

Issue: Compliance/duplicative grievances; Ruling Date: March 7, 2003; Ruling #2002-189; Agency: Department of Health; Outcome: grievances not duplicate, may go forward.



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

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Health  
Ruling No. 2002-189  
March 7, 2003

The grievant has requested a ruling on whether her September 26, 2002 grievance with the Virginia Department of Health (VDH or the agency) is in compliance with the grievance procedure. The agency administratively closed the grievance, claiming that it duplicated a grievance filed on September 5, 2002. For the following reasons, this Department finds that the September 26, 2002 is not duplicative of the September 5, 2002 grievance and may proceed through the management resolution steps.

FACTS

The grievant is employed in the Office of Family Health Services at VDH. On August 7, 2002, the grievant received a Notice of Improvement Needed/Substandard Performance for delivering an alleged unacceptable work product. Thereafter, on September 5, 2002, the grievant initiated a grievance alleging that (1) the Notice of Improvement Needed/Substandard Performance was issued in retaliation for her previous complaints about discriminatory and unfair treatment by her immediate supervisor; and (2) she is performing duties not included in her previous position description.

According to the grievant, she received a Performance Improvement Plan related to the earlier Notice of Improvement Needed/Substandard Performance on September 18, 2002.<sup>1</sup> In response to the Performance Improvement Plan, the grievant initiated her September 26, 2002 grievance. In her September 26, 2002 grievance, the grievant alleges retaliation and harassment by her supervisor and the

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<sup>1</sup> The Performance Improvement Plan is dated September 2, 2002. The supervisor and reviewer signed it on September 11, 2002. Subsequently, upon the grievant's alleged refusal to sign the Performance Improvement Plan, it was sent via certified mail to her.

reviewer for exercising her rights under the Family and Medical Leave Act (FMLA) and initiating an earlier grievance. In its first management resolution step response, the agency administratively closed the September 26, 2002 grievance for noncompliance alleging that the grievance arises out of the same facts as the September 5, 2002 grievance. As such, the grievant seeks a compliance ruling from this Department.

### DISCUSSION

An employee's grievance must not duplicate another grievance challenging the same action or arising out of the same facts.<sup>2</sup> If there is duplication, management may notify the employee that the grievance will be administratively closed due to noncompliance.<sup>3</sup>

While the September 5, 2002 and September 26, 2002 grievances share much of the same factual background, they challenge different management actions. The September 5, 2002 grievance was initiated in response to the Notice of Needs Improvement/Substandard Performance. The September 26, 2002 grievance was initiated in response to the Performance Improvement Plan dated September 11, 2002. The agency cannot close the September 26, 2002 grievance for arising out of the same facts as the September 5, 2002 grievance merely because the Performance Improvement Plan should have accompanied the earlier Notice of Needs Improvement/Substandard Performance. Additionally, when the grievant initiated her September 5, 2002 grievance, she had not yet received the Performance Improvement Plan and thus had no knowledge of the plan. Moreover, the receipt of the Performance Improvement Plan raises concerns about issues not raised in the earlier grievance – the supervisor's and reviewer's alleged retaliation for a previous grievance initiated by the grievant and for exercising her rights under FMLA. Therefore, this Department does not view the issues raised in the September 26, 2002 grievance as challenging the same action as the September 5, 2002 grievance.<sup>4</sup>

### CONCLUSION

This Department concludes that the September 26, 2002 grievance does not duplicate the September 5, 2002 grievance and may proceed through the management resolution steps. The agency was correct in its assertion that the

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<sup>2</sup> See *Grievance Procedure Manual* § 2.4, page 7.

<sup>3</sup> *Id.*

<sup>4</sup> It should be noted that the parties may mutually agree to consolidate the two grievances for processing through the management resolution steps and agency head qualification stage. However, written approval by the Director of this Department in the form of a compliance ruling is required before two or more grievances are permitted to be consolidated for purposes of a single hearing.

grievant may not use the expedited grievance process.<sup>5</sup> Accordingly, within 5 workdays of receipt of this ruling, the grievant must either conclude her September 26, 2002 grievance or advance it to the second resolution step. This grievance does not make a determination about the merits of the September 26, 2002 grievance, only that it is in compliance with the grievance procedure. This Department's rulings on matters of compliance are final and nonappealable.<sup>6</sup>

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Claudia T. Farr  
Director

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Jennifer S.C. Alger  
Employment Relations Consultant

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<sup>5</sup> The expedited process is only available in cases where a grievant has suffered a pay loss. The grievant does not appear to have suffered such a loss. *See* the Grievance Procedure Manual § 2.4, pg. 7.

<sup>6</sup> Va. Code § 2.2-3003(G).