

Issue: Compliance/grievance procedure issue; who to file grievance with? –other  
issue/violence in the workplace; Ruling Date: November 22, 2005; Ruling #2006-1101;  
Agency: Virginia Information Technologies Agency; outcome: grievant directed to file  
with VITA



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

COMPLIANCE RULING OF DIRECTOR

In the matter of the Virginia Information Technologies Agency  
Ruling Number 2006-1101  
November 22, 2005

The grievant has requested a compliance ruling in the July 21, 2005 grievance that she initiated with the Virginia Information Technologies Agency (VITA). The grievant appears to assert that because VITA cannot provide her with the relief that she seeks, she wishes to pursue her grievance with the Department of Corrections (DOC). For the following reasons, this Department concludes that the appropriate party to this grievance is VITA.

FACTS

The grievant is employed as an IT Technician I. She asserts that on July 7, 2005, she was verbally berated and harassed for an extended period of time by a DOC departmental manager. She asserts that the verbal abuse was unprovoked. The grievant claims that she now fears the manager will lose control and engage in another "tirade." The grievant asserts that the verbal abuse has caused her considerable medical and emotional expense. As relief, the grievant sought to have the departmental manager suspended and terminated, or demoted and transferred.

The first step respondent answered the grievance by stating that "[t]he specific relief you seek is not a valid course of action across agencies based on the facts of the grievance. VITA is working with DOC HR for an appropriate response." The grievant advanced her grievance to the second step and included an attachment for consideration by the second-step respondent. The attachment noted that the grievant felt that the relief that she had requested "were the only options that would afford complete compliance and safety in that particular work environment, with that particular person." She did concede, however, "there may be other remedies available."

The second-step respondent began his response by stating that "[r]egarding the relief you sought in step one . . . we are unable to grant this relief." The second-step respondent, however, went on to list the relief that he was able to grant. He noted that he had met with DOC Inspector General (IG) and provided her with a copy of the grievance. The second-step response indicated that the IG had begun an investigation, which she was leading. The response noted that the IG confirmed that statements had been received

from witnesses and that the statements were being reviewed. The second-step respondent further stated that after DOC prepared findings, DOC would host a meeting with him, the IG, DOC's Human Resource Office, and VITA's Human Resource Office to review the findings. Finally, the second-step respondent noted that the IG confirmed that the departmental manager had been restricted from entering the Technology Service Unit until further notice.

Based on the second-step response, the grievant seeks permission to pursue her grievance with DOC.

### DISCUSSION

The grievance procedure provides that an employee's grievance must arise in the agency in which the employee works.<sup>1</sup> This Department has long held that this provision requires that an employee must initiate her grievance with her employing agency,<sup>2</sup> with one exception: this Department has granted grievants an opportunity to initiate their grievances with agencies other than the current employer when the actions grieved arose in an agency in which the grievant had previously been employed and the relief could only be granted by the previous employing agency.<sup>3</sup>

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<sup>1</sup> *Grievance Procedure Manual*, § 2.4(2).

<sup>2</sup> See EDR Rulings #2002-020 and #2003-530. *C.f.* EDR Ruling #2005-1021.

<sup>3</sup> See, e.g., EDR Ruling #2006-1113. The grievant in Ruling #2006-1113 worked for the Department of Transportation as a General Administration Manager II until June 30, 2005. On or about June 16, 2005, the grievant gave VDOT a two-week advance notice of his intention to resign from his position. The grievant had been offered and accepted a position with the State Compensation Board (SCB). On June 30, 2005, the grievant's last day of work with VDOT, the VDOT Chief Financial Officer presented the grievant with a Group III Written Notice with termination from VDOT. On July 29, 2005, the grievant initiated a grievance challenging the Group III and termination with his immediate supervisor at the SCB. His supervisor responded by stating that he could provide no relief and by closing the grievance. The grievant subsequently sought permission to grieve the Group III and termination with VDOT. This Department allowed the grievant to proceed against VDOT holding that the issue being grieved, a Group III Written Notice with termination, involved discipline issued by VDOT and thus arose entirely within VDOT. The ruling outcome was also greatly influenced by the fact that only VDOT management could provide redress regarding the discipline it had issued.

Here, the grieved action arose while the grievant was employed by VITA.<sup>4</sup> In addition, while VITA concedes that it does not have the authority to provide the grievant with the relief she requested, (disciplining or transferring a DOC department manager) VITA's actions nevertheless demonstrate that it is cognizant of its obligation to provide the grievant with a safe workplace, free from intimidation and the threat of violence.<sup>5</sup> Accordingly, under the circumstances, VITA appears to have taken reasonable steps to deal with the concerns raised in the grievance. Furthermore, because VITA has appropriately involved DOC with this matter, VITA's actions could potentially lead to the relief that grievant seeks, which, incidentally, a hearing officer has no authority to order.<sup>6</sup> In sum, under the facts of this case, no exception applies to the general rule that an employee must initiate her grievance with her employing agency, and grievant may not file this grievance with DOC.

### CONCLUSION

Accordingly, within 5-workdays of receipt of this ruling, the grievant must either advance her grievance to the next step respondent within VITA or inform VITA's Human Resource Office that she seeks to close her grievance. This Department's rulings on matters of compliance are final and nonappealable and have no bearing on the merits of the grievance.<sup>7</sup>

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Claudia T. Farr  
EDR Director

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<sup>4</sup> It does not appear that under the facts present here, DOC and VITA jointly employ the grievant. The grievant concedes that her work is assigned and supervised by VITA employees, and that no DOC employee assigns, supervises, or controls how the grievant completes her work. *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 (9<sup>th</sup> 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).

<sup>5</sup> *See* DHRM Policy 1.80, Workplace Violence.

<sup>6</sup> *See* *Grievance Procedure Manual*, § 5.9(b) which lists examples of relief that are not available from the hearing officer including "Taking any adverse action against an employee (other than upholding or reducing the disciplinary action challenged by the grievance). It should be noted that one of the primary purposes of the grievance procedure is to provide a means through which employees can raise concerns with management. As a result of the grievance process, both DOC's Office of Inspector General and DOC's Human Resources Office have been put on notice of the DOC departmental manager's alleged improper behavior. DOC now has the opportunity, indeed the responsibility, to take appropriate action.

<sup>7</sup> Va. Code § 2.2-1001(5).

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