

Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date: February 4, 2011; Ruling No. 2011-2872; Agency: Department of Corrections; Outcome: Grievant In Compliance in part, Grievant Not In Compliance in part.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF THE DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2011-2872
February 4, 2011

The grievant has requested a ruling on whether five grievances he recently initiated with the Department of Corrections (the agency) are in compliance with the grievance procedure. For the reasons set forth below, this Department determines that some of the grievances do not comply with the initiation requirements of the grievance procedure.

FACTS

As of the drafting of this ruling, the grievant appears to have initiated nine grievances with the agency since August 2010. The first four grievances challenged a long history of events that involve allegations of retaliation, discrimination, hostile work environment, and favoritism. The grievant requested transfer to a different facility as well. Three of these grievances also challenge the series of events that led to the grievant's placement on administrative leave and a determination that he was not fit for duty. The first four grievances were concluded following a meeting with a member of management on December 10, 2010.

The grievant and the agency signed an agreement on that date to settle the grievances. In the agreement, the agency agreed to transfer the grievant to a different facility per his request. The grievant also agreed to conclude the first four grievances and that he would not file "additional grievances challenging the same incidents/issues/actions" as raised in those four grievances. Ten days later, the grievant initiated the first of the next five grievances that are the subject of this ruling. The agency has closed those five grievances for initiation noncompliance, asserting that the grievances are duplicative of past grievances and run afoul of the December 10, 2010 agreement. The grievant has sought this compliance ruling to have his recent five grievances re-opened.

DISCUSSION

The grievance procedure provides that a grievance must not challenge the same management action challenged by another grievance.¹ Without question, the grievant has initiated multiple grievances, all of which related to interrelated ongoing issues. While few of

¹ *Grievance Procedure Manual* § 2.4.

these grievances are completely identical, they challenge many of the same management actions and history of events. For instance, in his first four grievances, the grievant has raised numerous allegations of past discrimination and retaliation. To the extent that any of his other five grievances challenge allegations of discrimination or retaliation, the question becomes what new management actions of alleged discrimination or retaliation occurred since the last grievances were concluded about those same issues? If there are no new management actions challenged, the discrimination or retaliation claim is no different than the past allegations. If that is the case, the grievance will be deemed duplicative.

December 20, 2010 Grievance

This grievance appears to challenge the grievant's failure to be returned to work as of December 20, 2010,² though the stated "Date Grievance Occurred" on the Grievance Form A is December 2, 2010, prior to the meeting and agreement on December 10, 2010. The grievant has also included numerous facts from the past regarding his time on administrative leave and allegations about discrimination. However, none of the allegations of discrimination, beyond the fact that the agency has failed to return the grievant to work, occurred since his last grievances about discrimination had been concluded. Further, the grievance does not raise any new management actions taken against the grievant in the intervening few days. As such, the claims of discrimination challenge no new management actions and are, therefore, deemed to be duplicative of past grievances. While it might be acceptable to raise a question of why he has not been returned to work from administrative leave, this basic claim is repeated in other grievances discussed below. Therefore, that claim will be addressed as part of other grievances. This grievance may remain administratively closed.

January 3, 2011 Grievance

This grievance alleges ongoing retaliation. The grievant includes a request to be transferred back to his original facility, as well, and seeks a promotion. The Form A does not include any new management actions taken against the grievant that occurred since the initiation of his prior retaliation grievances or since the December 10, 2010 agreement. This grievance appears to challenge issues of retaliation that have been raised in prior grievances. Consequently, the January 3, 2011 grievance was appropriately determined to be duplicative and will remain administratively closed.

January 5, 2011 Grievance

While this grievance re-asserts some of the past history from other grievances, the basic claim of this grievance is that the agency has failed to return the grievant to work despite new developments involving the grievant's medical appointments. Thus, this grievance appears to challenge new management actions (more precisely inactions in this case) based on a claimed failure to act on materially significant new developments. Consequently, this grievance must be

² To the extent this grievance is also challenging the grievant's initial removal from the workplace, it would be duplicative of issues raised in prior grievances that had been concluded on December 10, 2010.

allowed to proceed. To the extent the grievant is alleging that any of these new management actions (or inactions) are the result of discrimination and/or retaliation, the grievant is able to raise those theories to challenge these new management actions (or inactions) challenged in this grievance.

It appears that the agency asserts that the grievant's filing of this grievance violates the terms of his December 10, 2010 agreement with the agency. While this is certainly not an unreasonable argument, we cannot find that this grievance is truly challenging the "same incidents/issues/actions" as his prior grievances. Rather here the grievant is challenging the agency's allegedly improper failure to return him to work following his recent completion of medical appointments. Further, this grievance asserts new issues regarding alleged breaches of confidentiality. These are not issues that could have been raised on December 10, 2010. Notwithstanding the agreement that was signed, the January 5, 2011 grievance should be permitted to proceed.

January 7, 2011 and January 18, 2011 Grievances

These grievances continue to raise many of the same repetitive and ongoing issues in dispute between the grievant and the agency, including discrimination, retaliation, the failure to return the grievant to work, and procedural and/or document disputes in grievances.³ Most notably, the grievances include almost identical lengthy requests for relief. This Department has found no new management actions taken against the grievant challenged by these grievances and, therefore, concludes that these grievances are duplicative and will remain administratively closed.

CONCLUSION

As stated above, this ruling finds that four of the five grievances initiated by the grievant do not comply with the initiation requirements of the grievance procedure and were appropriately closed. The grievant's January 5, 2011 grievance must be permitted to proceed. As such, **within five workdays of receipt of this ruling** the appropriate first step-respondent must respond to that grievance. This Department's rulings on matters of compliance are final and nonappealable.⁴

The parties should be mindful that the grievance procedure provides that a grievance cannot "be used to harass or otherwise impede the efficient operations of government."⁵ 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.⁶ While none of

³ Initiating a new grievance is not the proper means to raise noncompliance matters. Rather, issues of noncompliance are generally raised pursuant to Section 6 of the *Grievance Procedure Manual* as part of the related grievance. See EDR Ruling No. 2008-1984.

⁴ See Va. Code § 2.2-1001(5), 2.2-3003(G).

⁵ *Grievance Procedure Manual* § 2.4.

⁶ See EDR Ruling No. 2002-224.

these factors are controlling in themselves, those factors could, in some cases, support an inference of harassment cumulatively or in combination with other factors.

A reminder of this language is being provided at this time because the grievant has initiated nine grievances since August 2010, many of which challenge the same or related issues, and the last five grievances in less than 30 days. Because this ruling essentially narrows the grievances down to one active grievance, we need not address whether the grievant's repeated filing of these grievances in such a short amount of time and generally about the same issues amounts to harassment. However, the grievant should be cautioned that if he continues to file grievances at such a pace without new management actions being challenged, his conduct could run afoul of this provision of the *Grievance Procedure Manual*. If either party has questions about the provisions of the grievance procedure, they should contact EDR's AdviceLine at 1-888-232-3842.

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Director