

Issue: Compliance – Grievance Procedure (other issue); Ruling Date:
December 18, 2007; Ruling #2008-1820; Agency: Virginia Department of
Health; Outcome: Grievant In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Health
Ruling No. 2008-1820
December 18, 2007

The Department of Health (the agency) seeks to administratively close the grievant's September 8, 2005 and September 30, 2005 grievances. For the reasons discussed below, the agency's request is denied.

FACTS

On August 24, 2005, the grievant received a Group II Written Notice for failure to report to work as scheduled without proper notice and failure to follow her supervisor's instructions.¹ The grievant was also issued a Group II Written Notice with termination for unauthorized use/misuse of state property and abuse of state time and resources on September 1, 2005.² The grievant initiated grievances challenging these actions on September 8, 2005, and September 30, 2005, respectively.³ The grievances were eventually qualified for hearing by the agency head and consolidated by this Department in EDR Ruling Nos. 2006-1306 and 2006-1307. The hearing was scheduled for May 11, 2006, and began and concluded without the grievant present.⁴ On that same day, the grievant communicated to the agency that she was under the care of a medical provider and was not able to participate in the grievance hearing.⁵ As a result, the hearing officer issued an order on May 16, 2006, removing the grievance from the hearing docket and returning it to the hearings coordinator.⁶ This Department determined in EDR Ruling No. 2006-1358 that the hearing officer did not abuse his discretion and held that the grievance would be stayed until the grievant submits a written release from her psychiatrist certifying she is fully capable of participating in the grievance hearing. Upon such notification, the hearings coordinator will re-appoint a hearing officer and the hearing will be reopened. The grievant has not yet submitted a release.

¹ EDR Ruling Nos. 2006-1203 and 2006-1204.

² *Id.*

³ *Id.*

⁴ EDR Ruling No. 2006-1358.

⁵ *Id.*

⁶ Order of Hearing Officer, Case Nos. 8265/8309, May 16, 2006.

The agency now presents evidence of various actions taken by the grievant after EDR Ruling No. 2006-1358 was issued. The agency has provided documents indicating that the grievant filed a complaint against the agency in the United States District Court for the Eastern District of Virginia in Norfolk, claiming harassment, discrimination on the basis of national origin, and retaliatory discharge, in violation of Title VII of the Civil Rights Act of 1964, as amended. This action was concluded by an order of the court on April 3, 2007, which granted summary judgment to the agency. According to the agency, the grievant has also submitted complaints related to her termination pursuant to the agency's internal EEO complaint procedure. The agency asserts that the grievant has submitted similar complaints to the Department of Human Resource Management's Office of Equal Employment Services, the Secretary of Administration, and a member of the U.S. Congress.

Additionally, the agency describes various instances of alleged "dilatory tactics" by the grievant in these grievances and related matters. According to the agency, the grievant appealed EDR Ruling Nos. 2006-1203 and 2006-1204 to circuit court, but never appeared in court to pursue her claim.⁷ The agency has provided documentation indicating that the grievant also failed to appear before the Virginia Workers' Compensation Commission, leading to the dismissal of her claim.⁸ The agency states that the grievant filed an assault and battery charge in 2005 against a former co-worker, which was dismissed due to lack of evidence because the grievant did not appear at the trial. Finally, the agency has provided documents indicating that the grievant failed to appear at the hearing related to her unemployment claim with the Virginia Employment Commission.⁹

DISCUSSION

The agency seeks closure of the grievant's September 8, 2005 and September 30, 2005 grievances on two grounds. First, the agency cites the grievant's alleged "history of dilatory tactics" and the fact the grievant has not pursued her grievances in over a year to suggest they should be closed for "want of prosecution." Second, the agency contends that the doctrines of *res judicata* and collateral estoppel should cause the dismissal of the grievances due to the preclusive effects of the federal district court's April 3, 2007 order. These arguments are considered separately below.

Failure to Prosecute

The agency argues that because of the grievant's conduct in other proceedings and due to the fact the grievant has not pursued her grievances for over a year, the grievances should be dismissed for "want of prosecution." There is no provision in the grievance procedure that specifically applies to such a request. Therefore, it must be assumed the

⁷ The hearing in the action was alleged to have occurred in April 2006.

⁸ The Commission's dismissal order is dated February 2, 2007.

⁹ The decision in that matter was issued April 27, 2006.

agency is alleging that the grievant has failed to comply with a substantial procedural requirement of the grievance procedure and seeks closure of the grievances on the basis of this alleged noncompliance.¹⁰

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹¹ That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department's (EDR's) involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.¹² If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from the EDR Director, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for the delay in conforming to EDR's order.¹³

In this case, the agency's request for a compliance ruling would normally be premature. The agency presented no evidence that it has provided the grievant any notice of her alleged noncompliance before requesting a ruling from this Department. However, given the unique procedural posture of this case and because the grievant is aware of the agency's arguments and has responded to them, it makes sense to address the compliance issue at this time instead of requiring the agency to provide formal notice of noncompliance.

In EDR Ruling 2006-1358, this Department stated that a hearing officer will be reappointed and the grievances will proceed to hearing once the grievant provides medical documentation in support of her ability to proceed. The ruling did not require a time by which the grievant must provide such documentation. However, implicit in the ruling's grant of the stay was the understanding that the grievant would come forward promptly when she was able to proceed. The assertion of rights and claims in a reasonably timely manner is essential to resolving those rights and claims in a reasonably

¹⁰ Va. Code § 2.2-3003(G); *Grievance Procedure Manual* § 6.3.

¹¹ *Grievance Procedure Manual* § 6.3.

¹² *Id.*

¹³ While in cases of substantial noncompliance with procedural rules the grievance statutes grant the EDR Director the authority to render a decision on a qualifiable issue against a noncompliant party, this Department favors having grievances decided on the merits rather than procedural violations. Thus, the EDR Director will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, this Department will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

timely manner.¹⁴ Because there is evidence that the grievant has pursued other complaints while her grievances have been stayed, it raises the question of whether the grievant has followed this Department's ruling in good faith. Based on her involvement in the other complaints and the passage of time since the last notice from her physician, it would appear that the grievant's subsequent behavior could be inconsistent with being incapable of participating in a grievance hearing.

Therefore, the grievant is required, **within 30 calendar days** of the date of this ruling, to provide this Department with justification in the form of current medical documentation indicating that she continues to be under the care of a health care provider or psychiatrist and is incapable of participating in a grievance hearing, if that is indeed the case.¹⁵ Simply providing documentation that indicates the grievant continues to be under the care of a health care provider or psychiatrist is not sufficient. The documentation must indicate that the grievant is incapable of participating in a grievance hearing. If EDR does not receive adequate documentation, the hearings coordinator shall re-appoint a hearing officer and the hearing shall be reopened. If the grievant submits documentation sufficient to warrant continuation of the stay, this Department will continue to stay the grievance until the grievant indicates that she has been released or certified by her health care provider or psychiatrist as capable to participate in a grievance hearing. Once the grievant is capable to proceed, she must provide the necessary notification to this Department and the agency **within five workdays**.

*Res Judicata*¹⁶

The agency argues that the federal court's order granting the agency summary judgment in the action brought by the grievant in the United States District Court for the Eastern District of Virginia should preclude the claims raised in the grievance. "[T]he

¹⁴ See Va. Code § 2.2-3000(A) ("[T]he grievance procedure shall afford an immediate and fair method for the resolution of employment disputes."); see also EDR Ruling No. 2008-1794.

¹⁵ The grievant has recently submitted certain medical documents to this Department indicating that she wishes the continuance of her grievances to be maintained. While EDR accepts this information to establish that the grievant still wishes to pursue her grievances, if only at a later time, the medical documentation submitted is insufficient to continue the stay because it is from 2005, and, thus, not necessarily reflective of her current condition.

¹⁶ The agency also raises the doctrine of collateral estoppel, which "precludes the same parties to a prior proceeding from litigating in a subsequent proceeding any issue of fact that was actually litigated and essential to a final judgment in the first proceeding." *Glasco v. Ballard*, 249 Va. 61, 64, 452 S.E.2d 854, 855 (1995). This doctrine applies even if the subsequent proceeding involves a different claim for relief. *Id.* To establish collateral estoppel, the following elements must be established: (1) the parties to the two proceedings must be the same, (2) the issue of fact sought to be litigated must have been actually litigated in the prior proceeding, (3) the issue of fact must have been essential to the prior judgment, and (4) the prior proceeding must have resulted in a valid, final judgment against the party against whom the doctrine is sought to be applied. *Id.* Because collateral estoppel necessarily involves consideration of the facts of the grievances, EDR will not preemptively decide such issues of fact before the hearing. The hearing officer, as the finder of facts in grievance hearings, should make the initial determination on claims of collateral estoppel. Nothing in this ruling is meant to preclude the application of collateral estoppel to this case.

bar of *res judicata* precludes relitigation of the same cause of action, or any part thereof, which could have been litigated between the same parties and their privies.”¹⁷ To bar a claim through *res judicata*, a party must establish four elements: (1) identity of the remedy sought, (2) identity of the cause of action, (3) identity of the parties, and (4) identity of the quality of the persons for or against whom the claim is made.¹⁸ “The doctrine of *res judicata* only applies if the cause of action a [party] asserts in the pending proceeding is the same as the cause of action asserted in the former proceeding.”¹⁹ The party who asserts a *res judicata* defense bears the burden of proof.²⁰

The District Court decided the federal case on summary judgment in favor of the agency on the three claims raised by the grievant: discriminatory firing, hostile work environment, and retaliation. However, as explained further below, because there is a lack of identity of the causes of action between the claims raised in the federal court case and those raised in the grievance, the agency has not established the defense of *res judicata*.

In her grievances, the grievant is challenging Written Notices and her termination. The elements considered by a hearing officer in a challenge to a disciplinary action are: (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency’s discipline was consistent with law and policy, and (iv) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.²¹ Discrimination and retaliation theories make up only a part of the grievances, which primarily involve questions about the alleged conduct being disciplined and the excuses for the alleged conduct. The breadth of the grievances differs from the narrower claims brought in federal court, which concerned only her assertions of discrimination and retaliation. As such, it cannot be said that there is an identity of the cause of action between the federal court claims and the broad dispute presented by the grievance in this case.

In addition, the causes of action are manifestly different because of the divergent burdens of proof involved.²² The claims the grievant made in her federal court case were

¹⁷ *Davis v. Marshall Homes, Inc.*, 265 Va. 159, 164, 576 S.E.2d 504, 506 (2003) (quoting *Smith v. Ware*, 244 Va. 374, 376, 421 S.E.2d 444, 445 (1992)).

¹⁸ *Id.*

¹⁹ *Id.* at 165, 576 S.E.2d at 506.

²⁰ *Id.*

²¹ *Rules for Conducting Grievance Hearings* § VI(B).

²² *See, e.g., Brooks v. United States*, 833 F.2d 1136, 1146 (4th Cir. 1987) (stating “it is also well established that because of the different burdens of proof involved, acquittal of a criminal charge is not *res judicata* in a civil case”); *see also Sanchez v. U.S. Airways, Inc.*, No. 99-6586, 2001 U.S. Dist. LEXIS 9732, at *11-*20 (E.D. Pa. July 13, 2001) (finding that *res judicata* did not apply between one case in which an employee alleged that he was fired without cause and another in which the employee alleged that his termination was the result of discrimination because of the different inquiries and burdens of proof); *Blackwell v. American Airlines, Inc.*, No. 98 C 6856, 2001 U.S. Dist LEXIS 8474, at *4-*7 (N.D. Ill. June

affirmative in nature. The grievant had the burden of proof to establish the elements of her claims under the requirements of Title VII.²³ At a grievance hearing, it is the agency that has the burden to prove, *inter alia*, that the disciplinary actions were consistent with law and policy.²⁴ The adjudication by the federal court was only that the grievant could not establish by a preponderance of the evidence her claims under Title VII. In her grievance, however, it is the agency that must prove that she actually engaged in the behavior, the behavior was misconduct, and the disciplinary actions were consistent with law and policy. As such, the District Court's order does not preclude the grievance from proceeding.

CONCLUSION

Based on the foregoing, the agency's request to dismiss the grievances for noncompliance is denied. The agency's request to dismiss the grievances because of *res judicata* is also denied. This Department's rulings on matters of compliance are final and nonappealable.²⁵

Claudia T. Farr
Director

13, 2001) (refusing to apply *res judicata* and collateral estoppel, because of the differing issues and burdens of proof, to a court action in which the employee alleged discrimination and retaliation even though in an earlier arbitration proceeding the issues of whether the employer had just cause to terminate the employee were considered).

²³ *E.g.*, Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 285 (4th Cir. 2004) (en banc).

²⁴ *Rules for Conducting Grievance Hearings* § VI(B).

²⁵ Va. Code §§ 2.2-1001(5), 2.2-3003(G).