

Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date: January 31, 2012; Ruling No. 2012-3204; Agency: Department of Correctional Education; Outcome: Agency in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF THE DIRECTOR

In the matter of the Department of Correctional Education
Ruling Number 2012-3204
January 31, 2012

The grievant has requested a ruling on whether her December 7, 2011 grievance with the Department of Correctional Education (the agency) is in compliance with the grievance procedure. The agency asserts that the issue challenged by the grievant is not grievable. For the reasons set forth below, this Department determines that the grievance will remain closed.

FACTS

The grievant's December 7, 2011 grievance challenges a memo, dated November 21, 2011, sent to her by a member of upper management directing the removal of names of incarcerated youth from a presentation. The agency took no disciplinary action against the grievant. However, the grievant challenges the November 21, 2011 letter as a "reprimand." As relief, the grievant has requested, in short, a "written retraction and apology" for the letter and training for the member of upper management and the agency's human resource director on workplace harassment, retaliation, the "Code of Conduct," and ethical supervision practices. The agency has closed the grievance, asserting that the issue being challenged is "not grievable." The grievant now appeals that determination.

DISCUSSION

If the access provisions and initiation requirements are met, the *Grievance Procedure Manual* essentially allows an employee to grieve anything related to his/her employment.¹ Therefore, the grievant's challenge to a memo related to her employment has been incorrectly characterized by the agency as "not grievable." Though no disciplinary action was taken, there is no prerequisite for such an action to occur before a management action, even the issuance of a memo, may be the potential subject of a properly initiated grievance. However, our inquiry does not end here. A fair reading of the agency's position is that the grievant has failed to meet the grievance initiation requirements.

Section 2.4 of the *Grievance Procedure Manual* provides that a grievance cannot "be used to harass or otherwise impede the efficient operations of government."² This prohibition is

¹ See *Grievance Procedure Manual* §§ 2.3, 2.4; see also Va. Code § 2.2-3000.

² *Grievance Procedure Manual* § 2.4.

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.³ 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.⁴ It may be inferred that a grievant intends the natural and probable consequences of his/her acts.⁵ 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.⁶

The grievant's December 7, 2011 grievance challenges a written directive to remove the names of individuals from a presentation. However, the grievant's perception that this memo was somehow disciplinary or a reprimand is not borne out by the facts. The agency has simply directed the grievant to make changes to an item of the grievant's work, which is entirely within management's prerogative. Further, the agency's memo was at the direction of its attorney.

Yet, we understand the grievant's arguments. If the grievant did indeed submit the presentation for approval and then utilized that presentation in a manner directed by her superiors, it would certainly make any attempt by the agency to then discipline the grievant for those actions highly suspect. However, the agency took no disciplinary action here. Therefore, the grievant's alarm over these issues is overstated. If it is assumed that the grievant's superiors approved of the presentation with the names, it is reasonable that they could later change their minds and direct her to remove the names without disciplining her.

The grievant's requested forms of relief are also not appropriate. For instance, the grievant's request for a written retraction and apology is baseless. The agency has exercised its management discretion in a reasonable manner in providing an instruction at the direction of its attorney. Thus, a retraction is unwarranted. Similarly, this Department has reviewed nothing that anyone at the agency should apologize for in its handling of this matter. Where concerns have been handled in a reasonable and measured way, as appears to be the case here, the grievant's request for members of management to be trained in certain areas is unwarranted and borderline insulting.

Thus, there is nothing to truly address in this grievance that would require full consideration by all management step-respondents. The agency has given the grievant a reasonable instruction that it intends the grievant to follow. There is no likelihood that the instruction, based on direction from the agency's attorney, will change. The grievant can either follow the instruction or subject herself to possible disciplinary action. There are no further issues to address or facts to explore regarding the November 21, 2011 memo.

³ See EDR Ruling No. 2002-224.

⁴ 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.

⁵ See *id.*

⁶ See *id.*

In addressing this matter, we are also cognizant of the grievant's conduct in past grievances. As noted in EDR Ruling Nos. 2012-3057, 2012-3059, the grievant has a history of submitting numerous ruling requests on meritless issues.⁷ EDR must be vigilant not to allow the grievance procedure to become a tool for an employee to challenge each and every action by his/her superiors, however minor. The facts and circumstances surrounding her December 7, 2011 grievance, when considered with knowledge of the grievant's prior conduct in her grievances, support an inference of harassment. The November 21, 2011 memo directed the grievant to alter a presentation. It is not the type of issue normally seen challenged in a grievance because there was no consequence and was a reasonable response to a concern of management.

Taking all of these factors into account, it is this Department's determination that the December 7, 2011 grievance will remain closed. There are simply no issues of substance to address and allowing the grievance to proceed would serve no other purpose than to impede the efficient operations of government. Use of the grievance procedure in this case would not advance the interests of any party or the Commonwealth. As such, this Department has determined that the December 7, 2011 grievance does not comply with Section 2.4 of the *Grievance Procedure Manual* because it supports an inference of harassment and impedes the efficient operations of government. This Department's rulings on matters of compliance are final and nonappealable.⁸

Importantly, however, this ruling does not find that the grievant has somehow divested herself of the right to file any future grievances with the agency. Indeed, if this grievance was addressing a more substantial matter, such as one that rose to the level of an adverse employment action, there would be no question that the grievance ought to proceed. This ruling is confined to the precise facts of this case, in light of the grievant's prior conduct in her grievances and the insignificant nature of the management action at issue.

Claudia T. Farr
Director

⁷ See EDR Ruling Nos. 2012-3057, 2012-3059; EDR Ruling Nos. 2012-3047, 2012-3048; EDR Ruling No. 2011-3019.

⁸ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).