

Issue: Compliance/Consolidation of separate grievances and separate grievants for purposes of hearing; Ruling Date: November 5, 2003; Ruling #2003-171, 2003-172, 2003-173; Agency: Department of Military Affairs; Outcome: Grievances consolidated per grievant for three separate hearings.



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Military Affairs

Ruling Number 2003-171, 2003-172 and 2003-173
November 5, 2003

On behalf of his clients, the representative for three grievants has requested a compliance ruling regarding eight grievances they collectively had initiated on July 23, 2003 with the Department of Military Affairs (DMA). The grievants' representative requests that the eight grievances be consolidated for the purposes of a single hearing, to which the agency agrees. The grievants' representative further states that the consolidation request is conditional, based on this Department's approval of preconditions relating to the conduct of the hearing.¹ These issues are discussed below.

FACTS

Grievant #1

Until his termination on June 27, 2003, grievant #1 was employed as an Information Technology Specialist II with DMA. On June 27, 2003, he received two Group II Written Notices with termination for failure to follow supervisory instructions.² On the same date, he was issued a Group III Written Notice with termination for behavior

¹ Specifically that, (1) two full days be set aside for the hearing, with the option for a third day of hearings at the hearing officer's discretion, (2) at least one hour and ten minutes be set aside for the parties to prepare for closing arguments, and (3) at least one hour and ten minutes be set aside for each party to deliver their closing argument.

² *Group II Written Notice #1*- On December 3, 2002 the grievant allegedly refused to work on the Adjutant General's computer as directed. On January 29, 2003, he allegedly refused to teach a computer class as directed by his supervisor. *Group II Written Notice #2*- While on suspension, the grievant allegedly utilized a workstation at Fort Pickett to access the internet on February 20, February 21, February 27, and March 3, 2003.

that undermined the effectiveness of the agency's activities.³ On July 23, 2003, grievant #1 initiated a separate grievance to challenge each of the three disciplinary actions and his termination. The grievances were unresolved during the respondent steps, and on September 22, 2003, were qualified for hearing.

Grievant #2

Until his termination on June 27, 2003, grievant #2 was employed as an Information Technology Specialist III with DMA. On June 27, 2003, he was issued two Group III Written Notices with termination for engaging in behavior that undermined the effectiveness of the agency's activities.⁴ On the same date, he was issued a Group II Written Notice with termination for falsifying reports to his supervisor on December 12 and 17, 2002. On July 23, 2003, grievant #2 initiated a separate grievance to challenge each of the three disciplinary actions and his termination. The grievances were unresolved during the respondent steps, and the Agency Head subsequently qualified them for hearing.

Grievant #3

Until his termination on June 27, 2003, grievant #3 was employed as an Information Technology Specialist III with DMA. On June 27, 2003, he was issued two Group III Written Notices with termination for engaging in behavior that undermined the effectiveness of the agency's activities.⁵ On July 23, 2003, grievant #3 initiated a separate grievance to challenge each of the two disciplinary actions and his termination. The grievances were unresolved during the respondent steps, and the Agency Head subsequently qualified the grievances for hearing.

DISCUSSION

Preconditions

As preconditions to consolidating the eight grievances for the purposes of a single hearing, the grievants' representative requests this Department's prior agreement that (1)

³ *Group III Written Notice*- On March 7, June 25, August 17, and October 5, 2002, the grievant allegedly violated the scope of his duties by accessing data and information on command computers without authorization.

⁴ *Group III Written Notice #1*- During the period February 12-October 26, 2002, the grievant allegedly failed to maintain the network in accordance with generally accepted rules and practices. *Group III Written Notice #2*- On February 12, October 25, and October 26, the grievant allegedly violated the scope of his duties by gaining unauthorized access to various workstations. In October 2002, he failed to follow his supervisor's instructions by failing to open up his workstation for monitoring and failing to configure a server and place it in his supervisor's office.

⁵ *Group III Written Notice #1*- During the period February - April, 2002, the grievant allegedly failed to maintain the network in accordance with generally accepted rules and practices. *Group III Written Notice #2*- During 2001, February, September, and October 2002, the grievant allegedly violated the scope of his duties by gaining unauthorized access to various workstations. In October 2002, he failed to follow his supervisor's instructions by disconnecting the Security Server and failing to retain security logs.

two full days be set aside for the hearing, with the option for a third day of hearings at the hearing officer's discretion, (2) at least one hour and ten minutes be set aside for the parties to prepare for each other's closing argument, and (3) at least one hour and ten minutes be set aside for each party to deliver their closing argument.

The grievance procedure and the Rules for Conducting Grievance Hearings grant to hearing officers, not this Department, the authority to decide procedural issues arising during the conduct of the hearing.⁶ Hearing officers are also authorized to judge the admissibility, relevancy, materiality of evidence and the weight it will be given as well as excluding evidence that is irrelevant, immaterial, insubstantial, privileged, or repetitive.⁷ Inherent in this authority is the discretion to determine the length of the hearing based upon his judgment of the time needed for a full and fair presentation of the evidence by both sides.⁸ Additionally, hearing officers are empowered to determine the allocation of time each party may have to prepare and make closing statements.

In this instance, approval of the request would usurp or unduly infringe upon the authority previously granted to hearing officers to decide these matters. Accordingly, the grievant's representative's request to predetermine the length of the hearing and the time allocated to prepare and present closing statements is denied.

Consolidation

Written approval by the Director of this Department or her designee in the form of a compliance ruling is required before two or more grievances are permitted to be consolidated in a single hearing. EDR strongly favors consolidation 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.⁹ For the reasons discussed below, these eight grievances may not be consolidated for a single hearing, but will proceed to three separate hearings and decisions as indicated.

While the Group Notices for each grievant are distinct disciplinary actions issued for separate offenses, this Department finds that consolidation of the three grievances of grievant #1; the three grievances of grievant #2; and the two grievances of grievant #3 at three separate hearings is appropriate. Both parties have requested consolidation and, more importantly, consolidation is not impracticable. For that reason, the eight grievances are consolidated as indicated above to be heard by the same hearing officer at

⁶ Va. Code § 2.2-3005 (C) (2); *Grievance Procedure Manual*, §5.7, page 14.

⁷ Va. Code § 2.2-3005 (C) (5); *Grievance Procedure Manual*, § 5.7, page 14.

⁸ Under the *Rules for Conducting Grievance Hearings*, III. (B), page 3, a hearing should last no longer than a total of 8 hours. A hearing may be continued beyond 8 hours only if necessary to a full and fair presentation of the evidence by both sides.

⁹ *Grievance Procedure Manual* § 8.5, page 22.

three separate hearings.¹⁰ This Department's rulings on compliance are final and nonappealable.¹¹

Claudia T. Farr
Director

¹⁰ It should be noted that consolidation of multiple grievances challenging separate disciplinary actions that are based on unrelated circumstances is a departure from this Department's past practice. However, where *both* parties have requested consolidation, the potential for prejudice to either is presumably minimized. For that reason, and in the interest of judicial economy and the economic interests of the parties, this Department *generally* will consolidate such grievances if *both* parties request consolidation *and* this Department does not find consolidation impracticable. *See Switzenbaum v. Orbital Sciences Corp.*, 187 F.R.D. 246 (E.D. Va. 1999), discussing Rule 42(a) of the Federal Rules of Civil Procedure, which permits the consolidation of actions that pose common questions of law and fact. In that case, the court concluded that "[j]udicial economy generally favors consolidation, but the court must conduct a careful inquiry in this regard that balances the prejudice and confusion that consolidation might entail against the waste of resources, the burden on the parties, and the risk of inconsistent judgments that separate proceedings could engender." *Switzenbaum* at 247-248. While this Department is cognizant of the burden that separate hearings can place on parties, the primary objective of this Department is to ensure that both parties are ensured a full and fair opportunity to present their cases through a well-administered hearing process. Therefore, as is the case with all compliance matters, this Department shall make the final determination as to whether consolidation is practicable and appropriate.

¹¹ Va. Code § 2.2-1001 (5).