

Issue: Compliance/Consolidation of grievances for purposes of hearing; Ruling Date: December 30, 2004; Ruling #2004-924, 2004-926; Agency: Virginia Department of Transportation; Outcome: consolidation is granted



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution
COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Numbers 2004-924 and 2004-926
December 30, 2004

The Department of Transportation (VDOT or the agency) seeks a compliance ruling regarding two grievances filed by two separate VDOT employees (Grievant #1 and Grievant #2). The agency requests that the two grievances be consolidated for a single hearing. Both Grievant #1 and Grievant #2 agree to the consolidation. For the reasons discussed below, this Department finds that consolidation is appropriate and practicable in this case.

FACTS

As the result of an internal investigation conducted by the agency, on September 17, 2004, both grievants were issued Group II Written Notices with ten days suspension for allegedly requesting sexual favors and creating a hostile work environment within the Area Headquarters.¹ The two grievants challenged their discipline by initiating separate grievances. The two 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.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

¹ The Written Notices read "[a]s a result of an investigation conducted by Civil Right and Human Resources you are charged with requesting sexual favor and verbal conduct affecting or unreasonably interfering with an individuals work performance, creating an intimidating and hostile or offensive work environment."

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.

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 two grievances for hearing because the two employees were disciplined with Group II Written Notices for allegedly requesting sexual favors and for creation of an intimidating and hostile work environment, on the same date, based on the same investigation. Likewise, the two employees agree to consolidation because the facts of their case are interrelated and involve the same management officials and witnesses.

This Department finds that consolidation of the two grievances is appropriate. The two grievances involve the same parties, potential witnesses, legal issues, policies, and factual background, thus warranting consolidation, and consolidation is not impracticable in this instance. The hearing officer shall independently assess the merits of each grievance and separately address the merits of each grievance.⁷ This Department’s rulings on compliance are final and nonappealable.⁸

Claudia T. Farr
Director

June M. Foy

⁴ *Id.* At 247-248 *citing* Arnold v. Eastern Airlines, 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 The hearing officer is granted the discretion of addressing the merits of the two grievances in a single consolidated decision or two separate decisions.

⁸ Va. Code § 2.2-1001 (5).

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