Issue: Consolidation for purposes of hearing; Ruling Date: November 4, 2005; Ruling #'s 2006-1174, 2006-1175; Agency: Department of Motor Vehicles; Outcome: consolidated for purposes of hearing

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

RECONSIDERATION RULING OF DIRECTOR

In the matter of Department of Motor Vehicles
Ruling Numbers 2006-1174, 2006-1175
November 4, 2005

The Department of Motor Vehicles (DMV or the agency) has asked this Department to reconsider Rulings Nos. 2006-1129 and 2006-1131. These rulings consolidated the grievance hearings of two agency employees, Grievants A and B.

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 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. The agency objected to the grievants' request.

On October 5, 2005, this Department issued rulings granting the grievants' request for consolidation. In these rulings, EDR concluded that, although the alleged conduct for which the grievants were disciplined by the agency differed, the grievants' shared defense involved common witnesses, legal issues, and factual background. The rulings explained that because of these common questions of law and fact, consolidation was warranted, unless there was a persuasive reason, such as actual prejudice to the agency, to process the grievances individually. EDR then concluded that the agency had failed to show such a persuasive reason and the grievances should therefore be consolidated.

By letter dated October 7, 2005, the agency asked this Department to reconsider its consolidation decision. The grievants, through their attorney, have opposed the agency's request.

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]

The agency objects to the decision to consolidate the grievances on two grounds. First, the agency argues that this Department erred in citing a Virginia criminal statute and federal precedent in its ruling. In particular, the agency contends that EDR wrongly applied an "actual prejudice" standard, rather than first determining if the grievances shared "common questions of law or fact." Second, the agency asserts that had this Department applied the proper analysis (as set forth, the agency argues, in the Virginia Multiple Claimant Litigation Act, Va. Code §8.01-267.1), the grievances would not have satisfied the threshold "common question" requirement. For the reasons set out below, this Department finds neither of the agency's arguments persuasive.

With respect to the first of these objections, this Department has long looked to federal and Virginia precedent as instructive—although not dispositive—authority. As the grievants' attorney correctly notes, the grievance statute gives EDR wide discretion in its interpretation and implementation.[2] Nothing in the statute precludes EDR from considering federal and Virginia law, criminal or civil, case law or statute, as instructive authority, and it is this Department's practice to consider federal and Virginia precedent in interpreting the grievance statute, and to endeavor to do so in a manner that yields consistent, evenhanded rules for the conduct of grievances.[3] The standard applied in Rulings Nos. 2006-1129 and 2006-1131 is consistent with that previously applied by EDR in multiple grievant consolidation requests.[4] Although (as we acknowledged in the challenged rulings) this standard has generally been applied where the grievants have been disciplined for a single incident of shared alleged conduct, we see no reason why a different standard should apply when alleged agency, rather than grievant, conduct is at issue.

In addition, we note that the federal precedent to which the agency objects was cited for the fundamental proposition that "courts generally favor consolidation of actions that pose common questions of law or fact," provided, however, that a court must

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[1] Grievance Procedure Manual § 8.5.
[2] *See* Va. Code § 2.2-3000 *et seq.*
[3] *See, e.g.*, EDR Ruling No. 2005-1068, EDR Ruling No. 2005-1021; EDR Ruling No. 2005-987; EDR Ruling Nos. 2004-919, 2004-921; EDR Ruling Nos. 2004-624, 2004-648; and EDR Ruling No. 2004-599.
[4] *See* EDR Ruling No. 2005-1022, 2005-1023; EDR Ruling Nos. 2005-995, 2005-996, 2005-997; EDR Ruling Nos. 2005-992, 2005-993, 2005-994; EDR Ruling Nos. 2005-975, 2005-976, 2005-977; EDR Ruling Nos. 2004-902, 2004-903, 2004-904; and EDR Ruling Nos. 2004-830, 2004-831, 2004-832.

"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." These fundamental principles are also embedded in the agency's proposed standard, the Virginia Multiple Claimant Litigation Act, which would allow consolidation where the claims involve "common questions of law or fact and arise out of the same transaction, occurrence or series of transactions or occurrences," the common questions "predominate and are significant to the actions," and consolidation "will promote the ends of justice and the just and efficient conduct and disposition of the actions," "is consistent with each party's right to due process," and "does not prejudice each individual party's right to a fair and impartial resolution of each action."[5]

With respect to the agency's second argument—that consolidation would not have been appropriate under the "common questions" standard set forth in the Multiple Claimant Litigation Act—we first observe that, contrary to the agency's contention, this Department did in fact apply a "common questions of law or fact" standard in determining, as a threshold matter, that consolidation was appropriate. As we explained in the challenged rulings,

> 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).* [Emphasis added]

As the agency correctly recognizes, the grievants are claimants in these proceedings. Their allegations of retaliatory motive are both defenses to the disciplinary action as well as affirmative claims. When considered from the grievants' perspective, these claims of retaliatory discharge arise from the same transaction or occurrence—the alleged shared First Amendment activity.

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[5] *See* October 7, 2005 letter from agency to the EDR Director.

[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.

The agency's actual objection appears to be not that this Department failed to consider the existence of common questions, but rather that this Department wrongly concluded that such questions exist. The agency makes two arguments in this regard: first, that the grievants were disciplined for different conduct; and second, that to the extent the decision to grant consolidation rests on the grievants' shared First Amendment claim, that claim is without basis. These arguments go to the merits of the grievances, however, and as such are not relevant to a consolidation determination. In the same way that this Department would not deny an agency's consolidation request in a case involving multiple grievants simply because the grievants claimed that they had not engaged in the alleged shared misconduct, this Department will not here deny a consolidation request on the basis that the agency asserts that the grievants' retaliation theory is without merit. Such determinations of fact are for the hearing officer.

Finally, we note that although the agency argues that this Department wrongly considered prejudice to the agency in its determining that consolidation was appropriate, the agency offers no argument in its October 7th letter that consolidation would, in fact, result in prejudice to the agency.

Accordingly, for all the foregoing reasons, this Department affirms its previous rulings ordering consolidation.[7]

This Department's rulings on compliance are final and nonappealable.[8]

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Claudia T. Farr
Director

[7] The grievants' counsel correctly notes that this Department's compliance rulings are final and nonappealable. As we find that the agency has not stated a persuasive basis on which to reverse our previous ruling, it is unnecessary to address this objection.
[8] Va. Code § 2.2-1001 (5).