

Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: February 22, 2010; Ruling #2010-2551; Agency: Virginia Department of Agriculture and Consumer Services; Outcome: Hearing Officer In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Agriculture and Consumer Services
Ruling Number 2010-2551
February 22, 2010

The grievant has requested a compliance ruling concerning Case Number 9212. The grievant seeks the disqualification of the appointed hearing officer in that case. For the reasons set forth below, this Department determines that there is no basis to issue such an order.

FACTS

The hearing in Case Number 9212 took place on November 12 and 13, 2009. As of the time of the grievant's submission of this ruling request,¹ the hearing officer had yet to issue a decision.² The grievant asserts that because of this delay, and other issues regarding the hearing officer's request for submissions on issues related to potential adverse inferences following the hearing, the hearing officer should be disqualified.

DISCUSSION

The grievant asserts that the hearing officer has not issued a decision within thirty-five days of the appointment of the hearing officer. According to the grievance procedure and rules established by this Department, absent just cause, hearing officers are to hold the hearing and issue a written decision within 35 calendar days of appointment.³ In this case, the hearing officer was appointed on October 6, 2009, and the hearing held November 12 and 13, 2009. At the time of the grievant's compliance ruling request, the hearing officer had yet to issue a decision.

Preferably, hearings take place and decisions are written within the 35-day timeframe set forth in the grievance procedure. This Department recognizes, however, that circumstances may arise that impede the issuance of a timely decision, without constituting noncompliance with the grievance procedure so as to require a rehearing.⁴ There is no indication of inappropriate or improper delay in this case. Indeed, this case presents a complex factual history, which

¹ The grievant sent his ruling request by e-mail to this Department on February 18, 2010, after business hours.

² A decision has since been issued in Case Number 9212 on February 19, 2010.

³ *Grievance Procedure Manual* § 5.1.

⁴ *See, e.g.*, EDR Ruling No. 2006-1135.

apparently took two days to present at hearing. Further, the grievant's ruling request notes the various issues that contributed to the understandably delayed decision in this matter.

The grievant also challenges certain issues regarding the hearing officer's request for submissions following the hearing. According to the grievant, the hearing officer requested that the grievant submit information about documents he alleged the agency had failed to produce. On the same topic, the hearing officer apparently requested that the agency brief the issue of adverse inferences related to possible failures in document productions.⁵ There is nothing in the *Grievance Procedure Manual* or the *Rules for Conducting Grievance Hearings* that would prohibit a hearing officer from requesting briefs following the hearing. As such, providing an opportunity to the parties to provide submissions after hearing is within the hearing officer's discretion. There does not appear to be any abuse of discretion by the hearing officer's request for these submissions in this case. Indeed, it seems a reasonable request to assist the hearing officer's understanding of the parties' arguments and the questions at issue.

In short, there is no basis warranting such an extreme remedy as disqualification of the hearing officer in this case. The grievant's request is denied. This Department's rulings on matters of compliance are final and nonappealable.⁶

Claudia T. Farr
Director

⁵ The grievant also alleges that the agency's brief inappropriately contained testimony and irrelevant, immaterial, insubstantial and repetitive information. Whether the agency's brief contained improper material and the hearing officer's consideration of that material, if any, are issues more appropriately considered on administrative review of the hearing decision, should either party choose to request such a review in this case. See *Grievance Procedure Manual* § 7.2.

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