

Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date:
February 18, 2009; Ruling #2009-2208; Agency: Department of Corrections;
Outcome: Grievant Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2009-2208
February 18, 2009

The grievant has requested a compliance ruling in her October 31, 2008 grievance with the Department of Corrections (DOC or the agency).

FACTS

The grievant was previously employed as an Institution Superintendent with DOC. On November 13, 2006, the grievant was informed that as a result of an internal affairs investigation concerning sexual misconduct cases at her facility, she was being removed from her position as Institution Superintendent. To effectuate the removal, the agency gave the grievant the option of either using the “voluntary demotion” pay practice to a different position in a lower pay band with the same salary or receiving a Group III Written Notice with demotion. The grievant chose a “voluntary demotion” without the Written Notice.

On November 19, 2006, the grievant initiated three grievances challenging her demotion. After the parties failed to resolve the grievances during the management resolution steps, the grievances advanced to hearing. In his October 4, 2007 hearing decision, the hearing officer directed that the grievant be reinstated “to a comparable position as either a Superintendent or an Assistant Warden, such that she will be in the same Pay Band as she was when she was involuntarily demoted. . . . If the Agency is unable to provide an Assistant Wardenship, which is in the same Pay Band that the Grievant occupied when she was Superintendent, along with the appropriate housing or housing allowance, the Hearing Officer orders that the Agency return the Grievant to her original position with her original Pay Band and the housing provided at that Unit.”¹

In response to the hearing officer’s order, the agency placed the grievant in a “deputy warden” position. Believing this position was not “comparable” to the one she held prior to her demotion, the grievant initiated an implementation action with the circuit court. The circuit court agreed that the agency had failed to comply with the hearing officer’s orders and directed the agency to reinstate her to her previous position. The agency has appealed the circuit court’s decision to the Virginia Court of Appeals.

¹ Hearing Decision Case No. 8655 issued October 4, 2007 at 11.

On October 31, 2008, the grievant initiated a grievance challenging the agency's failure to reinstate her in accordance with the circuit court's decision. At the third step, the agency advised the grievant that her grievance was out of the compliance with the grievance procedure, in that it challenged the implementation of a hearing decision. By letter dated January 6, 2009, the grievant appealed the third-step respondent's decision to this Department. In addition, the grievant asserts an additional claim of party non-compliance and requests qualification of her grievance for hearing. These issues are addressed below.

DISCUSSION

October 31, 2008 Grievance

In her October 31, 2008 grievance, the grievant challenges the agency's alleged failure to reinstate her in accordance with the decisions by the hearing officer and circuit court. In reply, the agency asserts that it is not required to implement the decisions until judicial appeals have been exhausted.² The agency further argues that because the October 31st grievance essentially challenges the implementation of a hearing decision, it is not an appropriate subject for a grievance.

Under the grievance procedure, if a grievant believes that an agency has not properly implemented a hearing officer's orders, she may petition—as the grievant in this case has done—the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final hearing decision.³ Any determination by the circuit court may presumably in turn be appealed to the Virginia Court of Appeals, as has occurred in this case.

This Department has previously recognized that because there is an independent judicial procedure for the implementation of a hearing officer's order, a grievance may not be initiated for this purpose.⁴ To the extent an agency fails to comply with an order by a hearing officer or an implementation order by a district court, any remedy lies in the judicial system, not the grievance procedure. Accordingly, the October 31st grievance may be administratively closed by the agency.

Party Non-Compliance

The grievant has also asked this Department to rule on the alleged decision by the agency to raise an argument on appeal before the Court of Appeals that had not previously been raised before the circuit court. She asserts that the agency has raised this

² The grievant concedes that this is a "justified reason," but explains that she wanted to establish that she grieved the agency's conduct within the 30-day time period for grievance initiation.

³ Va. Code § 2.2-3006(D); *Grievance Procedure Manual* § 7.3(c).

⁴ See EDR Ruling No. 2007-1429.

new argument to “subvert[] the Grievance Procedure in an attempt to not comply with the Court Order and [her] reinstatement.”

A party’s decision to assert a legal argument at any point in the judicial process is not a matter of compliance with the grievance procedure to be determined by EDR. Rather, whether it is inappropriate for a party to assert an argument on appeal is a matter for the court to determine. Accordingly, this Department concludes that neither the agency’s actions before a court on judicial appeal, nor the grievant’s, may constitute non-compliance with the grievance procedure.

CONCLUSION

For the reasons set forth above, we find that the October 31, 2008 grievance was not in compliance with the grievance procedure and may be administratively closed by the agency. As a result, the grievant’s request for qualification of her grievance for hearing is moot. We further find that the agency’s decision to raise a purportedly new argument on judicial appeal does not constitute non-compliance under the grievance procedure.

This Department’s rulings on matters of compliance are final and nonappealable.⁵

Claudia T. Farr
Director

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