

Issue: Compliance/consolidation of three individual's grievances for purposes of hearing;
Ruling Date: September 17, 2004; Ruling #2004-830, 2004-831, 2004-832; Agency: Virginia
Department of Health; Outcome: all grievances consolidated for purposes of hearing.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Health
Ruling Numbers 2004-830, 2004-831, and 2004-832
September 17, 2004

The Virginia Department of Health (VDH or the agency) seeks a compliance ruling regarding three grievances filed by three separate VDH employees (Grievant #1, Grievant #2, and Grievant #3). The agency requests that the three grievances be consolidated for a single hearing, to which all three grievants object. For the reasons discussed below, this Department finds that consolidation is appropriate and practicable in this case.

FACTS

On December 12, 2003, the three grievants, along with other VDH employees and a privately employed individual, went on a shopping trip to a local mall. During this shopping trip, members of the group allegedly called two VDH female employees and asked them intimate questions for purposes of buying them a gift. As a result of their alleged participation in the events of December 12, 2003, the following disciplinary actions were taken against the grievants: Grievant #1, an Environmental Health Supervisor, received a Group II Written Notice and ten workday suspension without pay for violating the state's workplace harassment policy; and Grievant #2 and Grievant #3, both Environmental Health Specialist Seniors, received a Group II Written Notice and five workday suspension without pay for violating the state's workplace harassment policy. Grievant #1 challenged the disciplinary action by initiating a grievance on February 6, 2004. Grievants #2 and #3 challenged their discipline by initiating grievances on February 4, 2004.¹ The three grievances were unresolved during the management resolution steps, and subsequently qualified for hearing by the Agency Head.

DISCUSSION

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

¹ Grievant #2's Form A is dated February 3, 2004. However, the grievant states that the grievance was actually initiated on February 4, 2004.

there is a persuasive reason to process the grievances individually.² Likewise, in the interest of judicial economy, courts generally favor consolidation of actions that pose common questions of law or fact.³ However, before granting consolidation, 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.”⁴ Similarly, the Virginia rules of criminal procedure favor a joint trial of defendants charged with participating in contemporaneous and related acts or occurrences unless a joint trial would constitute prejudice.⁵ In such cases, the defendant must show actual prejudice, which results only when “there is a serious risk that a joint trial would compromise a specific trial right or prevent the jury from making a reliable judgment about guilt or innocence.”⁶ As such, it appears that in assessing whether a case is appropriate for consolidation or a joint trial, Virginia courts rely heavily upon to what extent prejudice could result if consolidation or a joint trial is granted. While not dispositive for purposes of the grievance procedure, the prejudice standard articulated by the Virginia courts under the civil and criminal procedural rules is nevertheless instructive in determining whether consolidation is appropriate for purposes of a grievance hearing.

In this case, the agency seeks consolidation of the three grievances for hearing because the “grievances challenge substantially similar management actions related to a single incident or set of circumstances.” Additionally, the agency alleges that consolidation would (1) foster consistent and efficient fact-finding and a more equitable result; (2) conserve the Commonwealth’s limited resources in terms of staff time; and (3) not be impracticable as the factual, legal and policy issues in the three grievances are identical and lack complexity.⁷ Finally, the agency claims that the three grievants have “collaborated” with each other through the course of their grievances and as such, confidentiality is not an issue.

The grievants oppose consolidation of their grievances for a single hearing. Specifically, Grievant #1 seeks a separate hearing so that only the facts pertaining to his case will be heard, thus diminishing the possibility of inferences being drawn by the hearing officer as to culpability and level of involvement of the three grievants. Grievant #2 seeks a separate hearing on the basis that the “underlying grievances, while similar, are complex from a factual or legal standpoint” and while the grievances arise out of the same set of circumstances, his level of involvement and culpability is different than the other two grievants. Lastly, Grievant #3 seeks a separate hearing to avoid the possibility of the actions of others tainting the hearing officer’s view of his personal involvement and culpability for the events of December 12, 2003.

These three grievances involve the same parties, legal issues, policies, and factual background, thus warranting consolidation, unless there is a persuasive reason to process the

² *Grievance Procedure Manual* § 8.5.

³ *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.

⁴ *Id.* at 247-248 *citing* *Arnold v. Eastern Airlines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982).

⁵ *See* Va. Code § 19.2-262.1.

⁶ *Barnes v. Judge Commonwealth of Virginia*, 22 Va. App 406, 470 S.E.2d 579 (1996) *citing* *Zafiro v. United States*, 506 U.S. 534, 539, 113 S.Ct. 933 938, 122 L. Ed. 2d 317 (1993).

⁷ *See* Rules for Conducting Grievance Hearings, § III(C).

grievances individually (e.g. consolidation would result in prejudice to one or more of the grievants or would be impracticable). The grievants' objections to consolidation are based primarily upon the presumption that if consolidation is granted, the hearing officer will not be able to appropriately and independently assess the culpability and level of involvement of each individual. This Department has no reason to believe, nor have the grievants presented credible evidence, that the hearing officer would be unable to properly fulfill his duty to independently assess the culpability and propriety of discipline administered for each grievant⁸ if the three grievances were consolidated for a single hearing. Indeed, we note that in the criminal law context, the Court of Appeals of Virginia has determined that the existence of varying degrees of culpability is insufficient to establish actual prejudice for purposes of defeating a joint trial of codefendants.⁹

Moreover, it does not appear that the underlying grievances are so complex from a factual or legal standpoint that to grant consolidation would be impracticable as alleged by Grievant #2. It appears that the grievances involve the same parties and potential witnesses and all challenge the same set of circumstances, namely the events of December 12, 2003 and the discipline imposed for participation in those events. Further, all grievants were disciplined for alleged violations of the same policy, specifically, VDH Policy 2.30 *Workplace Harassment*.

In light of the above, this Department finds that consolidation of the three grievances for a single hearing is appropriate. Accordingly, the three grievances are consolidated to be heard by the same hearing officer in a single hearing. The hearing officer shall independently assess the merits of each grievance and issue three separate decisions based upon his conclusions. This Department's rulings on compliance are final and nonappealable.¹⁰

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Director

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⁸ See *Rules for Conducting Grievance Hearings*, § VI(B) (“[i]n cases involving discipline, the hearing officer reviews the facts *de novo* (afresh and independently, as if no determinations had been made yet) to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.”)

⁹ See *Turner v. Commonwealth of Virginia*, 2002 Va. App. LEXIS 70. On appeal from a joint trial, one of the defendants asserted that the varying degrees of culpability created “confusion and prejudice because it reduced the confidence that should be part of a jury verdict.” The court found that “[d]espite the varying degrees of culpability claimed, [the defendant] fails to show that he suffered actual prejudice during the course of his trial” and that the verdicts displayed no confusion on the part of the jury in determining the individual liability of the codefendants.

¹⁰ Va. Code § 2.2-1001 (5).

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