

Issue: Consolidation/grievant seeks immediate hearing officer appointment; Ruling Date: June 1, 2006; Ruling #2006-1360, 2006-1369; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: EDR consolidates all grievances for purposes of hearing to occur at completion of last grievance



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution
COMPLIANCE/CONSOLIDATION RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation and
Substance Abuse Services
Ruling Number 2006-1360, 2006-1369
June 1, 2006

The grievant seeks a compliance ruling regarding the appointment of hearing officers to hear her three grievances. She seeks the immediate appointment of a hearing officer to the first two of her three grievances, without consolidation with her third and final grievance.

FACTS

The Department of Mental Health, Mental Retardation and Substance Abuse Services (or agency) employed the grievant as a Registered Nurse at one of its facilities. In May of 2005, the grievant went on Short-Term Disability (STD) following surgery. In July of 2005, she returned to work. Shortly after her return, the grievant was informed that she would not be allowed to continue to work the schedule that she had worked since her hire: Saturday, Sunday and Monday. The grievant challenged the schedule change in an August 9, 2005 grievance, asserting that the change was retaliatory in nature.

On March 10, 2006, the grievant was issued a Group I Written Notice for an accumulation of unplanned leave. On March 27, 2006, the grievant grieved the Written Notice, asserting that the agency's (1) refusal to apply the self-scheduling model that the Director allegedly agreed to, and (2) failure to allow nurses to switch shifts, led to the accumulation of hours that resulted in the March 10th Written Notice. Although the Written Notice did not include any period of suspension, the grievant used an expedited grievance form to challenge the Written Notice on the purported basis that she had lost wages.

On April 18, 2006, the grievant received a second Group I Written Notice for an accumulation of unplanned leave hours. Because the grievant already had four active Written Notices, the agency terminated the grievant's employment with the April 18th Group Notice.

On April 21, 2006, this Department qualified the August 9th grievance noting the "common facts and allegations" contained in the August 9th retaliation grievance and the March 27th grievance challenge to the Written Notice. The April 21st ruling instructed the agency to seek the appointment of a hearing officer within 5-workdays of receipt of the ruling.

On April 28, 2006, the agency qualified the March 27th grievance. On the same day, the grievant initiated a grievance challenging the April 18th Written Notice that terminated her employment. The April 28th grievance challenged the agency's alleged "incorrect documentation of unplanned time with no just cause," and like the August 9th and March 27th grievances, the April 28th grievance alleged that the agency's actions were retaliatory.

On May 4, 2006 and May 9, 2006, this Department received requests for the appointment of a hearing officer for the March 27th and August 9th grievances, respectively.

As for the April 28th grievance, the second-step-meeting took place on May 12, 2006¹. The second-step respondent agreed to allow the grievant until May 17th to review documents that the grievant had requested under the Freedom of Information Act (FOIA). The second step response was sent to the grievant on May 19, 2006.

DISCUSSION

Approval by the Director of this Department or her designee in the form of a compliance ruling is required before two or more grievances may be consolidated in a single hearing. Moreover, EDR may consolidate grievances for hearing without a request from either party.² EDR strongly favors consolidation and will consolidate grievances when they involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.³

Likewise, in the interest of judicial economy, courts generally favor consolidation of actions that pose common questions of law or fact.⁴ However, before granting 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 risk of inconsistent judgments that separate proceedings could engender."⁵ 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.⁶

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

¹ The agency reports that the second-step meeting was originally scheduled to take place on May 10th but had to be rescheduled for the following day because the second-step respondent, Facility Director, had a scheduling conflict. Because the grievant apparently had a scheduling conflict of her own on the 11th, the meeting was again rescheduled for the next day, May 12th.

² *Grievance Procedure Manual*, § 8.5.

³ *Id.*

⁴ 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.

⁵ *Id.* At 247-248 citing *Arnold v. Eastern Airlines*, 681 F.2d 186, 193 (4th Cir. 1982).

⁶ See Va. Code § 19.2-262.1.

jury from making a reliable judgment about guilt or innocence.”⁷ 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.

Here, the sole risk of prejudice identified by the grievant is that she claims that she has lost wages as a result of agency actions. This Department is cognizant of the burdens that job loss places upon individuals and, accordingly, included in the grievance procedure the expedited process that the grievant is currently using to challenge her termination. However, we note that the April 28th grievance challenging the grievant’s discharge, although expedited, has not yet been qualified for hearing. As soon as it is qualified, by the agency head (and it will be qualified automatically because it challenges formal discipline), and this Department receives the corresponding request for the appointment of a hearing officer (which should be in a matter of days following the qualification), this Department will appoint a single hearing officer to hear, the August 9th, March 27th, and April 28th grievances.

Consolidation of the three grievances for hearing is appropriate, as the grievances involve the same parties, many of the same potential witnesses and share a related factual background. In addition to assuring a full exploration of potentially interrelated facts and issues (e.g., the common thread of alleged retaliation raised in each grievance), consolidation will promote judicial economy and consistency, and is entirely in keeping with numerous EDR rulings.⁸ Finally, consolidation is not impracticable in this instance.⁹

This Department’s rulings on matters of compliance are final and nonappealable.¹⁰

Claudia T. Farr
Director

⁷ *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).

⁸ *See* EDR Ruling Nos. 2006-1083 and 2006-1084; Nos. 2006-1147 and 1213; Nos. 2006-1148 and 2006-1163; Nos. 2006-1156 and 2006-1158; Nos. 2006-1174, 2006-1175; Nos. 2006-1207, 2006-1208, and 2006-1209; Nos. 2006-1236, 2006-1237, and 2006-1238; Nos. 2006-1243, 2006-1244, 2006-1251 and 2006-1246; Nos. 2006-1266, 2006-1267, and 2006-1268; Nos. 2006-1285, 2006-1286, 2006-1287, and 2006-1288; Ruling Nos. 2006-1294 and 2006-1295; Rulings Nos. 2006-1306 and 2006-1307; Ruling Nos. 2006-1326 and 2006-1327; Ruling Nos. 2006-1346 and 2006-1347.

⁹ While the agency’s stated preference would have been to have the August 9th FMLA retaliation grievance heard separately from March 27 and April 28th Written Notice grievances, it has no objection to the consolidation of all three grievances.

¹⁰ Va. Code § 2.2-1001(5).