

Issue: Compliance/grievance procedure/resolution steps; Consolidation/consolidate two grievances for purposes of hearing; Ruling Date: September 11, 2006; Ruling #2007-1411, 2007-1439; Agency: Department of Transportation; Outcome: Agency not in compliance with grievance procedure; Consolidation for purposes of hearing.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND CONSOLIDATION
RULING OF DIRECTOR

In the matter of the Virginia Department of Transportation
Ruling No. 2007-1411, 2007-1439
September 11, 2006

On July 24, 2006, the grievant requested a compliance ruling in his April 19, 2006 grievance with the Virginia Department of Transportation (VDOT or the agency). In addition, for the reasons set forth below, the grievant's April 19th grievance is consolidated for hearing with his grievance of May 22, 2006.

FACTS

The grievant was employed by the agency as a Construction Claims Engineer. On April 19, 2006, the grievant initiated a grievance challenging a Group III Written Notice.¹ The grievance was not resolved during the management resolution steps, and the grievant requested qualification of his grievance for hearing. His request for qualification was apparently received by the Acting Commissioner's office on June 21, 2006.

Having not received a response to his request for qualification, the grievant gave written notice of non-compliance to the agency head by letter dated July 6, 2006. On July 7, 2006, the grievant received a letter of non-compliance from the agency, also dated July 6th. The agency states that at the time it sent the July 6th letter, the employee relations office (which apparently sent the letter of non-compliance to the grievant) was unaware that he had advanced the grievance.

The agency further states that on July 10, 2006, it received the grievant's letter of non-compliance to the Acting Commissioner.² The agency asserts that it subsequently advised the grievant that his grievance had been qualified for hearing in a letter dated July 17, 2006, which the agency notes was the fifth workday following its receipt of the grievant's "noncompliance

¹The grievant subsequently received a Group II Written Notice and was terminated effective April 24, 2006. On May 22, 2006, the grievant initiated a grievance challenging this disciplinary action. In the Form A for his May 22nd grievance, the grievant states that his termination continued a "long pattern of harassment, capricious behavior, and retaliation," which the grievant apparently alleges includes the Group III Written Notice challenged in his April 19th grievance.

² The agency states that it also received a letter from the grievant dated July 7, 2006, which was addressed to the employee relations office. The agency describes the content of the July 7th letter as being "essentially the same" as that of the July 6th letter of non-compliance.

notice.”³ The agency states that this letter was sent by certified and first-class mail on the same day, and it asserts that the date of mailing was July 17th.⁴ The grievant, however, has presented evidence that the letter was in fact mailed by the agency on July 25, 2006, over one week after it was apparently written.⁵

By letter dated July 24, 2006, the grievant requested a compliance ruling from this Department.⁶ On July 26, 2006, this Department received a request from the agency for the appointment of a hearing officer.

DISCUSSION

Compliance

The grievance procedure requires both parties to address procedural non-compliance through a specific process.⁷ That process assures that the parties first communicate with each other about the purported non-compliance, and resolve any compliance problems voluntarily without EDR’s involvement. Specifically, the party claiming non-compliance must notify the other party in writing and allow five workdays for the opposing party to correct any non-compliance. If the party fails to correct the alleged non-compliance, the other party may request a ruling from EDR. Should EDR find that the agency violated a substantial procedural requirement, EDR may render a decision against the noncomplying party on any qualifiable issue, unless the noncomplying party can establish just cause for its non-compliance. However, rendering such a decision is reserved for the most egregious of circumstances. For instance, if a party ignores a previous compliance order from EDR, a ruling in favor of the opposing party may be granted.

In this case, the agency failed to comply with the grievance procedure when it did not respond to the grievant’s request for qualification on a timely basis and when it apparently failed to respond to the grievant’s letter of non-compliance within five workdays of receipt. However, as the agency has since qualified the grievance and requested the appointment of a hearing officer, the issue of non-compliance is now moot.

We must nevertheless express our concern with the agency’s representation to the grievant—as well as to this Department—that it notified him by mail on July 17, 2006 of the

³ On July 11, 2006, the agency head’s designee advised the grievant that she would make the qualification decision on his grievance and notify this Department to proceed with a hearing. She subsequently apparently qualified the grievance for hearing on July 17, 2006.

⁴ The agency states that the original grievance record was sent with the certified letter.

⁵ The agency has provided this Department with a copy of a United States Postal Service “Track and Confirm” Screen identifying the number of the certified letter mailed to the grievant. That documentation indicates that the certified letter arrived at the unit for delivery on July 26, 2006. The grievant has presented a photocopy of an envelope bearing the same tracking number as that indicated by the agency’s documentation. This photocopy has a postmark date of July 25, 2006. The grievant has also presented a photocopy of an envelope sent to him by the agency by first-class mail, which also bears a postmark of July 25, 2006.

⁶ The agency argues that the grievant failed to comply with the grievance procedure when he sent his July 24, 2006 “non-compliance notice” to this Department, rather than to the agency head. While the agency is correct that a grievant must first advise an agency head in writing of non-compliance prior to seeking a compliance ruling from this Department, the grievant did so with his July 6th letter to the Commissioner.

⁷ See *Grievance Procedure Manual* § 6.3.

qualification of his grievance. Although the agency is correct that its letter advising the grievant that his grievance had been qualified was dated July 17th, evidence presented by the grievant suggests that the letter was not mailed until July 25th, more than a week later.

However, while this Department does not condone the agency's conduct, we do not find that it was so egregious in nature as to justify an award on the merits on the grievant's behalf. Accordingly, we deny the grievant's request that he be awarded the full relief sought in his grievance as a remedy for the agency's non-compliance. The agency is cautioned, however, that future non-compliance, in this grievance or in others, could result in an award of relief on the merits.

Consolidation

Approval by the Director of this Department or her designee in the form of a compliance ruling is required before two or more grievances may be consolidated in a single hearing. Moreover, EDR may consolidate grievances for hearing without a request from either party.⁸ EDR strongly favors consolidation and will consolidate grievances when they involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.⁹

This Department finds that consolidation of the grievant's April 19, 2006 and May 22, 2006 grievances is appropriate. The grievances appear to involve several of the same parties and potential witnesses, as well as related claims. Furthermore, consolidation is not impracticable in this instance.

This Department's rulings on matters of compliance are final and nonappealable.¹⁰

Claudia T. Farr
Director

⁸ *Grievance Procedure Manual*, § 8.5.

⁹ *Id.*

¹⁰ Va. Code § 2.2-1001(5).