

Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date: July 6, 2010;  
Ruling #2010-2649; Agency: Virginia Community College System; Outcome:  
Grievant In Compliance.



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

**COMPLIANCE RULING OF THE DIRECTOR**

In the matter of the Virginia Community College System  
Ruling No. 2010-2649  
July 6, 2010

The grievant has requested a ruling on whether his April 15, 2010 grievance with the Virginia Community College System (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's April 15, 2010 grievance raises issues regarding interactions he has recently had with his supervisor, the Sergeant. Primarily, the grievant, an officer in one of the agency's police units, has alleged retaliation for submitting an earlier grievance on or about December 10, 2009. For instance, the grievant has concerns with responses by his supervisor about the grievant's "on-going actions" in relation to his earlier grievance and/or raising of workplace issues. The grievant's supervisor stated that that grievant's conduct could be perceived by others as creating a "hostile work environment." The grievant appears to view his supervisor's statements as retaliatory for filing the December 10 grievance and as expressing negativity toward the grievant's use of the grievance procedure and raising of workplace issues. Further, these comments by the supervisor were allegedly made while the earlier grievance was active and shortly before the hearing. The grievant ultimately withdrew the earlier grievance on the eve of the scheduled hearing.

The Lieutenant administratively closed the April 15 grievance for alleged noncompliance, asserting that the grievant is using the grievance procedure to harass and/or impede agency operations. The agency has submitted various arguments in support: 1) the grievance challenges no adverse employment action and, therefore, the matters should be addressed through informal discussion; 2) the grievant withdrew his earlier grievance at the last minute, on the eve of a scheduled hearing; 3) the agency has devoted large amounts of time and resources to address the earlier grievance and prepare for the hearing; 4) work schedules for other officers had to be adjusted to have witnesses available for the second step meeting in the earlier grievance and the hearing; 5) the day-to-day operations of the agency have been disrupted

by forcing higher-level management to respond to unsubstantiated claims of retaliation and discrimination; 6) the grievant is using the process to circumvent attempts by management to address performance and/or conduct issues by the grievant; 7) the grievant has a pattern of informal complaints and repeated use of the grievance procedure; 8) the grievant is challenging the same actions as his earlier grievance; and, as stated by the Lieutenant, 9) the grievance could be seen as the grievant “discriminating against his supervisor and fellow officers ... on the basis of color.”

### DISCUSSION

The grievance procedure provides that a grievance cannot “be used to harass or otherwise impede the efficient operations of government.”<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> It may be inferred that a grievant intends the natural and probable consequences of his/her acts.<sup>4</sup> 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.<sup>5</sup> The agency has asserted numerous grounds to support its arguments in this matter, each of which are addressed generally below.

#### Frequent Use of Grievance Procedure

Based on information presented for this ruling, the grievant has recently filed a total of two grievances, including the one that is the subject of this ruling.<sup>6</sup> We conclude that filing of these two grievances does not support a finding of frequent use such that a grievance should be closed as harassing or impeding efficient operations.<sup>7</sup>

The agency also states that the grievant has submitted numerous informal complaints in the past. According to the grievant’s supervisor, he has “dealt with numerous complaints from [the grievant] regarding the working habits of every officer under [his] command except [one officer].”<sup>8</sup> While several operational adjustments were reportedly made as a result of the complaints, the grievant’s supervisor states that his investigation of all the complaints determined that they were minor and “personality conflict based.” Reasonable minds could

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<sup>1</sup> *Grievance Procedure Manual* § 2.4.

<sup>2</sup> See EDR Ruling No. 2002-224.

<sup>3</sup> 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.

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> The grievant apparently also filed one other grievance in October 2000.

<sup>7</sup> See EDR Ruling No. 99-138 (finding grievant to be harassing and/or impeding the operations of government had filed 24 grievances in about two years).

<sup>8</sup> The grievant’s supervisor currently has five officers, including the grievant, under his command.

disagree about the relative importance of issues the grievant has raised in the past. However, this Department cannot draw any inference that the grievant's past history of submitting informal complaints indicates that his purpose for filing this grievance was to harass or impede agency operations.<sup>9</sup>

### Frivolous Nature of Grievance

In various ways, the agency appears to assert that the April 15 grievance is harassing because of its alleged frivolous nature. First, the agency appears to state that because the grievance does not challenge any adverse employment action, there is no basis for the grievance. However, there is no such limitation imposed by the Code of Virginia or the *Grievance Procedure Manual*.<sup>10</sup> The adverse employment action standard is only applied to determine what grievances will qualify for an administrative hearing, not what issues can be grieved.<sup>11</sup> By statute, employees are encouraged and permitted to use the grievance procedure to raise and resolve concerns related to their employment and pursue their grievance at least through the management steps.<sup>12</sup> Thus, employees with access can generally grieve anything related to their employment. As such, any absence of an adverse employment action has no bearing on the issue of whether a grievance can be closed as harassing.

The agency also appears to assert that the issues raised in this grievance are somehow duplicative of his earlier grievance. For instance, the agency states that the grievant used some of the same words in his new grievance. While it might be said that the grievant could be raising similar theories, i.e., "retaliation," the management actions being challenged are entirely different. Here, the grievant is challenging acts that occurred after the first grievance. As such, these grievances, even if similar words are used, are not duplicative.

Knowing use of the grievance procedure to raise concerns that have no arguable basis in fact, policy, or law could be grounds to close a grievance for harassment or impeding the efficient operations of government. We cannot conclude that is the case here. The grievant has alleged significant concerns about recent interactions with his supervisor. For instance, he alleges that his supervisor stated that he was "not happy" with some of the grievant's recent actions during his use of the grievance procedure. The grievant has raised issues with his supervisor's statement in an e-mail that the grievant's conduct could be seen as a "hostile work environment" against a co-worker and possibly others. While the grievant's supervisor has explained reasonably that he was merely stating how other officers might have perceived the grievant's conduct, the grievant's claims clearly raise important workplace issues.

### Withdrawal of First Grievance

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<sup>9</sup> It is also noteworthy that the Code of Virginia states that "employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Va. Code § 2.2-3000.

<sup>10</sup> See Va. Code § 2.2-3003; *Grievance Procedure Manual* § 2.4.

<sup>11</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>12</sup> See Va. Code § 2.2-3000.

The agency also attempts to imply an improper, harassing motive to the grievant's withdrawal of his first grievance on the eve of the scheduled hearing. We see no evidence in the grievant's withdrawal to suggest he is now using the grievance procedure to harass or impede agency operations. Rather, the grievant, in the weeks leading up to the hearing, made attempts to prevent what he perceived as potential retaliation against others testifying at the hearing and to ensure that a fair hearing, in his view, took place. In addition, it appears one of the reasons for his withdrawal was due to the refusal of witnesses to attend the hearing to testify. For instance, because of certain witnesses apparently withdrawing, the grievant sought to have a Vice President and a member of human resources testify as knowledgeable witnesses. Both of these witnesses declined to be part of the hearing.

The agency also discusses the large amounts of time and resources expended to process the earlier grievance, respond to the grievance, and prepare for the hearing. However, this Department cannot infer that because of the significant work the agency completed on an earlier grievance that the grievant is using this new grievance to somehow harass or impede agency operations. A grievance is state business and requires the efforts of management as any other state business.

#### Disruption of day-to-day operations

The agency challenges the grievant's use of the grievance procedure because it allegedly disrupts day-to-day operations. The agency asserts that through the grievance, higher level management is forced to respond to unsubstantiated claims. One of the primary purposes of a grievance is to determine whether a claim can be substantiated. Furthermore, even if ultimately a claim is not fully substantiated, the grievance process affords parties the opportunity to explore the facts that prompted the grievance, thus, potentially reducing the likelihood of future conflict.

The agency also asserts that adjustments had to be made to the work schedules of various officers to ensure coverage at various times for the grievant's first grievance. While we acknowledge the impact that participating in a hearing can have on the work environment, this Department cannot find that the grievant's purpose for filing this grievance is to cause such disruptions.

#### Use of Process to Circumvent Performance Management

The agency asserts that the grievant is using the grievance procedure to prevent management from raising and addressing performance deficiencies with the grievant. This argument is confusing because the grievance process does not prohibit management from pursuing disciplinary action or otherwise implementing performance management as prescribed by applicable state and agency policy and related law. While unwarranted management actions may be reversed by the grievance process, there is nothing inherent in an employee's use of the grievance procedure that prevents supervisors from properly managing employee performance. While the agency alludes to a history of the grievant's use of medical and other leave to avoid such matters, it presents no information or evidence to show that the grievant's use of leave was inappropriate under policy, much less that any leave issues demonstrate that his grievance was

initiated to harass the agency. For instance, there is no evidence that the grievant's use of sick leave was for non-sick leave reasons or was otherwise disapproved by the agency. As such, this Department can draw no negative conclusions against the grievant for assumedly appropriate use of leave under policy.

### CONCLUSION

To establish that a grievance is harassing or impeding the efficient operations of government is a high burden. The arguments presented by the agency in this case do not reach that level. Accordingly, this Department cannot conclude that the grievant is using the grievance procedure to harass or otherwise impede the efficient operations of the agency.

This ruling in no way determines whether either party's conduct was appropriate or inappropriate. However, at the same time, this Department understands and appreciates the grievant's supervisor's encouragement of the grievant to find "common ground" and work "collaboratively and harmoniously" with his fellow officers. Such goals are reasonable and support the creation of efficient work environments with good morale.

For the reasons discussed above, this Department has determined that the grievance initiated on or around April 15, 2010 is compliant with Section 2.4 of the *Grievance Procedure Manual* and must be permitted to proceed. The grievance must be returned to the appropriate first 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.<sup>13</sup>

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Claudia T. Farr  
Director

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<sup>13</sup> See Va. Code §§ 2.2-1001(5), 2.2-3003(G).