

Issue: Compliance/agency requests that 3 different grievants be consolidated for purposes of hearing; Ruling Date: November 22, 2004; Ruling #'s 2004-902, 2004-903, 2004-904;
Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services;
Outcome: consolidation is appropriate and practicable



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
And Substance Abuse Services
Ruling Numbers 2004-902, 2004-903, and 2004-904
November 22, 2004

The Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency) seeks a compliance ruling regarding three grievances filed by three separate DMHMRSAS employees (Grievant #1, Grievant #2, and Grievant #3). The agency requests that the three grievances be consolidated for a single hearing. Grievants #1 and #3 agree to the consolidation, while Grievant #2 opposes consolidation. For the reasons discussed below, this Department finds that consolidation is appropriate and practicable in this case.

FACTS

On September 29, 2004, it was discovered that the nursing staff at one of the DMHMRSAS facilities may have failed to properly treat a patient over a 35-day period. An investigation into the alleged neglect revealed that Grievants #1 and #3, both Registered Nurses (RN's), were responsible for treatment of the patient as well as subsequent documentation regarding the treatment. The investigation further found that Grievant #2, a Licensed Practical Nurse (LPN), was responsible for auditing the treatment records for completeness on several of the days in question. As a result of the investigation, each of the three grievants was issued a Group III Written Notice with termination for patient neglect.

The three grievants challenged their discipline by initiating separate grievances. 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

there is a persuasive reason to process the grievances individually.¹ Likewise, in the interest of judicial economy, courts generally favor consolidation of actions that pose common questions of law or fact.² 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.”³ 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.⁴ 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.”⁵ 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 “[e]ach of the three (3) employees was terminated with a Group III written notice for patient neglect and involves the same investigation, same set of facts, witnesses, etc.” Additionally, the agency alleges that consolidation would save the Commonwealth time and resources.

Grievant #2 opposes consolidation of the three grievances for a single hearing. Specifically, Grievant #2, an LPN, operates under a different set of standards and responsibilities than Grievants #1 and #3, both RN’s. If consolidation is granted, Grievant #2 believes that he will be improperly considered the equivalent to Grievants #1 and #3, which could result in an inequitable outcome. Moreover, Grievant #2 claims that his grievance issues are different than the other grievants’ issues and that consolidation violates his right to a fair and equitable hearing. Finally, Grievant #2 challenged his discipline by utilizing the expedited grievance process, while Grievants #1 and #3 challenged their discipline through the regular grievance process. Despite Grievant #2’s use of the expedited process, all three grievances were qualified for hearing at the same time. Grievant #2 claims that the concurrent qualification of the grievances resulted from the agency’s delay in processing his grievance, and appears to assert that he should not be penalized (i.e. consolidating his grievance with the grievances of Grievant #1 and Grievant #3) for the agency’s delay.⁶

¹ *Grievance Procedure Manual* § 8.5.

² 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.

³ *Id.* at 247-248 *citing* *Arnold v. Eastern Airlines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982).

⁴ See Va. Code § 19.2-262.1.

⁵ *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).

⁶ To the extent that Grievant #2 is attempting to cite the agency with noncompliance with the grievance process, such an argument would fail. The grievance procedure requires both parties to address procedural

These three grievances involve the same parties, potential witnesses, legal issues, policies, and factual background, thus warranting consolidation, unless consolidation would result in prejudice to one or more of the grievants or would be impracticable. Grievant #2's 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 responsibilities, level of involvement, and culpability, if any, of each individual. This Department has no reason to believe, nor has Grievant #2 presented credible evidence to show, that if the cases were consolidated, the hearing officer would be unable to properly fulfill his duty to independently assess the propriety of discipline issued to each grievant.⁷ 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.

In light of the above, 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.⁸

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noncompliance through a specific process. *See Grievance Procedure Manual* § 6. That process assures that the parties first communicate with each other about the purported 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 alleged noncompliance, the grievant may request a ruling from this Department. Then, 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 on the merits in the grievant's favor unless the agency can establish just cause for its noncompliance. Further, the grievance procedure requires that all claims of party noncompliance be raised immediately. *Grievance Procedure Manual* § 6.3. Thus, if Party A proceeds with the grievance after becoming aware of Party B's procedural violation, Party A may waive the right to challenge the noncompliance at a later time. *Grievance Procedure Manual* § 6.3. Further, this Department has long held that it is incumbent upon each employee to know his responsibilities under the grievance procedure.

⁷ *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.”)

⁸ Va. Code § 2.2-1001 (5).