

Issue: Compliance/5-day rule; Ruling Date: August 26, 2004; Ruling #2004-857;
Agency: Department of Corrections; Outcome: EDR declines to rule in favor of the
grievant; agency cured non-compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2004-857
August 26, 2004

The grievant has requested a compliance ruling regarding his grievance initiated with the Department of Corrections (DOC or the agency) on June 1, 2004. The grievant claims that the agency head failed to provide him with a timely qualification response and as such, the agency is out of compliance with the grievance procedure. As relief, the grievant seeks reinstatement to his former position. For the reasons set forth below, this Department declines to rule in favor of the grievant.

FACTS

Prior to his termination, the grievant was employed as a Corrections Lieutenant with DOC. On May 4, 2004, the grievant was issued a Group III Written Notice with termination for a criminal conviction and conduct unbecoming a Corrections Lieutenant. The grievant challenged the discipline by initiating his June 1, 2004 expedited grievance. The grievant received the second step-response on June 17, 2004 and advanced the grievance to the agency head for qualification on June 21, 2004. The agency head qualified the grievance for hearing on July 6, 2004. On July 12, 2004, this Department (EDR) received DOC's request for the appointment of hearing officer to hear the June 1, 2004 grievance. A hearing officer was subsequently appointed by EDR on July 20, 2004.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹ 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 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

¹ See *Grievance Procedure Manual* § 6.

Department may resolve the grievance in the grievant's favor unless the agency can establish just cause for its noncompliance.

Generally speaking, if a party has corrected any purported non-compliance prior to this Department's (EDR) receipt of a ruling request, we typically consider the non-compliance to be cured and, thus, there is no reason for EDR to take further action. An exception might be a case in which the non-compliant party has violated a substantial procedural requirement of the grievance procedure. In such cases, this Department has the authority to render a decision against the non-complying party on any qualifiable issue.² EDR would generally consider such an action only where the non-compliant party engaged in bad faith or significantly prejudiced the other party. This is not such a case. Here, although it appears that the agency failed to respond to the grievant's request for qualification within the mandated five workdays, the grievant has not cited to any prejudice suffered as a result of the alleged agency noncompliance. Furthermore, because the grievance has now been qualified and a hearing officer appointed, the issue to which the grievant now objects has been cured (corrected). Thus, this Department declines to rule in favor of the grievant and the grievance shall proceed with the hearing phase of the grievance procedure. This Department's rulings on matters of compliance are final and not subject to further review.³

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Director

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² *Grievance Procedure Manual* § 6.3(5).

³ Va. Code 2.2-1001(5).