

Issue: Compliance – Grievance Procedure (Resolution Steps), and Administrative Review of Hearing Decision in Case No. 8723; Ruling Date: February 5, 2008; Ruling #2008-1885; Outcome: Grievant Not In Compliance, Hearing Officer In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

**COMPLIANCE RULING AND ADMINISTRATIVE
REVIEW OF DIRECTOR**

In the matter of the Department of Juvenile Justice
Ruling No. 2008-1885
February 5, 2008

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8723. In addition, the grievant alleges that the Department of Juvenile Justice (DJJ or the agency) failed to comply with the grievance procedure. For the reasons set forth below, this Department will not disturb the decision of the hearing officer. Moreover, this Department concludes that the grievant has waived his right to challenge the agency's alleged noncompliance at the second management resolution step of the grievance process.

FACTS

On August 8, 2007, the grievant initiated an expedited grievance challenging his receipt of four written notices¹ and resulting demotion and salary reduction. The grievance proceeded through the management resolution steps and was qualified for hearing by the agency head on August 29, 2007. A hearing officer was subsequently appointed and a hearing was held on October 31, 2007. In a November 20, 2007 hearing decision, the hearing officer rescinded two of the Group II Written Notices, upheld the Group I Written Notice and the Group II Written Notice for failure to follow a supervisor's instructions, rescinded the grievant's demotion and salary reduction, and ordered the agency to reinstate the grievant to his previous position with full back pay.²

The agency subsequently sought a reconsideration decision by the hearing officer. In addition, on December 5, 2007, this Department received the grievant's request for

¹ The grievant received a Group II Written Notice for failure to properly serve a disciplinary charge, a Group II Written Notice with suspension for failure to write an incident report and call for assistance, a Group I Written Notice for unprofessional and disruptive behavior and a Group II Written Notice for failure to follow a supervisor's instructions.

² Decision of Hearing Officer, Case No. 8723 ("Hearing Decision") at 8, issued Nov. 20, 2007.

administrative review of the hearing officer's. The hearing officer issued his reconsideration decision on December 10, 2007 upholding his November 20, 2007 decision.³

DISCUSSION

The grievant argues that he has been denied "procedural due process" because of the agency's alleged failure to comply with the grievance process and that the hearing officer erred by failing to include in his decision information relating to the agency's alleged actions and by concluding that the argument regarding the agency's alleged denial of due process is moot.⁴ The grievant cites the following alleged non-compliance by the agency resulting in the denial of due process: (1) the agency failed to provide documents requested relevant to the grievance; and (2) the second step response failed to address the issues and relief requested.

Documents Issue

The grievance statute provides that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to actions grieved shall be made available, upon request from a party to the grievance, by the opposing party."⁵ Accordingly, upon initiation of a grievance or anytime subsequent thereto, either party may request the opposing party to provide all documents relevant to the actions grieved. A party has a duty to conduct a reasonable search to determine whether the requested documentation is available and to provide the documents, as well as any related "just cause"⁶ objections for not providing any documents, to the other party in a timely manner.⁷ Once a hearing officer has been appointed, this Department has long held that all disputes relating to the production of documents should be presented to the hearing officer for his determination.⁸ If the opposing party fails to produce the documents requested, the requesting party may seek an order from the hearing officer compelling production of the documents.⁹

³ Reconsideration Decision of Hearing Officer, Case No. 8723-R, ("Reconsideration Decision") at 3, issued Dec. 10, 2007.

⁴ In his November 20th decision, the hearing officer responded to the grievant's denial of procedural due process argument by stating: "Grievant argued that the Agency failed to produce and failed to consider all of the necessary documents and arguments as part of the step process. The Hearing Officer finds this argument to be moot. Grievant had the opportunity to obtain documents as part of the Hearing Process and present those documents and any related arguments to the Hearing Officer during the hearing." Hearing Decision at 7.

⁵ Va. Code § 2.2-3003(E). This Department's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided.

⁶ "Just cause" is defined as "[a] reason sufficiently compelling to excuse not taking a required action in the grievance process." *Grievance Procedure Manual* § 9. Examples of "just cause" for failure to produce documents include, but are not limited to, (1) the documents do not exist, (2) the production of these documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.

⁷ See *Grievance Procedure Manual* § 8.2.

⁸ *Id.*

⁹ See *Rules for Conducting Grievance Hearings* § III(E). The *Rules for Conducting Grievance Hearings* further state that:

Although a hearing officer does not have subpoena power, he has the authority to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as the hearing officer or the EDR Director had ordered. Under such circumstances, an adverse inference could be drawn with respect to any factual conflicts resolvable by the ordered documents or witnesses. For example, if the

In this case, the grievant asserts that the agency's failure to produce documents resulted in a denial of the grievant's due process rights.¹⁰ This Department finds the grievant's argument without merit. More specifically, while it appears that the agency may have failed to comply with the grievant's requests for documents during the management resolution steps, action this Department certainly does not condone, the grievant admits that at least some of the documents requested were ultimately received prior to hearing.¹¹ Moreover, the grievant has presented no evidence to indicate that there are additional or missing documents that were not produced that would or could affect the outcome of this case.¹² Most importantly, however, the hearing officer was appointed to this case on October 4, 2007. Anytime subsequent to appointment, the grievant could have requested an order from the hearing officer for the production of relevant documents.¹³ The grievant does not allege nor has this Department found any evidence in the record to suggest that the grievant requested such an order from the hearing officer.

Accordingly, while this Department does not excuse the agency's delay in providing the documents requested, which were clearly relevant to the grievance,¹⁴ under the particular circumstances of this case, it cannot be concluded that the grievant was denied procedural due process as a result of the agency's delay. Likewise, this Department will not order any form of relief given that (1) the grievant did not request an order for the production of documents, (2) at least some documents requested were received well in advance of the October 31, 2007 hearing, and (3) the grievant was afforded a full and fair opportunity to present his case to a neutral hearing officer, present evidence in support of his case, and to cross-examine witnesses testifying against him. Additionally, in light of the above, and in particular, the grievant's ultimate receipt of documents prior to hearing and his apparent failure to seek an order for the production of any additional documents needed, this Department finds no error on the part of the hearing officer with respect to his finding "moot" the grievant's argument regarding the agency's past failure to produce documents.

agency withholds documents without just cause, and those documents could resolve a disputed material fact pertaining to the grievance, the hearing officer could resolve that factual dispute in the grievant's favor. *Id* at § V(B).

¹⁰ Due process is a legal concept appropriately addressed to the circuit court. Nevertheless, because due process is inextricably intertwined with the grievance procedure, this Department will address the issue of due process. *See* *McManama v. Plunk*, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property.").

¹¹ In his request for administrative review, grievant's counsel states that he requested specific records on October 9, 2007, and that he received documents in his office on October 19, 2007. Grievant's counsel further states that the agency complied with the hearing officer's order to provide required documents. Because the grievant does not appear to have requested an order for the production of documents in this case, the hearing officer's order referenced by grievant's counsel presumably indicates the hearing officer's October 11, 2007 letter directing the parties to provide the other party with any proposed exhibits by 5:00 p.m. on October 25, 2007.

¹² Because the hearing decision has already been rendered, corrective action for a past issue of party noncompliance would seem to be necessary only if the decision would be affected by the introduction of any missing documents.

¹³ *See* Rules for Conducting Grievance Hearings § III(E).

¹⁴ The grievant requested "the evidence and an explanation of the evidence to support the Written Notices" that were the subject of his grievance.

Alleged Noncompliance at Second Management Resolution Step

The grievant also claims that the second step-respondent failed to address the issues and relief requested and as such, was out of compliance with the grievance procedure.¹⁵ Because this alleged violation occurred during the management resolution steps, the objection challenges an alleged procedural violation by the agency prior to the hearing, not an alleged violation of the grievance procedure during the hearing phase or by the hearing officer.¹⁶ Accordingly, this Department will address the grievant's challenge as such.

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹⁷ That process assures that the parties first communicate with each other about the purported noncompliance and resolve any compliance problems voluntarily without this Department'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. 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. In addition, the grievance procedure requires that all claims of party noncompliance be raised immediately.¹⁸ Thus, if Party A proceeds with the grievance after becoming aware of Party B's procedural violation, Party A may waive the right to challenge the noncompliance at a later time.¹⁹

Here, the grievant claims that an alleged procedural violation occurred at the second resolution step of the grievance process. Although he was aware of a possible procedural error at this step, he advanced to the hearing, without raising the issue of noncompliance with this Department until after he had received his hearing decision. As such, the grievant waived his right to challenge the agency's alleged noncompliance at this step. Moreover, as stated above, despite any potential non-compliance prior to the hearing, the grievant received adequate due process through the grievance hearing.

¹⁵ See *Grievance Procedure Manual* § 3.2 ("The response must address the issues and the relief requested and should notify the employee of his procedural options.")

¹⁶ "Once a grievance has been qualified for hearing, any claims of party noncompliance occurring during the hearing phase should be raised in writing with the hearing officer appointed to hear the grievance. If a party disagrees with a hearing officer's decision or order on a matter of compliance, an objection should be made to the hearing officer, and a ruling from EDR must be requested in writing and **received by EDR** within 15 calendar days of the date of the hearing decision." *Grievance Procedure Manual* § 6.3 (first emphasis added).

¹⁷ See *Grievance Procedure Manual* § 6.

¹⁸ *Grievance Procedure Manual* § 6.3.

¹⁹ *Id.*

Additionally, the grievant asserts that as a result of the agency's alleged repeated and inexcusable noncompliance with the grievance process, he should be granted full relief. This Department has repeatedly held that 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. Accordingly, even if the grievant had not waived his right to challenge the agency's alleged noncompliance at the second resolution step, and this Department were to find that the agency failed to comply with the document production provisions of the grievance process, such actions do not necessarily entitle the grievant to a favorable reward on the merits of the grievance.²⁰

APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.²¹ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.²² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²³

Claudia T. Farr
Director

²⁰ For an example of what circumstances were rendered sufficient for this Department to find against a noncompliant party, see EDR Ruling No. 2007- 1470.

²¹ *Grievance Procedure Manual* § 7.2(d).

²² Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²³ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).