

Issue: Compliance – Grievance Procedure: 5-Day Rule, and Other Issue;
Ruling Date: October 5, 2007; Ruling #2008-1824; Agency: Department of
Corrections; Outcome: Agency in Compliance, Grievant Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2008-1824
October 5, 2007

The grievant has requested a compliance ruling in his November 2, 2006, grievance with the Department of Corrections (DOC or the agency). In addition, the grievant requests to reopen grievance hearing Case No. 8497 based on newly discovered evidence. For the reasons set forth below, this Department concludes that the agency has complied with the grievance process and denies the grievant's request to reopen grievance hearing Case No. 8497.

FACTS

On October 20, 2006, the grievant received a Group I Written Notice for unsatisfactory job performance. The grievant challenged the disciplinary action by initiating a grievance on November 2, 2006. On January 3, 2007, the agency mailed the third step response to the grievant. At some point, however, the grievant sent the agency head a notice of noncompliance as a result of his failure to receive the third step response within the mandated 5 workday time frame. In response, on January 24, 2007, the agency sent the grievant a letter advising him that the agency had mailed him the third step response on January 3, 2007. Because the grievant apparently failed to either advance or conclude his grievance within 5 workdays of receipt of the third management resolution step response, the agency sent the grievant a notice of noncompliance on July 27, 2007. On August 1, 2007, the grievant advanced his grievance to the agency head for a qualification determination. The agency head qualified the grievance on August 15, 2007 and contemporaneously requested the appointment of a hearing officer via Form B. A hearing officer was subsequently appointed on September 18, 2007.

On September 24, 2007, the grievant requested a compliance ruling from this Department as a result of the agency's alleged failure to timely qualify his grievance for hearing. In his request, the grievant states "[t]his is to notify you that [the agency and facility] are out of compliance for more than six months now. I need a ruling and challenge why the Agency took so long to qualify for this [sic] hearing." In addition, the grievant seeks to reopen a previous grievance case of his, Case No. 8497, based on newly

discovered evidence. Case No. 8497 proceeded to hearing on January 30, 2007 and a decision was rendered on February 5, 2007.¹

DISCUSSION

Agency's Alleged Noncompliance

The grievance procedure requires both parties to address procedural noncompliance through a specific process.² That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department's (EDR'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.³ If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from the EDR Director, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for its delay in conforming to EDR's order.⁴

Depending on when the agency head received the grievant's August 1, 2007 request for qualification of his November 2, 2006 grievance, the agency may or may not have been in compliance with the grievance procedure when the qualification determination was issued on August 15, 2007.⁵ However, even if the agency head did make his determination outside of the mandated time frame, it does not appear that the grievant gave the agency the requisite notice of noncompliance in this case, thus rendering the grievant's request for a compliance ruling on this issue premature. Moreover, the grievant's assertion that the agency has been out of compliance for "more than six months" is not accurate. It appears that the grievant was the one that was out of

¹ See Decision of Hearing Officer, Case No. 8497, issued February 5, 2007.

² *Grievance Procedure Manual*, § 6.3.

³ *Id.*

⁴ While in cases of substantial noncompliance with procedural rules the grievance statutes grant the EDR Director the authority to render a decision on a qualifiable issue against a noncompliant party, this Department favors having grievances decided on the merits rather than procedural violations. Thus, the EDR Director will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, this Department will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

⁵ It appears that the agency date stamped the Form A upon receipt. However, the date stamp is somewhat difficult to read in this case. It appears that the grievant's request for qualification may have been received by the agency on August 8, 2007, which would mean that the agency's August 15, 2007 qualification determination was issued within 5 workdays and thus, timely.

compliance with the grievance process for an extended period of time by failing to advance his grievance to the agency head for a qualification determination. In any event, the agency has now qualified the grievance for hearing and a hearing officer has been appointed, thus rendering the issue of any purported noncompliance moot.

Request to Reopen Grievance Case No. 8497

The grievant seeks to reopen Case No. 8497 based on newly discovered evidence. Administrative reviewers, i.e., the hearing officer, the Director of this Department, and the Director of the Department of Human Resource Management (DHRM), do not have the authority or jurisdiction to consider evidence that is discovered outside of the mandated 15 calendar day period for filing requests for administrative review.⁶ If administrative reviewers were allowed to address evidence discovered after the 15 calendar day period has expired, the finality of the grievance process would be severely hindered. And while the grievance procedure's appeal framework was never intended to impede administrative reviewers from carrying out their statutory obligations, if the administrative review process were open-ended, allowing for multiple (revised) opinions based on evidence discovered outside of the 15 calendar day period, the judicial appellate process would be derailed through the loss of a clear, defined point at which hearing decisions becomes final and ripe for judicial appeal. Similarly, the process for seeking implementation of a final hearing decision would be thwarted by the absence of any definitive point at which decisions could be considered final and ripe for petition.⁷ Accordingly, the grievant's request to reopen Case No. 8497 based on newly discovered evidence must be denied due to the untimeliness of his request.

This Department's rulings on matters of procedural compliance are final and nonappealable.⁸

Claudia T. Farr
Director

⁶ See e.g., EDR Ruling #2008-1740 and EDR Ruling #2007-1576. See also *Grievance Procedure Manual* § 7.2(a) ("all requests for review must be made in writing, and **received** by the administrative reviewer, within 15 calendar days of the date of the original hearing decision.")

⁷ Va. Code § 2.2-3006 (C) states "[t]he hearing officer's final decision shall be effective from the latter of the date issued or the date of the conclusion of any administrative review and judicial appeal, and shall be implemented immediately thereafter, unless circumstances beyond the control of the agency delay such implementation." Section 2.2-3006 (D) states "[e]ither party may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final decision or recommendation of a hearing officer." Va. Code § 2.2-3006 (D).

⁸ Va. Code § 2.2-1001 (5).