

Issue: Compliance/Grievance Procedure/Other—Grievance Procedure Issue; Ruling Date: April 10, 2007; Ruling #2007-1579; Agency: Department of Corrections; Outcome: Grievant in compliance.



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Corrections  
Ruling No. 2007-1579  
April 10, 2007

The grievant has asked for a compliance ruling from this Department regarding the withdrawal of his grievance. He alleges that his attorney withdrew his grievance without authority.

**FACTS**

On November 6, 2006, the grievant initiated a grievance challenging his termination from employment with the Department of Corrections (the agency). After advancing through the management steps, the grievance was qualified for hearing by the agency head on December 19, 2006. A hearing officer was appointed on January 8, 2007. During a pre-hearing conversation, the grievant's attorney reportedly indicated to the hearing officer that the grievant intended to withdraw the grievance. According to the grievant's attorney, she had spoken with the grievant on January 10, 2007 and received his verbal authorization to withdraw the grievance. At that time, she sent the grievant a withdrawal form to fill out and return. On January 18, 2007, a member of the grievant's attorney's staff contacted the grievant and requested that he return the signed withdrawal form, which had yet to be received. The grievant reportedly stated at that time that he would send the form. Upon receiving notice from the hearing officer that he needed to receive a formal indication of withdrawal soon or he would schedule the grievance for hearing, the grievant's attorney submitted a letter to the hearing officer, with a copy to the grievant, on January 19, 2007, indicating the grievant's intent to withdraw the grievance. The hearing officer issued a notice of dismissal on January 22, 2007. The grievant never sent the withdrawal form to his attorney.

The grievant's wife reportedly notified the grievant's attorney on January 23, 2007 that the grievant had changed his mind and wanted to proceed with the grievance. Upon receiving notification of the dismissal of his grievance, the grievant sent a letter to the hearing officer, dated January 29, 2007, indicating that his attorney did not have authority to submit a formal written notification with withdrawal on his behalf, and that he wanted to pursue a hearing. The hearing officer sent a letter on February 12, 2007, later revised on February 15, 2007, determining that there was no demonstrated basis to rescind the Notice of Dismissal.

Thereafter, the grievant requested a ruling from this Department on the same grounds identified in his letter to the hearing officer.

### DISCUSSION

Section 5.11 of the *Grievance Procedure Manual* provides in part:

*When an employee withdraws the grievance prior to the issuance of a hearing decision, ... the employee must submit to the hearing officer a dated, **signed** statement clearly stating that he or she is withdrawing the grievance. Such a withdrawal statement terminates the grievance process.*<sup>1</sup>

The grievant's attorney unquestionably submitted a dated and signed statement to the hearing officer on behalf of the grievant indicating the grievant's intent to withdraw the grievance. Such a notice sent by an attorney representing a grievant will be effective even though the actual *employee* has not signed the statement.<sup>2</sup> Consequently, if the grievant's attorney had the authority to submit such a withdrawal, the grievance would cease at that point. Pursuant to section 5.11 of the *Grievance Procedure Manual*, the Order of Dismissal that a hearing officer issues following withdrawal of a grievance is "solely to document that the employee has withdrawn the grievance and that the grievance has been dismissed."<sup>3</sup> A grievance ceases as soon as the written and signed statement is submitted. A hearing officer has no authority to revive the grievance under the grievance procedure in such a situation.<sup>4</sup> The grievant's only relief would be to request a compliance ruling from this Department, which the grievant has now done.

The grievant has alleged that he did not grant his attorney authority to withdraw his grievance. An attorney does not have authority to withdraw or voluntarily dismiss her client's grievance without express authority from the client to do so.<sup>5</sup> Therefore, the question in this context is whether the grievant gave his attorney express authority to withdraw his grievance, not whether the attorney had apparent authority.<sup>6</sup> The grievant admits that he verbally agreed with

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<sup>1</sup> *Grievance Procedure Manual* § 5.11 (emphasis in original).

<sup>2</sup> *Cf., e.g., Snyder-Falkinham v. Stockburger*, 249 Va. 376, 381-82, 457 S.E.2d 36, 39 (1995) (recognizing precedent that an "attorney has full authority to act on behalf of the client in the conduct of litigation before the court, including making admissions and factual stipulations").

<sup>3</sup> *Grievance Procedure Manual* § 5.11.

<sup>4</sup> The hearing officer's letter and revised letter sent in response to the grievant's initial request to reopen the grievance are not rulings from which there is any right of appeal. Indeed, these letters were appropriately informative, but would not have been effective to reopen the grievance. The *Grievance Procedure Manual* provides no authority to the hearing officer to reopen a grievance withdrawn pursuant to section 5.11.

<sup>5</sup> *See, e.g., Virginia Concrete Co. v. Board of Supervisors*, 197 Va. 821, 828, 91 S.E.2d 415, 420 (1956)

<sup>6</sup> In this regard, the cases cited by the hearing officer in his letters do not address the appropriate standard. Those cases dealt with whether a settlement agreement agreed to by a party's attorney should be effective when the party later asserts that the attorney did not have authority to enter into the agreement. While that situation draws on similar principles, it is not sufficiently analogous to the withdrawal of a grievance. The settlement agreement scenario relies on an apparent authority analysis because of the equities involved regarding the opposing party who

his attorney to close his grievance. From the attorney's perspective, it was reasonable to assume that the grievant's statement was an indication of the grievant's intent. However, in view of all the facts, it appears that the grievant's subsequent objective behavior indicates a rescission of that authority or, at a minimum, indicates that the "authority" initially conveyed was not a final decision.

The grievant's attorney sent the grievant a withdrawal form to fill out, sign, and return. The grievant appears to have believed that completing this form was a further act that he himself needed to accomplish for the grievance to be withdrawn. Indeed, his belief would be reasonably supported by the follow-up call from his attorney's office requesting the signed withdrawal form. In addition, the grievant had read section 5.11 of the grievance procedure, which states that the "employee" must submit a signed writing to withdraw the grievance. According to the grievant, his attorney never told him that she was in communication with the hearing officer or that she intended to send a letter to withdraw the grievance. Rather, it appears the grievant chose to delay filling out the withdrawal form because he was still considering whether he wanted to withdraw the grievance at all.

The grievant's attorney should have known that, or at least questioned whether, the grievant had rescinded his initial agreement to withdraw the grievance and was giving the matter further thought. The grievant had not returned the withdrawal form, which was the only means by which the grievant's attorney had expressed to her client that the grievance could be withdrawn. There is no evidence that she ever told her client that she was going to send a letter to withdraw the grievance. The objective manifestations of the grievant's conduct, i.e., that he was balking at signing the withdrawal form, should have given the grievant's attorney pause that the grievant might not want to withdraw the grievance.

Only upon a showing of good cause will this Department reverse the withdrawal of a grievance and permit the grievance to continue.<sup>7</sup> Based on the information discovered during the investigation for this ruling, this Department determines that the grievant initially gave his attorney the authority to withdraw his grievance, but based on his later conduct, withdrew that authority. Further, upon discovering that his grievance had been withdrawn by his attorney, the grievant almost immediately sought to challenge the withdrawal. Moreover, it is now undisputed that the grievant seeks to proceed with his grievance. For the reasons stated above, the grievant has presented evidence of good cause to reopen his grievance. The grievant's request is granted. This Department holds that the withdrawal of the grievance by the grievant's attorney was not effective as it was not based upon express authority. The grievance will be reopened and proceed to hearing with the hearing officer previously appointed.

This Department's rulings on matters of compliance are final and nonappealable.<sup>8</sup>

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has entered into an agreement based upon the representations of an attorney. The withdrawal of a grievance is a unilateral act and, therefore, is not susceptible to the same equitable analysis.

<sup>7</sup> Cf. Wickham v. Green, 111 Va. 199, 203, 68 S.E. 259, 261(1910) ("[T]he plaintiff, on moving to reinstate his suit, should be required to show good cause for his motion.").

<sup>8</sup> Va. Code § 2.2-1001(5).

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Director