

Issue: Compliance; hearing officer appointment request; Ruling Date: October 8, 2002;
Ruling #2002-170; Agency: Department of Corrections; Outcome: Agency in
compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2002-170
October 8, 2002

The grievant has requested a ruling in his favor regarding his February 26, 2002 grievance with the Department of Corrections. The grievant claims that the agency, in contradiction to this Department's qualification ruling dated June 5, 2002, failed to request the appointment of a hearing officer within five workdays of receipt of the circuit court's decision to qualify the grievance for hearing.

FACTS

On January 28, the grievant filed a grievance challenging a Group III Written Notice with recommendation for termination received on January 23, 2002. On January 29, he received a formal letter of termination, effective February 1, based on the recommendation in the January 23 Written Notice. On February 26, he initiated a second grievance, challenging his termination.

The January 28 grievance proceeded to hearing before an administrative hearing officer on March 15. The hearing officer upheld the Written Notice and removal.¹ On March 27, the grievant requested another hearing on his termination, this one based on the February 26th grievance. DOC initially qualified the grievance for a hearing, then rescinded the qualification after the hearing officer issued his decision in the January 28th grievance upholding the discipline and termination. The grievant requested qualification of the February 26th grievance from this Department on the issue of termination, on the basis that the second grievance had never been consolidated with his earlier grievance. On June 5, 2002, this Department denied qualification of the February 26th grievance based on the principles of finality and res judicata.² In that ruling, this Department

¹ See Decision of Hearing Officer, April 11, 2002.

² See Qualification Ruling of Director No. 2002-074, June 5, 2002.

advised the grievant of his appeal rights and stated that if the circuit court should qualify the grievance for hearing, the agency will request the appointment of a hearing officer within five workdays of receipt of the court's decision.³

Subsequently, the grievant appealed this Department's denial of qualification. The circuit court, by letter ruling dated August 27, 2002, found that the grievant is entitled to a hearing on his February 26th grievance. Consequently, per this Department's June 5, 2002 qualification ruling, the agency was to request the appointment of a hearing officer within five workdays of receipt of the court's qualification decision. The agency allegedly failed to do so. As such, the grievant seeks a ruling from this Department in his favor regarding the termination.

DISCUSSION

This Department's directive to the agency to request the appointment of a hearing officer within five workdays of receipt of the court's qualification decision was intended to prompt the expeditious appointment of a hearing officer. As the grievant correctly notes, the *Grievance Procedure Manual* does not provide a time limit for the agency to appoint a hearing officer upon qualification by the circuit court. However, the grievant's request for a ruling regarding the agency's failure to appoint a hearing officer within five workdays, as directed in our June 5, 2002 qualification ruling, may properly be addressed as a noncompliance matter.

The grievance procedure requires both parties to address noncompliance through a specific process.⁴ That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily without this Department'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. If the agency fails to correct the alleged noncompliance, the grievant may request a ruling from this Department. Should this Department find that the agency violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department may resolve the grievance in the grievant's favor unless the agency can establish just cause for its noncompliance.

In the present case, the grievant has not yet notified the agency head of the alleged noncompliance as mandated by the grievance procedure, and therefore, his request for a compliance ruling from this Department is premature. Moreover, on September 17, 2002, this Department received the agency's request for the appointment of a hearing officer, thus rendering the issue of noncompliance moot. Additionally, although the agency's delay was unfortunate, the delay does not appear to have resulted from bad faith on the

³ *Id.*

⁴ *Grievance Procedure Manual* § 6, pages 16-18.

agency's part. In sum, because the agency has corrected any noncompliance by requesting the appointment of a hearing officer, the compliance issue that the grievant raises is moot and can have no effect on the outcome of the merits of his grievance.⁵

The grievant contends that if he failed to meet the deadline set by this Department concerning his appeal, the grievance would be concluded and, as such, the agency should be held to the same standard. This contention is incorrect. The grievance procedure states that an employee has five workdays from receipt of this Department's decision to deny qualification to submit his grievance form to the agency's Human Resources Office for appeal.⁶ A grievant's failure to do so would raise an issue of noncompliance that would be addressed in the same manner as set forth herein for the agency's alleged failure to request the appointment of a hearing officer within five workdays.⁷

CONCLUSION

For the reasons discussed above, this Department has determined that the agency is in substantial compliance with the procedural requirements of the grievance procedure. This Department's rulings on matters of compliance are final and nonappealable.⁸

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⁵ *Grievance Procedure Manual* § 6.3, page 17.

⁶ *Grievance Procedure Manual* §4.4, page 12.

⁷ See Department of Employment Dispute Resolution (EDR) Ruling No. 2002-175.

⁸ Va. Code § 2.2-1001(5).