

Issue: Consolidation/consolidate three grievances for purposes of hearing; Ruling Date: March 20, 2007; Ruling Nos. 2007-1572, 2007-1573, 2007-1574; Agency: Department of Transportation; Outcome: consolidation granted.



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

**CONSOLIDATION RULING OF DIRECTOR**

In the matter of the Department of Transportation  
Ruling Numbers 2007-1572, 2007-1573, 2007-1574  
March 20, 2007

The Department of Transportation (VDOT or the agency) has asked that the grievances of Grievants 1, 2, and 3 be consolidated for hearing. For the reasons discussed below, this Department finds that consolidation of these grievances is appropriate and practicable.

**FACTS**

Grievant 1 is employed by the agency as an Equipment Repair Supervisor, Grievant 2 is employed as a Transportation Operation Manager II, and Grievant 3 is employed as an Administrative Office Specialist III. On November 17, 2006, the agency issued Group II Written Notices to Grievants 2 and 3 for unauthorized use or misuse of state property or records. Grievant 1 received a similar Group II Written Notice on November 28, 2006. The agency asserts that the grievants were disciplined for "storing and transmitting the same sexually oriented e-mail message, using the state's computer systems."

The three grievants subsequently initiated grievances challenging the Written Notices. After the parties failed to resolve the three grievances during the management resolution steps, the agency head qualified the grievances for hearing.

The agency states that the grievants have indicated they want their grievances to be consolidated for hearing, and that the agency does not object to this request. By letter dated March 5, 2007, this Department advised the parties that it had received the request for consolidation and asked for any additional information regarding consolidation. No party has provided any additional information or objected to consolidation of the grievances for hearing.

**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.<sup>1</sup>

Likewise, in the interest of judicial economy, courts generally favor consolidation of actions that pose common questions of law or fact.<sup>2</sup> 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”<sup>3</sup> 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.<sup>4</sup>

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 of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.”<sup>5</sup> 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 three grievances in this case is appropriate. The three grievances involve many of the same parties and potential witnesses, and they share a common factual background. More important, the risk of prejudice would appear to be minimal at best, given that all parties agree to consolidation. Finally, consolidation is not impracticable in this instance.

This Department’s rulings on compliance are final and nonappealable.<sup>6</sup>

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Claudia T. Farr  
Director

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<sup>1</sup> *Grievance Procedure Manual*, § 8.5.

<sup>2</sup> *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).

<sup>3</sup> *Id.* At 248 *citing* *Arnold v. Eastern Airlines*, 681 F.2d 186, 193 (4<sup>th</sup> Cir. 1982).

<sup>4</sup> *See* Va. Code § 19.2-262.1.

<sup>5</sup> *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).

<sup>6</sup> Va. Code § 2.2-1001 (5).