

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: February 8, 2012; Ruling No. 2012-3242; Agency: Department of Corrections; Outcome: Agency Not in Compliance.



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of the Department of Corrections  
EDR Ruling No. 2012-3242  
February 8, 2012

The grievant has requested a compliance ruling related to his May 4, 2011 grievance. The grievant asserts that the agency failed to timely request the appointment of a hearing officer.

FACTS

On May 4, 2011, the grievant initiated a grievance with the agency. After the agency refused to qualify the grievance for hearing, the grievant requested qualification from this Department (EDR). When EDR also declined to qualify the grievance, the grievant asked the circuit court to qualify the grievance. In an order dated December 16, 2011, the circuit court granted the grievant the right to a grievance hearing. The order indicates that copies of the order were sent via certified mail to the grievant and the agency's legal representative, but the order does not state the date of the mailing. The order further indicates that a copy of the order was also faxed to a second agency legal representative on December 28, 2011.

On January 17, 2012, a Senior Legal Secretary from the Attorney General's Office forwarded a copy of the order (as an email attachment) to the agency. The following day, the agency requested from this Department's Division of Hearings appointment of a hearing officer.

DISCUSSION

The grievance procedure provides that "[w]ithin 5 workdays of the qualification of the grievance, the agency must request the appointment of a hearing officer from EDR, using a 'Form B.'"<sup>1</sup> This apparently did not occur here. However, under the particular facts of this case, this Department finds no reason to take any sort of punitive action against the agency for the delay.

The procedure requires both parties to address procedural noncompliance through a specific process.<sup>2</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

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<sup>1</sup> *Grievance Procedure Manual* § 5.1.

<sup>2</sup> *Grievance Procedure Manual* § 6.3.

party in writing and allow five workdays for the opposing party to correct any noncompliance.<sup>3</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 the delay in conforming to EDR's order.<sup>4</sup>

In this case, the agency failed to timely request the appointment of a hearing officer. It appears that the agency's legal counsel may not have promptly communicated with the agency that the grievance had been qualified, although it is not entirely clear what may have caused the delay here.<sup>5</sup> Nor has the grievant provided any evidence that he informed the agency head of the agency's failure to timely request the appointment of a hearing officer. As noted above, had the grievant informed the agency head of the noncompliance, waited five days for correction, and then asked for a compliance ruling from EDR (had the noncompliance not been corrected), this Department would have ordered the agency to submit the hearing officer request ("Form B"), which the agency has now done. Section 6.3 states that "[i]f the noncompliance is corrected within the 5 workdays, the party is considered in compliance and no relief will be available from EDR." Because the noncompliance has now been corrected, this Department has no basis to intervene.

This Department's rulings on matters of compliance are final and nonappealable.<sup>6</sup>

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Claudia T. Farr  
Director

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<sup>3</sup> See *Id.*

<sup>4</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.

<sup>5</sup> We note that the Court's Order was filed 4 ½ workdays prior to the beginning of the Virginia state government's official holiday closing from the afternoon of December 22, 2011 through December 26, 2011. Offices were also closed from December 31, 2011 through January 2, 2012. To be clear, however, by so noting the holiday season, we are not condoning delay in this or any case.

<sup>6</sup> See Va. Code §§ 2.2-1001(5); 2.2-3003(G).