

Issue: Compliance – Grievance Procedure (other issue); Ruling Date: October 9, 2018; Ruling No. 2019-4789; Agency: Department of Behavioral Health and Developmental Services; Outcome: Grievant Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

COMPLIANCE RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2019-4789
October 9, 2018

The Department of Behavioral Health and Developmental Services (the “agency”) seeks a compliance ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) concerning the grievant’s September 19, 2018 grievance. The agency alleges that the grievant has failed to comply with certain requirements of the grievance procedure.

FACTS

On September 19, 2018 the grievant initiated a grievance directly with EEDR, utilizing the Dismissal Grievance Form A to challenge his separation from employment. The agency has requested a ruling from EEDR, alleging that the grievant’s separation does not constitute a “dismissal” under the provisions of the *Grievance Procedure Manual* and, thus, the grievant is out of compliance with the grievance procedure.

DISCUSSION

If a Grievance Form A does not comply with the requirements for initiating a grievance, the agency may notify the employee, using the Grievance Form A, that the grievance will be administratively closed.¹ Because dismissal grievances are initiated directly with EEDR, the agency is unable to follow this process as outlined. Accordingly, the agency has requested a ruling from this Office regarding the issue of alleged noncompliance.

The *Grievance Procedure Manual* defines “dismissals” as terminations due to formal discipline or unsatisfactory job performance.² In this instance, the grievant was removed pursuant to Section H of DHRM Policy 1.60, *Standards of Conduct*, due to circumstances that prevented him from performing his job. Thus, EEDR agrees with the agency that the grievant’s separation from employment does not constitute a “dismissal” as defined by the *Grievance Procedure Manual* and, accordingly, this grievance is not eligible for the dismissal grievance process. The grievant may, however, challenge his separation through the expedited grievance process because he is disputing a separation from employment that is not considered a “dismissal.”³

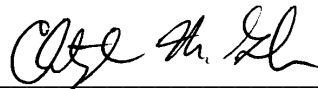
¹ *Grievance Procedure Manual* § 6.2.

² Va. Code § 2.2-3003(A); *Grievance Procedure Manual* § 2.5.

³ *Grievance Procedure Manual* § 2.4, 3.4.

Along with this analysis, this ruling will also address the timeliness of the grievance to challenge the grievant's separation from employment. EEDR has consistently held that a grievance initiated in a timely manner but with the wrong management representative will not bar a grievance for noncompliance.⁴ Rather, the remedy in such a situation is either for management to provide the grievance paperwork to the appropriate step-respondent or return the grievance to the grievant for submission to that step-respondent. In either case, for purposes of timeliness, the initiation date of the grievance will be considered the date it was submitted initially. EEDR views using the wrong grievance form or attempting to use the dismissal grievance process where there is not a right to do so as noncompliance of a similar nature that should be remedied in the same manner. Accordingly, this grievance will be deemed to have been filed on September 19, 2018 for timeliness purposes. To proceed with the grievance, however, the grievant is directed to resubmit his grievance on a Grievance Form A – Expedited Process to the agency **within ten workdays of the date of this ruling**. Once the grievant has done so, the agency must proceed with the management steps of the grievance procedure for an expedited grievance.⁵

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



Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

⁴ E.g., EDR Ruling No. 2011-2692; EDR Ruling No. 2007-1686; EDR Ruling No. 2006-1114; EDR Ruling No. 2001-195; EDR Ruling No. 99-007.

⁵ To the extent either party has raised the question of whether the grievance would qualify for a hearing, EEDR is unable to address the matter of qualification at this time. As the grievance must be returned to the agency and addressed through the expedited process, the agency head will issue a qualification decision that may be appealed to EEDR. *Grievance Procedure Manual* §§ 3.4, 4.2. As with any grievance challenging a management action that does not automatically qualify for a hearing (i.e., formal discipline or dismissal for unsatisfactory performance), the grievance may qualify for a hearing if the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state and/or agency policy may have been misapplied or unfairly applied. Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.

⁶ See Va. Code §§ 2.2-1202.1(5); 2.2-3003(G).