

Issue: Compliance/administrative review of Hearing Decision #504; Ruling Date: February 23, 2004; Ruling #2004-593; Agency: Department of Corrections; Outcome: grievant waived his right to challenge the agency's alleged noncompliance at the second-step meeting



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2004-593
February 23, 2004

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 504. The grievant contends that the decision does not comply with the grievance procedure's provision that allows the grievant to request that the agency designate another second-step respondent when an employee alleges retaliation or discrimination by the individual who would otherwise serve as the second-step respondent. For the reasons discussed below, this Department concludes that, by advancing his grievance through the management resolution steps and to hearing before contesting the agency's alleged noncompliance as provided in the grievance procedure, the grievant effectively waived his right to challenge the noncompliance.

FACTS

The grievant was an agricultural supervisor with the Department of Corrections (DOC) until his removal on October 13, 2003. On October 10, 2003, the grievant received two Group I Written Notices for abusive language and insubordination. Based on an accumulation of Written Notices, DOC terminated the grievant's employment, effective October 13. The grievant filed a grievance on October 31, challenging the Written Notices and removal.¹

The hearing took place on January 22, 2004 and the hearing officer issued his decision on January 26, 2004. In his decision, the hearing officer upheld the two Group I Written Notices and removal. The grievant requested administrative review by this Department.

DISCUSSION

In his request for administrative review, the grievant states that "[t]he specific portion of the grievance procedure with which the decision does not comply is Second Resolution Step Meeting [Grievance Procedure Manual section] 3.2."² As an initial point,

¹ See Grievance Form A, dated October 31, 2003.

² Request for Administrative Review, Case No. 504, dated February 2, 2004.

this objection challenges an alleged procedural violation by DOC prior to the hearing, not an alleged violation of the grievance procedure by the hearing officer.

Further, the grievance procedure requires both parties to address procedural noncompliance through a specific process.³ That process assures that the parties first communicate with each other about the purported 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 alleged noncompliance, the grievant may request a ruling from this Department.⁴

In addition, the grievance procedure requires that all claims of party noncompliance be raised immediately.⁵ Thus, if Party A proceeds with the grievance after becoming aware of Party B's procedural violation, Party A may waive the right to challenge the noncompliance at a later time.⁶ Finally, this Department has long held that it is incumbent upon each employee to know his responsibilities under the grievance procedure. Neither a lack of knowledge about the grievance procedure or its requirements, nor reliance upon general statements made by agency management or human resources will relieve the grievant of the obligation to raise a noncompliance issue immediately, as provided in the grievance procedure, upon becoming aware of a possible procedural violation.

Here, the grievant claims that an alleged procedural violation occurred *at the second management resolution step*. Although he was aware of a possible procedural error at the second-step, he continued to advance his grievance to the qualification phase, and then to hearing, without raising the issue of noncompliance with the agency head or with this Department until after he had received his hearing decision. As such, the grievant waived his right to challenge the agency's alleged noncompliance at the second-step meeting.

APPEAL INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.⁷ The grievant only requested administrative review from this Department. Therefore, the hearing decision in this case is now a final hearing decision. Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance

³ See *Grievance Procedure Manual* § 6, pages 16-18.

⁴ See *Grievance Procedure Manual* § 6.3, page 17.

⁵ *Id.*

⁶ *Id.*

⁷ *Grievance Procedure Manual*, § 7.2(d), page 20.

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arose.⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁹ This Department's rulings on matters of procedural compliance are final and nonappealable.¹⁰

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⁸ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a), page 20.

⁹ *Id.*

¹⁰ Va. Code § 2.2-1001 (5).