

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date:
November 6, 2007; Ruling #2008-1856, 2008-1857; Agency: Department of
State Police; Outcome: Agency Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of State Police
Ruling Nos. 2008-1856, 2008-1857
November 6, 2007

The Department of State Police (the agency) seeks a compliance ruling regarding the grievant's grievances initiated on April 9, 2007 and May 18, 2007. The agency alleges that the grievant has failed to comply with the time limits set forth in the grievance procedure for advancing or concluding her grievance.

FACTS

On April 9, 2007, the grievant initiated a grievance to challenge a Group II Written Notice (Grievance 1). The grievance proceeded through the management steps and was qualified for hearing by the agency head on June 14, 2007. The agency thereafter sent the grievance to the grievant by certified mail, which she, according to the agency, received on August 1, 2007. The agency asserts that the grievant has not returned the grievance to the Human Resource Director since that time, even after the agency reportedly sent the grievant a notice of noncompliance on September 7, 2007.

On May 18, 2007, the grievant initiated a grievance to challenge a Group I Written Notice (Grievance 2). The grievance proceeded through the management steps and was qualified for hearing by the agency head on July 19, 2007. Similar to Grievance 1, the agency sent the grievance to the grievant by certified mail, which she, according to the agency, received on August 1, 2007. The agency again asserts that the grievant has not returned the grievance to the Human Resource Director since that time, even after the agency reportedly sent the grievant a notice of noncompliance on September 7, 2007. The agency now requests a compliance ruling regarding these two grievances.

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 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.² 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 the delay in conforming to EDR's order.³

Both Grievance 1 and Grievance 2 present the same compliance issue. The agency asserts that the grievant has failed to return the grievance packages to the agency following qualification of both grievances for hearing by the agency head. However, there is no provision of the grievance procedure requiring that an agency return the grievance package to the grievant for additional input following qualification of a grievance for hearing by the agency head. Rather, the Grievance Procedure Manual states, "If the agency head qualifies the grievance for hearing, the agency's Human Resources Office must request the appointment of a hearing officer using the 'Form B,' within 5 workdays of the qualification decision."⁴ Therefore, in this case, because the agency has not requested the appointment of a hearing officer within five workdays of the agency head's qualification decision, the agency is in noncompliance.⁵ This Department therefore orders the agency to correct this oversight **within five workdays of the date of this ruling** by requesting the appointment of a hearing officer in Grievance 1 and Grievance 2 using the Form B. The grievant must return the original grievance packages to the agency within five workdays of the date of this ruling. The agency must submit a

¹ *Grievance Procedure Manual* § 6.3.

² *Id.*

³ 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.

⁴ *Grievance Procedure Manual* § 4.2.

⁵ This Department recognizes that there is an inconsistency between the grievance procedure and the Grievance Form A that could affect this issue. While the *Grievance Procedure Manual* is clear, confusion might be created by the inclusion of a box on the Form A for the grievant to state "I advance my grievance to hearing and am returning it to the Human Resources Office. (Only check if qualified by agency head.)" However, in such a situation, the unmistakable requirements of the *Grievance Procedure Manual* are controlling.

copy of the grievance materials with the Form B if it does not receive the original versions from the grievant before requesting the appointment of a hearing officer. If the grievant wishes to conclude her grievances, she should notify the agency's human resources office in writing within five workdays of the date of this ruling.

This Department's rulings on matters of compliance are final and nonappealable.⁶

Claudia T. Farr
Director

⁶ See Va. Code § 2.2-1001(5), 2.2-3003(G).