Department of Transportation; Outcome: Agency in compliance; grievances not consolidated at this time.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Transportation  
No. 2002-148  
August 20, 2002

The grievant has requested a compliance ruling regarding grievances he initiated on December 26, 2001; February 24, 2002; June 7, 2002; July 6, 2002; and July 18, 2002, with the Department of Transportation (the agency). The grievant seeks consolidation of all grievances, or in the alternative, consolidation of the June 7<sup>th</sup>, July 6<sup>th</sup>, and July 18<sup>th</sup> grievances. Further, the grievant alleges that the agency is out of compliance as a result of the second step respondent's alleged failure to reply to his June 7, 2002 grievance within the mandated five workdays.

FACTS

The grievant received a Group I Written Notice on December 3, 2001 for obscene or abusive language. On December 26, 2001, the grievant initiated a grievance challenging the Written Notice.

On February 11, 2002, the grievant was presented with another Group I Written Notice, this one based on alleged abusive language/disruptive behavior. On February 24, 2002, the grievant filed a grievance challenging the February 11<sup>th</sup> Written Notice. The February 24<sup>th</sup> grievance alleges, among other things, that management retaliated against the grievant for his December 26<sup>th</sup> grievance.

On May 14, 2002, at the request of the grievant, this Department consolidated the December 26<sup>th</sup> and February 24<sup>th</sup> grievances into a single grievance. The consolidated grievance has been qualified for hearing and a hearing officer has been appointed.

The grievant subsequently initiated grievances dated June 7<sup>th</sup>, July 6<sup>th</sup>, and July 18<sup>th</sup>. In his June 7<sup>th</sup> grievance, the grievant alleges that his supervisor failed to eliminate a hostile work environment and that management retaliated against him for his earlier grievances and for filing a harassment complaint. This grievance is currently at the second management resolution step of the grievance procedure. On July 1, 2002, the grievant sent a notice of party noncompliance to the agency head for failure of the second-step respondent to reply within five workdays.

The grievant's July 6<sup>th</sup> grievance alleges misapplication of the leave policy and disruptive behavior by his supervisor. The grievance also alleges retaliation by management for: (1) his June 7<sup>th</sup> grievance, (2) filing a harassment complaint, and (3) filing a retaliation complaint with agency management. Due to a loss in pay associated with the application of the leave policy, the grievant advanced this grievance by the expedited process. The grievance is currently at the qualification stage of the grievance process.

The grievant's July 18<sup>th</sup> grievance challenges a Group II Written Notice for leaving the area headquarters without permission and alleges retaliation for: (1) all previously filed grievances, (2) filing a harassment complaint on June 7<sup>th</sup>, and (3) filing a retaliation complaint with agency management on July 2<sup>nd</sup>. The grievance further alleges that the documentation of counseling on the Written Notice violates the Standards of Conduct and that agency management has failed to protect the employee from retaliation and has condoned such retaliation. The grievant inappropriately advanced his July 18<sup>th</sup> grievance by the expedited process.<sup>1</sup> The grievance is currently at the second management resolution step of the grievance process.

## DISCUSSION

### *Party Noncompliance*

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>2</sup> That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily without this Department's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance. If the agency fails to correct the alleged noncompliance, the grievant may request a ruling from this Department. Should this Department find that the agency violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department may resolve the grievance in the grievant's favor unless the agency can establish just cause for its noncompliance.<sup>3</sup>

In the present case, the grievant did not receive a second-step response to his June 7<sup>th</sup> grievance within five workdays. However, it appears that the grievant had initially indicated to the agency that he would withdraw his June 7<sup>th</sup> grievance. For that reason, management did not provide a second step response until after the five workday period had elapsed, following notice from the grievant that his withdrawal agreement had been "nullified" and that he had not received a second step response. The human resources office received this notice on July 16, 2002 and a copy of the second-step response was

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<sup>1</sup> Use of the expedited process in the July 18<sup>th</sup> grievance was inappropriate because it does not allege a pay loss as a result of any of the grieved issues.

<sup>2</sup> *Grievance Procedure Manual* § 6, pages 16-18.

<sup>3</sup> Va. Code § 2.2-3003 (G); *Grievance Procedure Manual* § 6.3, page 17. "Just cause" is defined as "a reason sufficiently compelling to excuse not taking a required action in the grievance process." *Grievance Procedure Manual* § 9, page 24.

mailed to the grievant the following day. The grievant received the second-step response on July 22, 2002. Under these circumstances, while it is unfortunate that the delay occurred, this Department finds that the agency has shown sufficient just cause for its failure to respond to the grievant within the five workday period.

Accordingly, within five workdays of receipt of this ruling, the grievant must either conclude his grievance or advance it to the third step respondent. This Department's rulings on matters of compliance are final and nonappealable.<sup>4</sup>

### *Consolidation*

This Department has long held that grievances may be consolidated at the resolution step phase of the grievance process by mutual agreement of the parties. Further, whenever more than one grievance is pending involving the same parties, legal issues, policies, and/or factual background, this Department may consolidate the grievances for purposes of hearing, unless there is a persuasive reason to process the grievances individually.<sup>5</sup>

In this case, the grievant seeks consolidation of the previously consolidated December 26<sup>th</sup> and February 24<sup>th</sup> grievances with the June 7<sup>th</sup>, July 6<sup>th</sup> and July 18<sup>th</sup> grievances, or, in the alternative, consolidation of the June 7<sup>th</sup>, July 6<sup>th</sup> and July 18<sup>th</sup> grievances. While the agency opposes the consolidation of all five grievances, it will agree to a consolidation of the June 7<sup>th</sup>, July 6<sup>th</sup>, and July 18<sup>th</sup> grievances if these grievances proceed through the normal grievance process, not the expedited process.

Although grievances alleging retaliation are often appropriate for consolidation, consolidation must be determined on a case-by-case basis. This Department concludes that given the facts of this case, consolidation of all grievances is not appropriate. First, consolidation would impede the imminent resolution of the first two grievances. The December 26<sup>th</sup> and February 24<sup>th</sup> grievances are currently ready to proceed to hearing, whereas the June 7<sup>th</sup>, July 6<sup>th</sup>, and July 18<sup>th</sup> grievances are in the management resolution steps. Consolidation of all five grievances would cause a significant delay in resolving the first two grievances given that: (1) the latter three grievances are still in the management resolution steps, and (2) not all issues contained in those three grievances automatically qualify for hearing. In addition, consolidation of a substantial number of grievances, five in this case, could result in a hearing laden with such numerous issues that adjudication could become unwieldy. Accordingly, this Department concludes that there are persuasive reasons to deny consolidation of all five grievances.

Further, at this time, a consolidation of the June 7<sup>th</sup>, July 6<sup>th</sup>, and July 18<sup>th</sup> grievances is inappropriate because each of those grievances are still in the management resolution steps, and two of those grievances do not automatically qualify for a hearing.<sup>6</sup>

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<sup>4</sup> Va. Code § 2.2-1001(5).

<sup>5</sup> *Grievance Procedure Manual*, § 8.5, page 22.

<sup>6</sup> Generally, this Department grants consolidation at the hearing stage, not during the management resolution steps, unless there are persuasive and practical reasons to do so. For example, by ruling dated

Once the three grievances have moved through the resolution steps and the qualification process, either party can renew a request for consolidation of all qualified grievance(s) to this Department. Because all three grievances involve the same general issues, policies, and individuals, consolidation would likely be granted assuming that (1) the parties move promptly to request the appointment of a hearing officer, (2) consolidation is practicable, and (3) neither the hearing officer nor any party has a persuasive objection to consolidation.

### CONCLUSION

For the reasons discussed above, this Department concludes that the agency is in compliance with the grievance procedure and the grievant has five workdays from receipt of this ruling to either advance or conclude his June 7<sup>th</sup> grievance. Further, this Department has determined that consolidation of all five grievances is not appropriate or warranted under the facts and circumstances surrounding the grievances. In addition, consolidation of the June 7<sup>th</sup>, July 6<sup>th</sup> and July 18<sup>th</sup> grievances is inappropriate at this time. Each of the five grievances should proceed to the next phase of the grievance process, respectively, and in a manner consistent with this ruling.

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Director

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May 14, 2002, this Department granted the grievant's consolidation request for his December 26<sup>th</sup> and February 24<sup>th</sup> grievances at the second management resolution step because both grievances challenged the same management action: formal discipline for abusive language, actions that automatically qualify for hearing under the grievance procedure. As such, this Department concluded that it was practical and appropriate to consolidate the grievances at the management resolution steps, in contradiction to the general rule.