

Issue: Compliance – Grievance Procedure (Resolution Steps and 5-Day Rule);  
Ruling Date: November 2, 2007; Ruling #2008-1839; Agency: Department of  
Motor Vehicles; Outcome: Resolution Steps – Grievant and Agency both in  
Compliance, 5-Day Rule – Grievant Not in Compliance.



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of the Department of Motor Vehicles  
Ruling No. 2008-1839  
November 2, 2007

The grievant seeks a compliance ruling in his September 25, 2007 grievance with the Department of Motor Vehicles (DMV or the agency). The agency administratively closed the grievance on October 3, 2007. In addition, the grievant asserts that the agency has failed to comply with the grievance process. For the reasons set forth below, this Department concludes that the agency improperly closed the September 25, 2007 grievance. Additionally, the grievant's request for a compliance ruling regarding the agency's alleged noncompliance is premature.

FACTS

The grievant is employed as a Law Enforcement Officer III with DMV. The grievant applied for a promotion to the position of Special Agent-in-Charge (SAC) within DMV. On August 13, 2007, the grievant learned that he was not selected to be interviewed for the SAC position.<sup>1</sup> As a result, the grievant initiated a grievance on September 25, 2007 challenging his nonselection for an interview for the SAC position.

DISCUSSION

Grievant's Alleged Noncompliance

The agency administratively closed the grievant's September 25, 2007 because "the issues raised relate to the selection process to fill [ ] position number 00765. Since the selection decision for this position has still not been made, no adverse employment action has occurred. Based on this, your complaint is premature."<sup>2</sup> In addition, the

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<sup>1</sup> According to the grievant, interviews for the SAC position were held on August 14<sup>th</sup> and 15<sup>th</sup>.

<sup>2</sup> During this Department's investigation, the grievant notified the investigating Consultant that the SAC position has now been filled.

agency asserts the grievant failed to comply with the grievance procedure when he signed the form in the wrong place. Each of these claims will be addressed below.

There are no limits on what issues may be grieved, at least through the management resolution steps, so long as the grievance is filed within 30 calendar days of the event being grieved; arises in the agency in which the employee works; pertains directly and personally to the employee's own employment; is not used to harass or disrupt agency business; has not been pursued through another state process; and, finally, does not challenge the same management action challenged by another grievance.<sup>3</sup>

In this case, the agency has mistakenly concluded that the grievant is challenging the agency's selection decision for position number 00765. The grievant's September 25, 2007 grievance challenges the agency's failure to select him for an interview for position number 00765 and claims that the agency has misapplied agency policies and procedures during the recruitment and interview phases of the selection process for position number 00765. The issues raised by the grievant pertain directly and personally to his employment; the grievant timely challenged his nonselection for an interview;<sup>4</sup> the action being grieved arose within his employing agency; and there is no evidence that the September 25<sup>th</sup> grievance challenges the same action challenged by another grievance or was initiated to harass or disrupt agency business. The issues raised by the September 25<sup>th</sup> grievance are therefore unquestionably grievable.<sup>5</sup> Accordingly, this Department finds that the agency's conclusion that the grievant's claims are premature and are not grievable is erroneous under the grievance procedure. Based on the foregoing, the grievant and the agency are advised that the grievant has **10 workdays** from the date of this ruling to advance his grievance to the first resolution step, at which point the first step-respondent must address the issues raised by the grievance.

Moreover, with regard to the grievant's signing the Form A in the incorrect place, this Department concludes that the grievant's error does not warrant closure of his grievance. The grievant's signing the Form A in the incorrect location appears to have been unintentional and harmless error. That is, the grievant's signature in the wrong box has no real impact on the processing of the grievance nor does it render the grievant's

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<sup>3</sup> *Grievance Procedure Manual* § 2.4.

<sup>4</sup> The grievant learned that he was not going to be interviewed for the SAC position on August 13, 2007 which means that he should have initiated a grievance by September 12, 2007 to be timely. However, in this case, the grievant and the agency agreed to extend the 30 calendar day time limit for an additional 30 days. The grievant challenged his failure to be interviewed for the SAC position within this additional 30-day period and as such, his September 25<sup>th</sup> grievance is timely.

<sup>5</sup> We note that in determining whether claims may be *grieved* (as opposed to whether claims may be *qualified* for a hearing), an agency should look to the issues presented by the grievance, not to whether the actions grieved constitute an adverse employment action (or materially adverse action for retaliation claims). *See Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006). Whether the action(s) constitute an adverse employment action or materially adverse employment action is irrelevant, through the management steps and agency head qualification determination, to the *grievability* of the issues raised.

intentions ambiguous.<sup>6</sup> Accordingly, this Department concludes that the grievant's actions do not warrant closure of his grievance at this time.<sup>7</sup>

#### Agency's Alleged Noncompliance

The grievant asserts the following issues of noncompliance: (1) the agency took more than five workdays to respond to his grievance at the first management resolution step; and (2) the designated second step-respondent wrote the October 3, 2007 first step response and directed the first step-respondent to sign it.

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>8</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 (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.<sup>9</sup> 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.<sup>10</sup>

In this case, the grievant has not notified the agency head of these alleged acts of noncompliance. Accordingly, his request for a compliance ruling on these issues is premature. More importantly, however, the agency did respond to the grievance on October 3, 2007, thereby rendering moot any issue of noncompliance for failure to

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<sup>6</sup> Compare EDR Ruling ## 2004-696 and 2004-611.

<sup>7</sup> Nevertheless, this Department recognizes that the Grievance Form A is an official grievance document used by the parties to communicate throughout the grievance process and as such, is of paramount importance during the grievance procedure. Because the grievant, the agencies, and this Department rely on the Form A to ascertain the intent of the parties, it is incumbent on the parties to clearly and accurately express their intentions on the Grievance Form A. If either party is unclear of how to proceed with the grievance process, they should, like the grievant did in this case, contact EDR's toll-free AdviceLine at 1-888-232-3842 for assistance.

<sup>8</sup> *Grievance Procedure Manual*, § 6.3.

<sup>9</sup> *Grievance Procedure Manual*, § 6.3.

<sup>10</sup> 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.

respond, at the first resolution step, to the grievance within the mandated five workdays. Moreover, assuming without deciding that the grievant's assertion is true that the second step-respondent wrote the first step response, it is not inappropriate for the step respondents to confer with one another during the grievance process and assist each other in constructing responses.

This Department's rulings on matters of compliance are final and nonappealable.<sup>11</sup>

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Claudia T. Farr  
Director

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<sup>11</sup> Va. Code § 2.2-1001 (5).