

Issue: Compliance/5 day rule; Qualification/race discrimination, written notices;  
Consolidation/consolidate grievances for purposes of hearing; Ruling Date: February 9,  
2005; Ruling #'s 2004-728, 2004-935, 2004-944; Agency: State Board of Elections;  
Outcome: qualified and consolidated



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of State Board of Elections  
Ruling Numbers 2004-728, 2004-935, and 2004-944  
February 9, 2005

The grievant has requested a ruling on whether her March 29, 2004 grievance with the State Board of Elections (SBE or the agency) qualifies for a hearing. Additionally, the agency seeks compliance rulings in the grievant's September 2, 2004 and October 29, 2004 grievances.

FACTS

The grievant was hired as an Administrative and Program Specialist III with SBE to help fulfill voting equipment requirements of the Help America Vote Act of 2002 (HAVA). The grievant's position was a federally funded restricted position expected to terminate in 2006. In January 2004, the grievant verbally informed the agency of her intent to relocate in the future to another state with her family. Since her announcement that she would be leaving SBE, the grievant alleges that the agency has engaged in a continual pattern of discrimination that has resulted in a hostile work environment. More specifically, in her March 29, 2004 grievance, the grievant alleges that: (1) she was denied training opportunities despite the agency head's alleged statement in March 2004 that training would be approved for all that requested it; (2) she was denied a requested raise in salary, while other alleged similarly-situated employees received a raise; (3) she has been falsely accused of not performing her job; (4) the agency is attempting to "displace" her from her position by redefining her job duties and description; (5) she has been denied access to information and systems needed to perform her job duties; and (6) the agency has excluded her from matters related to her job functions. The grievant further claims that two Caucasian co-workers allegedly leaving the agency were not treated in the same (inappropriate) manner as the grievant.

On September 1, 2004, the grievant was issued a Group I Written Notice for "[u]nauthorized time away from the work area" and "disruptive behavior." On the same day, the grievant was also issued a Group II Written Notice for "[f]ailure to follow a supervisor's instructions" and "[f]ailure to perform assigned work." The grievant challenged both Written Notices by initiating a grievance on September 2, 2004 grievance. The September 2<sup>nd</sup> grievance alleges discrimination, harassment and retaliation.

The second step-respondent mailed her response to the September 2<sup>nd</sup> grievance via certified mail to the grievant on October 5, 2004. The grievant acknowledges receipt of the second step response and alleges that she completed the employee response section of the second management resolution step and hand-delivered the September 2<sup>nd</sup> grievance to the third step-respondent's administrative staff. The agency claims that it has not yet received the September 2<sup>nd</sup> grievance back from the grievant.

On September 30, 2004, the grievant received a Group II Written Notice with termination because she "refused to accept her documentation of a Group I Written Notice issued 9/29/04." The grievant challenged her termination by initiating a grievance on October 29, 2004. The October 29<sup>th</sup> grievance alleges hostile work environment and that the agency engaged in a series of inappropriate acts to justify and substantiate the grievant's ultimate termination. The agency head qualified the October 29<sup>th</sup> grievance for hearing on November 29, 2004 and mailed the qualification response to the grievant, via certified mail, on November 30, 2004.

On December 13, 2004, the agency sent the grievant two notices of noncompliance, both via certified mail, for her failure to advance or conclude her September 2<sup>nd</sup> and October 29<sup>th</sup> grievances within the mandated five workdays.<sup>1</sup> By letter dated December 27, 2004, the agency seeks a compliance ruling from this Department on the grievant's alleged failure to respond to the notice of noncompliance or otherwise advance or conclude her September 2<sup>nd</sup> and October 29<sup>th</sup> grievances.

The grievant has permanently relocated to another state. Upon relocating, the grievant claims that she left a forwarding address with the post office, but does not recall if she alerted SBE of the new address. SBE appears to have been unaware of the address change as it was sending all correspondence to the grievant's Virginia address. Because it takes additional time to receive mail that must be forwarded to a new address, the grievant claims that she did not receive the agency head's qualification response in her October 29<sup>th</sup> grievance until sometime in early January 2005. Additionally, during this Department's investigation, the agency informed the investigating consultant that both December 13, 2004 notices of noncompliance were returned to the agency marked "unclaimed."

## DISCUSSION

### *Compliance*

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>2</sup> 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

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<sup>1</sup> See *Grievance Procedure Manual*, § 3.2.

<sup>2</sup> *Grievance Procedure Manual*, § 6.

claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.<sup>3</sup> If the grievant is the noncompliant party and fails to correct the alleged noncompliance within five work days of receiving the notice of noncompliance, this Department has long held that the agency may administratively close the grievance by notifying the grievant in writing (i) that the grievance has been administratively closed; and (ii) that the grievant may challenge the closing of her grievance by requesting a compliance ruling from this Department.<sup>4</sup>

#### October 29, 2004 grievance

The grievant has failed to advance or conclude her October 29<sup>th</sup> grievance within the mandated five work days and therefore is out of compliance with the grievance procedure. Nevertheless, this Department concludes that closure of the October 29, 2004 grievance would be premature because the grievant had not received the requisite notice of noncompliance, even though she had taken reasonable action to assure that mail delivered to her Virginia address would be forwarded by the post office to her new address.<sup>5</sup> Therefore, pursuant to this Department's authority to order a party to correct her noncompliance,<sup>6</sup> this Department orders the grievant to indicate on her Form A whether or not she desires to advance her October 29<sup>th</sup> grievance to hearing and to return the Form A to the SBE human resources office. The grievant must do so within 10 calendar days from the date of this ruling. Additionally, if she has not already done so, the grievant must notify the agency of her new address within 10 calendar days from the date of this ruling.

#### September 2, 2004 Grievance

Again, this Department concludes that closure of the September 2, 2004 grievance would be premature because the grievant has not received the requisite notice of noncompliance. Accordingly, the agency is instructed to mail the grievant a copy of the September 2, 2004 grievance within 10 calendar days from the date of this ruling or within 5 work days after learning of the grievant's correct address, whichever is later. Upon receipt, the grievant is instructed to (i) either advance the grievance to the third resolution step respondent, or (ii) conclude the grievance and return it to the agency's human resource office within 5 calendar days.

#### *Qualification – March 29, 2004 Grievance*

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<sup>3</sup> *Grievance Procedure Manual*, § 6.

<sup>4</sup> *Grievance Procedure Manual*, § 6.3.

<sup>5</sup> This Department recognizes that the agency made a good faith attempt to notify the grievant of the noncompliance, was unaware of the grievant's change of address, and that the grievant could have alerted SBE directly about her new address. However, by leaving a forwarding address with the post office, the grievant took a reasonable action to ensure that she would receive mail delivered to her Virginia address.

<sup>6</sup> *See Grievance Procedure Manual* § 6.3(5).

The grievant's October 29, 2004 grievance has been qualified for a hearing by the agency head. The grievant's March 29, 2004 grievance, like the October 29, 2004 grievance, raises the issue of hostile work environment and questions acts taken by management following grievant's notification to the agency that she would be resigning. Because the October 29<sup>th</sup> grievance qualifies for hearing and raises similar claims as the March 29<sup>th</sup> grievance, this Department deems it appropriate to send the March 29<sup>th</sup> grievance and all its claims for adjudication by a hearing officer as well, to help ensure a full exploration of what could be interrelated facts and issues.

### *Consolidation*

This Department may consolidate grievances whenever they involve the same parties, legal issues, and/or factual background.<sup>7</sup> EDR strongly favors consolidation and will order it unless there is a persuasive reason to process the grievances individually.<sup>8</sup> In this case, the events giving rise to the March 29<sup>th</sup>, September 2<sup>nd</sup>, and October 29<sup>th</sup> grievances are closely related and the issues and parties are the same. Accordingly, the March 29<sup>th</sup> and October 29<sup>th</sup> grievances are consolidated for a single hearing.<sup>9</sup> Further, if the September 2<sup>nd</sup> grievance is not resolved in the management resolution steps, it shall be consolidated with the March 29<sup>th</sup> and October 29<sup>th</sup> grievances for hearing as well.<sup>10</sup>

### CONCLUSION

Within 10 calendar days of the date of this ruling, the grievant it is ordered to: (1) indicate on the Form A of her October 29<sup>th</sup> grievance whether or not she wishes to advance her October 29<sup>th</sup> grievance to hearing and return the Form A to the SBE human resources office; and (2) if she has not already done so, advise SBE of her new mailing address. Within 10 calendar days of the date of this ruling or within 5 work days after learning of the grievant's correct address, whichever is later, the agency is ordered to send the grievant a copy of the September 2, 2004 grievance. Further, for the reasons discussed above, the March 29, 2004 grievance is qualified for hearing and consolidated with the October 29, 2004 grievance and the September 2, 2004 grievance (if that grievance is not resolved).

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Claudia T. Farr  
Director

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<sup>7</sup> *Grievance Procedure Manual* § 8.5.

<sup>8</sup> *Id.*

<sup>9</sup> *See Grievance Procedure Manual*, § 4.1(a).

<sup>10</sup> The September 2<sup>nd</sup> grievance challenges formal discipline and therefore, automatically qualifies for a hearing.

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