Issue: Consolidation of two grievants' grievances for purposes of hearing; Grievance issue; discipline/failure to follow instruction/policy; Ruling Date: October 5, 2005; Ruling #2006-1129, 2006-1131; Agency: Department of Motor Vehicles; Outcome: grievants and grievances combined for purposes of hearing.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Motor Vehicles
Ruling Numbers 2006-1129, 2006-1131
October 5, 2005

Grievants A and B, through their counsel, have asked that their pending grievances be consolidated for a single hearing. For the reasons discussed below, the grievants' request for consolidation is granted.

FACTS

The grievants are employed by the Department of Motor Vehicles (DMV or the agency) as managers of two Customer Service Centers within the same DMV District. Grievant A is currently awaiting the appointment of a hearing officer in her pending grievance against the agency; Grievant B has initiated a grievance on a Written Notice given to her on August 18, 2005, but that grievance remains in the management resolution steps. The grievants have asked this Department to consolidate their grievances for a single hearing and requested that the hearing on Grievant A's grievance be stayed until Grievant B's grievance has advanced through the management resolution steps.

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

[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.

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 grievants seek consolidation of their grievances for hearing because, they allege, the disciplinary actions being grieved were in violation of their First Amendment rights. Specifically, the grievants claim that they spoke with public officials about alleged criminal activity within the agency, and that the agency subsequently took disciplinary action against them in response to these discussions, as well as in response to an alleged written communication by one grievant to one of the public officials.

The agency opposes the grievants' request for consolidation on several grounds. First, the agency denies the grievants' allegation that the disciplinary action was taken in retaliation for First Amendment activity and argues that consolidation would "only serve to confuse the issues in both cases." The agency also objects to consolidation because the grievants work in different towns, and if the hearing were held where Grievant B works, witnesses would have to travel from the CSC in the town where Grievant A works. It would be more practical, the agency asserts, to hold Grievant A's hearing in conjunction with another pending hearing arising from the same CSC. The agency also argues that because the grievants were disciplined for different conduct, different witnesses will need to testify for each grievance. In addition, the agency objects to consolidation because Grievant B's grievance is currently in the resolution steps and has not yet been qualified for hearing. Finally, the agency argues that it is in the best interest of all employees at the CSC where Grievant A works to "move forward" and not have the resolution of her grievance "unnecessarily prolonged."

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[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).

In many of our previous consolidation decisions, we have allowed consolidation where the grievants have been disciplined for a single incident of shared conduct.[6] Here, a different scenario is presented, in that the common allegations and evidence relate to the defense to be offered by the grievant, rather than the conduct charged by the agency. In this case, the grievants were disciplined for different conduct, but they allege the disciplinary action was taken because they engaged in shared protected activity. This common defense appears to involve the same witnesses, legal issues, and factual background. Consolidation is therefore warranted, unless there is a persuasive reason to process the grievances individually (*e.g.*, consolidation would result in actual prejudice to the agency or would be impracticable).

In this case, there is no evidence that consolidation would result in actual prejudice to the agency. Although the agency suggests that consolidation would result in "confus[ing] the issues," this Department has no reason to believe that the hearing officer would be unable to assess the merits of the claims made by the agency and the grievants. Moreover, although the agency's desire to "move forward" on Grievant A's grievance is understandable, the agency has not shown that staying Grievant A's hearing to allow consolidation will result in actual prejudice to the agency at hearing.

With respect to the agency's assertion that consolidation would result in a greater loss of work time, there is no evidence that the difference between the employee time required for two separate hearings and the time required for a single hearing would prejudice the agency's rights at hearing. Indeed, in the absence of consolidation, those employee witnesses testifying in relation to the grievants' shared First Amendment defense would likely be required to attend two separate hearings, as would the grievants' supervisor, who issued the written notices being grieved. Further, while the agency has expressed concern that consolidation would result in witnesses from Grievant A's place of work having to travel to Grievant B's location to testify (a driving distance of approximately 64 miles), the grievants' attorney has advised this Department that he would agree to the hearing taking place at any location within the district in which both grievants work. We also note that the agency has indicated in correspondence to this Department that it does not have facilities to accommodate Grievant A's hearing in the town in which she works and would, even in the absence of consolidation, seek to hold the hearing in Town W, a driving distance of approximately thirty miles from Grievant A's place of work.[7]

The agency argues that consolidation would be in violation of § 5.2 of the *Grievance Procedure Manual*, which provides that in the absence of an agreement by the parties to the contrary, a hearing must take place in the locality where a grievant works. The section has little relevance here, however, because Grievant A's hearing apparently

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[6] *See, e.g.*, EDR Ruling Nos. 2005-975, 2005-976, 2005-977; EDR Ruling Nos. 2004-902, 2004-903, 2004-904; EDR Ruling Nos. 2004-830, 2004-831, 2004-832.

[7] We note that recent grievance hearings arising from the CSC at which Grievant A works have taken place in Town W, rather than the town in which the CSC is located.

cannot take place in the locality in which she works, even if the grievant or the hearing officer did not agree to an alternative site. Under these circumstances, § 5.2 does not limit the EDR Director's ability to consolidate grievances arising in different locations in the interests of judicial economy and efficiency.

The agency rightly observes that Grievant B's request for consolidation is premature, as her grievance has not advanced through the management resolution steps. While we generally will not consolidate grievances prior to qualification, in this case, the conduct being grieved is formal written discipline, which automatically qualifies for hearing.[8] Moreover, because Grievant A's grievance has been qualified for hearing, to dismiss Grievant B's request as premature would, in effect, prejudice Grievant A's request for consolidation. We note, however, that this ruling in no way precludes resolution of Grievant B's grievance during the management resolution steps.

In light of the above, this Department finds that consolidation of the two grievances for a single hearing is appropriate. Accordingly, the grievances are consolidated to be heard by the same hearing officer in a single hearing. Grievant A's grievance will be stayed until Grievant B's grievance has been qualified for hearing by the agency. If Grievant B's grievance is resolved during the management resolution steps, Grievant A's grievance will proceed to hearing. The hearing officer shall independently assess the merits of each grievance and issue two separate decisions based upon his conclusions. This Department's rulings on compliance are final and nonappealable.[9]

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Claudia T. Farr
Director

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Gretchen M. White
EDR Consultant

[8] As the grievants raise their First Amendment claims as a defense to the grieved disciplinary action, those claims will automatically qualify for hearing.
[9] Va. Code § 2.2-1001 (5).