

Issue: Compliance/respondent steps; Ruling Date: June 2, 2005; Ruling #2005-1021;
Agency: Department of Social Services (Office of Comprehensive Services for At-Risk
Youth and Families) Outcome: respondent steps should be managed by the Office of
Comprehensive Services.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Office of Comprehensive Services for
At-Risk Youth and Families
Ruling Number 2005-1021
June 2, 2005

The Office of Comprehensive Services for At-Risk Youth and Families (OCS or the agency) has requested a compliance ruling in the grievant's April 15, 2005 grievance. Specifically, the grievant initiated her April 15th grievance with her immediate supervisor, the Director of OCS, as the first management resolution step-respondent. There is a dispute among the parties regarding who should serve as the remaining management resolution step-respondents.¹ Accordingly, OCS requests a ruling as to this issue.

FACTS

The grievant is employed as a Program Administration Manager III. On March 16, 2005, the grievant was informed that due to an OCS reorganization, her position was being abolished and she would be laid off effective May 24, 2005. On April 15, 2005, the grievant challenged the agency's action by initiating a grievance alleging misapplication of the layoff policy and procedures and discrimination on the basis of age.

The grievant claims that she is an employee of the Department of Social Services (DSS) and as such, the designated management resolution step-respondents in her April 15th grievance should include management staff from DSS. In support of her belief, the grievant asserts the following: (1) the announcement seeking qualified candidates for her current position identified DSS as the recruiting agency; (2) when hired, she was oriented by DSS and required to fill out DSS forms; (3) her identification badge says DSS; (4) her e-mail address is a DSS address; (5) the state's Personal Management Information System (PMIS) lists her employing agency as DSS; (6) she appears on the DSS internal website directory as a DSS employee; (7) her paychecks are issued by DSS; (8) her leave forms are processed through DSS; (9) when hired, the former Director of OCS sought an

¹ OCS is a relatively small agency, specifically, it is the administrative entity of the State Executive Council for Comprehensive Services for At-Risk Youth and Families. See Va. Code § 2.2-2649. OCS has never processed a grievance, nor set forth its designated step-respondent list as required under the *Grievance Procedure Manual*.

exception to policy from DSS regarding the grievant's starting salary; (10) offers of employment for OCS positions come from DSS; (11) all hiring requests for OCS must be made through DSS; (12) she is governed by DSS policies and procedures; (13) her personnel file is located at DSS; and (15) OCS is not an independent agency.

In support of her contention that OCS is not an independent agency, the grievant asserts the following: (1) the Director of OCS is not an appointed position and thus OCS is not an agency, as Va. Code § 2.2-106 states that the Governor shall appoint the head of each agency of the executive branch unless otherwise stated; (2) the Director of OCS is not listed in the 2005 Virginia Appropriation Act with other agency heads and their compensation; and (3) the state agency listing on Virginia's governmental web site does not list OCS as an executive branch agency.

Conversely, OCS asserts that despite its reliance upon DSS for various administrative functions,² it is a separate state agency from DSS and as such, the grievant is an employee of OCS. In support of its contention, the agency offers the following: (1) OCS is listed as a separate agency on the state's organizational chart; (2) the Secretary of Health and Human Resources is responsible for OCS under statute; and (3) the OCS Director reports directly to the Secretary of Health and Human Resources. Additionally, OCS asserts that the grievant works exclusively for OCS.

DISCUSSION

Before the appropriate management resolution step-respondents can be established in this case, this Department must ascertain whether OCS is an entity separate and apart from DSS and if so, which entity employs the grievant. Each Secretary of the Governor's Cabinet is responsible for providing overall supervision and direction to the agencies that report to him or her. The Code of Virginia lists OCS as one of the "agencies" for which the Secretary of Health and Human Resources is responsible.³ Additionally, OCS has its own agency code (200) and performance measures. Accordingly, for purposes of the grievance procedure, this Department concludes that OCS is an independent agency, separate and apart from DSS.

The question remains whether the grievant is an employee of OCS or DSS. Courts, relying upon the common law principles of agency, consider several factors in determining an employee's employment status.⁴ While no one factor is outcome

² OCS relies upon other larger state agencies to provide its various operating functions. For example, DSS provides all human resource and personnel functions for OCS and houses its administrative budget. OCS maintains, however, that despite its reliance upon DSS for personnel functions such as payroll processing and hiring paperwork, OCS maintains control over its employees and its administrative budget.

³ See Va. Code § 2.2-212.

⁴ See *Atkins v. Computer Sciences Corporation*; 264 F. Supp. 2d 404 (E.D. Va. 2003) (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989)). ("[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the

determinative, strong emphasis is placed on the level of control the employer exercises over the employee and the work she is performing.⁵ While not dispositive for purposes of the grievance procedure, the courts' analysis of a party's employment status is nevertheless helpful and instructive for determining the grievant's employing agency in this case.

Significantly in this case, the grievant's Employee Work Profile (EWP) lists her agency as OCS. Additionally, her core responsibilities include: (1) managing the assistance and review team component of OCS; (2) directs OCS technical assistance and training activities; (3) directs OCS compliance activities; (4) assists in monitoring legislative activities related to the Comprehensive Services Act (CSA) and its stakeholder agencies; (5) represent OCS and the Director on various groups and taskforces in areas relating to local assistance and compliance with the CSA; and (6) other senior management duties as assigned by the OCS Director. Based on the foregoing, it appears that the grievant works for and is controlled exclusively by OCS. Accordingly, while it is understandable that under the facts and circumstances surrounding this case the grievant would believe she is an employee of DSS, this Department concludes that for purposes of the grievance procedure and its requirements, the grievant is an employee of OCS.

Consequently, the grievant's designated management resolution step-respondents should be employees of OCS. In this case, because the grievant's immediate supervisor is also the Director of OCS, the management resolution steps would effectively collapse into a one-step process with the Director of OCS serving as both the lone management resolution step-respondent as well as the agency head. Accordingly, unless otherwise waived in accordance with the grievance procedure, the parties are instructed to conduct a face-to-face meeting and within 5 workdays of such meeting, the Director of OCS shall provide the grievant with a written response.⁶ Within 5 workdays of receipt of the agency head's response, the grievant shall indicate on Form A whether or not she seeks qualification of her grievance and advance it to the Director of OCS.⁷ If the grievant

location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in the business; the provision of employee benefits; and the tax treatment of the hired party.")

⁵ See *Magnuson v. Peak Technical Services, Inc. et al.*, 808 F. Supp. 500, 510 (E.D. Va. 1992) (in determining whether a "joint employer" relationship exists under Title VII, "[c]onsideration of all of the circumstances surrounding the work relationship is essential, with greatest emphasis placed on the extent of the employer's right to control the manner and means of the worker's performance."). See also *Ward v. Atlantic Coast Line Railroad Co.*, 362 U.S. 396, 80 S. Ct. 789 (S. Ct. 1960) (in determining whether the plaintiff is employed by the defendant, the primary factor to consider is whether the defendant had the "power to direct, control, and supervise the plaintiff in the performance of his work."); *Lopez v. Johnson* 333 F.3d 959, 963 (9th Cir. 2003) (the court concluded that "[a]lthough the [defendant] retained control over parking within PSNS and provided the office space and equipment [plaintiff] used, it did not retain any control over the terms and conditions" of the plaintiff's work to be considered the plaintiff's employer).

⁶ See *Grievance Procedure Manual* § 3.2.

⁷ See *Grievance Procedure Manual* § 3.3.

requests qualification, within 5 workdays, the Director of OCS shall make a qualification determination and return the Form A to the grievant.⁸

Further, under the grievance procedure, each agency should maintain a list of step respondents.⁹ Each designated step respondent shall have the authority to provide the grievant with a remedy, subject to the agency head's approval.¹⁰ Pursuant to its statutory responsibilities, EDR has long collected and maintained each agency's designated step respondents. This assures that each agency's management resolution step respondents are appropriate, are known to employees and to EDR, and that this phase of the grievance process is administered consistently and fairly. Accordingly, for future grievances, OCS is ordered to compile its list of designated step-respondents and submit it to EDR for approval.

This Department's rulings on matters of compliance are final and nonappealable and have no bearing on the merits of the grievance.¹¹

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⁸ See *Grievance Procedure Manual* § 4.2.

⁹ See *Grievance Procedure Manual* § 8.9.

¹⁰ See Va. Code § 2.2-3003(D).

¹¹ Va. Code § 2.2-1001(5).