

Issue: Compliance/Grievance Procedure-Duplicative grievances; Ruling Date: July 30, 2004;
Ruling #2004-748; Agency: Department of Transportation; Outcome: grievances are not
duplicative and grievance may proceed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation
No. 2004-748
July 30, 2004

By letter dated June 2, 2004, the grievant requests a compliance ruling from this Department. The grievant asserts that the Department of Transportation (VDOT or the agency) improperly closed his May 18, 2004 grievance. The agency states that it closed the grievance because the issue raised in the May 18th grievance arose out of the same facts of a prior grievance, which was resolved and closed. For the reasons set forth below, this Department finds that the May 18th grievance is not duplicative of a previous one, and may proceed.

FACTS

On January 9, 2004, the grievant was issued a Group II Written Notice with a 10-day suspension, which he challenged by initiating a grievance on February 2, 2004. On April 29, 2004, the day before the scheduled grievance hearing, the parties signed a *Memorandum of Stipulation* in which they agreed (1) to the removal of the Written Notice, (2) to reimbursement of lost pay and benefits, (3) that no provision provides for the reimbursement of the grievant's attorney's fees, and (4) that there was no need for a grievance hearing.

On May 6, 2004, the agency counseled the grievant in writing based on the same facts that formed the basis of the January 9th Written Notice. The grievant initiated the grievance that is the subject of this ruling on May 18, 2004, challenging the May 6th counseling memorandum.

DISCUSSION

The grievance procedure states that a grievance may "not duplicate another grievance challenging the same action or rising out of the same facts."¹ In this case the grievances do not challenge the same action. The February 2nd grievance challenged the agency's January 9, 2004 Group II Written Notice. The May 18th grievance challenges the agency's May 6, 2004 counseling memorandum. Likewise, although the Written Notice and counseling memorandum were issued for the same alleged misconduct, the *grievances* do not arise from the same facts. The "facts" that formed the basis of the February 2nd grievance were that the agency issued the grievant a Written Notice on January 9th. The "facts" that formed the basis of the May 18th grievance were that the

¹ *Grievance Procedure Manual* § 2.4.

agency issued the grievant a counseling memorandum on May 6th. These were separate management actions, which the grievant was free to challenge through separate grievances.²

CONCLUSION

For the reasons set forth above, the May 18th grievance is not duplicative of the February 2nd grievance and the grievant may continue to advance his grievance through the management resolution steps.³ By copy of this ruling, the grievant and the agency are advised that the grievant has 5 workdays from receipt of this letter to either conclude the grievance or request to advance it to the next resolution step. This Department's rulings on matters of compliance are final and nonappealable.⁴

Claudia T. Farr
Director

William G. Anderson, Jr.
EDR Consultant, Sr.

² Cf. EDR Ruling #2002-001 in which a grievant was presented with a Group II Written Notice on November 26, 2001, for her alleged failure to follow her supervisor's instructions. The grievant was told to respond to the notice within 24 hours with any mitigating circumstances that might warrant reducing the Notice. She complied and presented her response the following day. The HR Manager was not able to meet with the grievant for several days because he was out of town on a business trip. However, on December 3, 2001, the HR Manager met with the grievant and agreed to modify the Group II Notice by reducing it to a Group I. On December 28, 2001, the grievant challenged the Group I Notice by initiating a grievance. The agency asserted that the trigger date for the grievance procedure's 30-day initiation rule began on November 26, 2001 when the HR Manager first presented the Group II Notice to the grievant. This Department held that in grievances challenging a disciplinary action, the 30-calendar day timeframe begins on the date that management presents or delivers the Written Notice to the employee. EDR explained that the action being grieved was not the Group II Notice issued on November 26th but the Group I Notice which was issued on December 3rd when the HR Manager reduced the Group II Notice to a Group I. Thus, the grievant had 30-calendar days, or until January 2, 2002 to initiate a grievance. Because the grievant initiated her grievance on December 28, 2001, which was within 30 calendar days from when the HR Manager reduced the Group Notice, the grievance was timely.

³ While the grievant may seek qualification of the May 18th grievance once it has passed through the management resolution steps, as a general rule, grievances that challenge counseling memoranda do not qualify for hearing. Under the grievance procedure, counseling memorandum do not qualify for hearing unless there is evidence raising a sufficient question as to whether, through the issuance of the memorandum, management took an "adverse employment action" against the grievant affecting the terms, conditions, or benefits of his employment. A counseling memorandum, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment. Moreover, the General Assembly has limited issues that may be qualified for a hearing to those that involve adverse employment actions. We note, however, that should the counseling memorandum later serve to support an adverse employment action against the grievant, e.g., a "Below Contributor" performance rating, the grievant may address the underlying merits of the counseling memorandum through a subsequent grievance challenging the performance evaluation. *See* EDR Rulings # 2002-109, 2002-069, and 2003-425.

⁴ Va. Code §2.2-1001(5).