

Issue: Consolidation/consolidate grievances for hearing; Ruling Date: March 24, 2006;
Ruling #'s 2006-1306, 2006-1307; Agency: Virginia Department of Health; Outcome:
grievances consolidated for hearing



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution **CONSOLIDATION RULING OF DIRECTOR**

In the matter of Department of Health
Ruling Number 2006-1306 and 2006-1307
March 24, 2006

The Department of Health (or agency) seeks a consolidation ruling regarding two grievances initiated by the grievant on August 24 and September 30, 2005. For the reasons set forth below these grievances are consolidated for hearing.

FACTS

The grievant was employed by the agency as a Health Counselor II. On August 24, 2005, the grievant was issued a Group II Written Notice for alleged failure to follow her supervisor's instructions and failure to report to work as scheduled. She challenged the August 24th Written Notice by initiating a grievance the same day. On or about September 1, 2005, the grievant was issued a Group II Written Notice with termination for purported unauthorized use/misuse of state property and abuse of state time and resources. She challenged the September 1st Written Notice in a September 30th grievance. In both grievances the grievant asserts discrimination and/or retaliation by her immediate supervisor. Both grievances were qualified for hearing by the agency head.

DISCUSSION

Written approval by the Director of this Department or her designee in the form of a consolidation 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 consolidation, the court must "conduct a careful inquiry in this regard that balances the

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.

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.

This Department finds that consolidation of the August 24th and September 30th grievances is appropriate. The grievances involve the same parties and potentially many of the same witnesses. Furthermore, consolidation will allow the exploration of the grievant’s claims of retaliation/discrimination and its alleged impact in the disciplinary actions that formed the basis for these grievances. Finally, consolidation is not impracticable in this instance.

The grievant objects to consolidation on the basis that she believes that the process will be more open if the two grievances are heard separately. This Department is not persuaded by the grievant’s objection. The process will be no less open if the grievances are consolidated. Moreover, the grievant has not cited to any potential prejudice that might result from consolidation. Accordingly, the grievances are consolidated for hearing.

This Department’s rulings on compliance are final and nonappealable.⁶

Claudia T. Farr
Director

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).

⁶ Va. Code § 2.2-1001 (5).