

Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date: August 20, 2009; Ruling #2010-2374; Agency: Department of Conservation & Recreation; Outcome: Grievant In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF THE DIRECTOR

In the matter of Department of Conservation and Recreation
Ruling No. 2010-2374
August 20, 2009

The grievant has requested a ruling on whether his May 27, 2009 grievance with the Department of Conservation and Recreation (the agency) is in compliance with the grievance procedure. The agency asserts that the grievant did not meet the rules for initiating a grievance as he is allegedly using the grievance procedure to harass or impede the efficient operations of government. For the reasons set forth below, this Department determines that the grievance complies with the grievance procedure and may proceed.

FACTS

The grievant initiated his May 27, 2009 grievance to challenge a selection in which he competed. He was given an initial interview, but was eliminated from the process after that stage. The agency has administratively closed the grievance at the third resolution step due to alleged noncompliance, asserting that the grievant is using the grievance procedure only to harass or impede the efficient operations of government.

The agency states that in the 22 years the grievant has been employed with the agency he has filed 19 grievances. Most of those grievances did not result in any relief being awarded to the grievant, but in four of them, the grievant did receive at least partial relief. The agency also notes that the grievant has filed many other complaints, such as with the Federal Equal Employment Opportunity Commission and the Commonwealth's Office of Equal Employment Services. Many of the grievant's complaints have alleged discrimination and retaliation.

The agency maintains that all of the grievant's claims of discrimination and retaliation, across venues, have been unsuccessful. Parts of the May 27, 2009 grievance at issue here include similar claims of discrimination and retaliation; other parts include allegations of misapplication of policy. The agency notes that the grievant has filed similar unsuccessful grievances challenging selections in 1999, 2006, and 2007.

DISCUSSION

The grievance procedure provides that a grievance cannot “be used to harass or otherwise impede the efficient operations of government.”¹ This prohibition is primarily intended to allow an agency to challenge issues such as the number, timing, or frivolous nature of grievances, and the related burden to the agency.² However, to find that a grievant has failed to comply with this provision of the *Grievance Procedure Manual*, there must be evidence establishing that the grievant knew with substantial certainty that his/her actions would impede the operations of an agency.³ It may be inferred that a grievant intends the natural and probable consequences of his/her acts.⁴ While neither the number, timing, or frivolous nature of the grievances, nor related burden to an agency, are controlling factors in themselves, those factors could, in some cases, support an inference of harassment cumulatively or in combination with other factors. Such determinations are made on a case-by-case basis.⁵

The agency appears to argue that the high number of the grievant’s past unsuccessful grievances and complaints, which alleged similar charges, indicates that his May 27, 2009 grievance is for no purpose other than to harass or impede the operations of government. While the number of grievances in which this grievant has been involved is comparatively high, it cannot be said that the number and/or timing of these grievances is so excessive that the May 27, 2009 grievance should be closed. Indeed, it appears that the last grievance the grievant submitted was in 2007. Conversely, in EDR Ruling No. 99-138, the grievant who was found to be harassing and/or impeding the operations of government had filed 24 grievances in a span of about two years, many of which were submitted within days of each other.

As to the alleged frivolous nature of the May 27, 2009 grievance, it is understandable that the agency would consider the grievant’s complaints of discrimination and retaliation to be spurious at this point. The grievant has apparently never succeeded on such claims, even though he has raised them multiple times and in multiple venues. Nevertheless, the May 27, 2009 grievance does not simply raise these claims, but also raises issues of misapplication of policy. Further, we cannot conclude at this early stage that there are no new facts related to the challenged selection that could support the grievant’s claims of discrimination or retaliation.

For the above reasons, this Department cannot conclude from the surrounding facts and circumstances that the grievant is using the grievance procedure to harass or otherwise impede the efficient operations of the agency. There is insufficient evidence to establish that the grievant’s intent was to harass or impede rather than to challenge a

¹ *Grievance Procedure Manual* § 2.4.

² See EDR Ruling No. 2002-224.

³ See EDR Compliance Ruling No. 99-138, Sept. 21, 1999. Closing a grievance on these grounds is an extreme sanction. As such, the analysis of such a claim carries a commensurately high burden.

⁴ See *id.*

⁵ See *id.*

management action on the basis of alleged discrimination, retaliation, and misapplication of policy.

CONCLUSION

For the reasons discussed above, this Department has determined that the grievance initiated on or around May 27, 2009 is compliant with Section 2.4 of the *Grievance Procedure Manual* and must be permitted to proceed. The grievance must be returned to the third step-respondent, who must respond to the grievance within five workdays of receipt of this ruling. This Department's rulings on matters of compliance are final and nonappealable.⁶

Claudia T. Farr
Director

⁶ See Va. Code §§ 2.2-1001(5); 2.2-3003(G).