

Issue: Compliance/should grievance advance to hearing; Ruling Date: July 14, 2004;
Ruling #2004-611; Agency: Department of Corrections; Outcome: grievance shall
advance to hearing



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2004-611
July 14, 2004

The grievant has requested a ruling in his October 16, 2003 grievance with the Department of Corrections (DOC or the agency). It appears that the grievant seeks qualification of his October 16, 2003 grievance, however for the reasons stated below, this Department rules not on whether the grievance should qualify for hearing on the merits, but concludes as a matter of compliance that the October 16, 2003 grievance shall advance to hearing.

FACTS

The grievant is employed as a Utilities/Trades Lead Worker with DOC. On September 17, 2003, the grievant was suspended from work for failing to remove his earrings when instructed to do so by his supervisor. The grievant timely challenged his suspension on October 16, 2003. The grievant claims that his suspension resulted in a loss of seventeen (17) hours of pay plus overtime and compensatory time he would have earned had he not been suspended.¹ As further relief, the grievant requests that the Group II Written Notice he was told he would receive as a result of his September 17th behavior not go on his record² and that he face no retaliation or other adverse treatment for filing his October 16, 2003 grievance.

On November 26, 2003, the grievant was issued a Group I Written Notice for his September 17, 2003 behavior. The grievant did not initiate a separate grievance in response to the Group I Written Notice, but attempted, it appears, to challenge the Group

¹ Due to Hurricane Isabel, other Building and Grounds employees were on alert for emergency duty during the time of the grievant's suspension. The grievant claims that like other Building and Grounds employees, he would have been entitled to overtime and compensatory time had he not been wrongfully suspended.

² On September 22, 2003, the grievant returned to work and met with the warden regarding his suspension and behavior on September 17, 2003. According to the grievant, the warden advised agency management at the meeting to give the grievant a Group II Written Notice as a result of his September 17th actions. At the time of the initiation of his grievance, the grievant had not yet received the anticipated Group II Written Notice or any other Written Notice in response to his actions on September 17, 2003.

Notice through his existing October 16, 2003 grievance. On January 6, 2004, the agency head marked the box to qualify the October 16, 2003 grievance for hearing, stating the reason as “[d]isciplinary actions are grievable.” A hearing officer was appointed and notice of the appointment was provided to DOC on January 22, 2004. Subsequently, DOC sent a memorandum to this Department stating that it had mistakenly qualified the October 16, 2003 grievance and wished to rescind its request for appointment of a hearing officer.³ On February 4, 2004, the agency head issued a revised qualification determination that denied qualification of the October 16, 2003 grievance for hearing. Subsequently, the grievant sought a ruling from this Department.

DISCUSSION

Under the grievance procedure, grievances are initiated with agency management and proceed through three management resolution steps.⁴ Within 5 workdays of receipt of the third-step response, the employee may request that his grievance be qualified for a hearing and submit the form to the agency head.⁵ The grievance procedure states that “[w]ithin 5 workdays of receiving the employee’s hearing request, the agency head must determine whether the grievance qualifies for hearing” and “must provide a written response on the Grievance ‘Form A’ or an attachment.”⁶

The Form A is an official grievance document used by the parties to communicate throughout the grievance process. For example, employees initiate their grievances using the Form A, stating the issues grieved, the facts supporting this grievance, and the relief requested.⁷ Employees are encouraged to use great care in completing the Form A, because additional claims may not be added once the grievance is initiated.⁸ Moreover, employees use the Form A to communicate whether (1) they are claiming discrimination or retaliation by their step respondents or (2) their grievances involve a loss in pay, thus allowing them to use the Expedited Process.⁹ During the management resolution steps, an employee “indicate[s] *on the grievance form* his intention to continue” or “indicate[s] *on the grievance form* his intention to conclude the grievance.”¹⁰

Agencies also rely on the Grievance Form A to communicate with employees during the grievance process. If a grievant is out of compliance with the grievance

³ It appears that the agency qualified the October 16, 2003 grievance on the belief that the grievance automatically qualified for hearing under the grievance procedure as it challenged formal discipline (i.e. the November 26, 2003 Group I Written Notice). Upon further review, however, the agency determined that the October 16, 2003 grievance challenges only the September 16, 2002 suspension, not the Group I Written Notice and thus does not automatically qualify for hearing under the grievance procedure.

⁴ *Grievance Procedure Manual* § 2.1, page 5.

⁵ *Grievance Procedure Manual* § 3.3, page 10.

⁶ *Grievance Procedure Manual* § 4.2, page 11.

⁷ *Grievance Procedure Manual* § 2.4, page 6.

⁸ *Id.*

⁹ *Grievance Procedure Manual* § 2.4, page 7.

¹⁰ *Grievance Procedure Manual* §§ 3.1, 3.2, and 3.3, pages 8-10 (emphasis added).

procedure, “management may notify the employee, *using the “Form A,”* that the grievance will be administratively closed due to noncompliance.”¹¹ Moreover, step respondents are responsible for entering the date of receipt of the grievance and issue a written response using the Form A.¹²

The Grievance Form A is of paramount importance during the grievance procedure. Because the grievant, the agencies, and this Department rely on the Form A to ascertain the intent of the parties, it is incumbent on the parties to clearly express their intentions on the Form A. An inquiry into the subjective intent of the parties beyond that which is clearly and unambiguously expressed on the Form A would be impracticable. Likewise, allowing a party to later change his or her original decision as indicated on Form A could be unfair to the opposing party. Therefore, this Department can only rely on the plain language of the Grievance Form A when determining the intent of a party.¹³

Here, the Grievance Form A, as completed by the agency head, clearly states that the October 16, 2003 grievance is qualified for hearing. Moreover, it does not appear that the denial of qualification on February 4, 2004 was due to newly discovered evidence or evidence that was unavailable at the time the agency head made his original qualification determination. Accordingly, this Department concludes that, based on the plain reading of the Grievance Form A and this Department’s precedent, the October 16, 2003 grievance shall advance to hearing.

It should further be noted that issues that have not been qualified in the grievance assigned to the hearing officer are not before the hearing officer, and may not be resolved or remedied.¹⁴ As such, because the Group I Written Notice was not an issue in the October 16, 2003 grievance and thus, not qualified for hearing, the Group I Written Notice will not be resolved or remedied at the hearing on the October 16, 2003 grievance.¹⁵

CONCLUSION

For the reasons discussed above, this Department concludes that the October 16, 2003 grievance shall advance to hearing. By copy of this ruling, the grievant and the agency are advised that the agency has five workdays from receipt of this ruling to request the appointment of a hearing officer. This Department’s rulings on matters of compliance are

¹¹ *Grievance Procedure Manual* § 2.4, page 7 (emphasis added).

¹² *Grievance Procedure Manual* §§ 3.1, 3.2, and 3.3, pages 8-10.

¹³ In a recent compliance ruling, this Department held that a grievant cannot claim that what she indicated on Form A was a mistake. *See* EDR Ruling #2004-696, May 11, 2004.

¹⁴ *Rules for Conducting Grievance Hearings*, page 9.

¹⁵ It appears, however, that information surrounding the Group I Written Notice may be relevant to the grievant’s suspension and resulting October 16, 2003 grievance. As such, information relating to the Group I Written Notice may be offered at hearing as background evidence in support of his October 16, 2003 grievance, which challenges his suspension only.

final and nonappealable.¹⁶ Further, this ruling in no way reflects the substantive merits of the grievant's claims.

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¹⁶ Va. Code § 2.2-1001(5).