

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: February 7, 2014; Ruling No. 2014-3795; Agency: Virginia Department of Health; Outcome: Grievant Not in Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Human Resource Management*  
*Office of Employment Dispute Resolution*

**COMPLIANCE RULING**

In the matter of the Department of Health  
EDR Ruling Number 2014-3795  
February 7, 2014

The Department of Health (the agency) has requested a compliance ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management, alleging that the grievant has failed to comply with the time limits set forth in the grievance procedure for advancing or concluding her grievance.

FACTS

This grievance, regarding a September 3, 2013 Group II Written Notice, was initiated on or about September 28, 2013. At the same time, the grievant initiated a dismissal grievance regarding a September 25, 2013 Group II Written Notice that included termination. On November 8, 2013, EDR issued a consolidation ruling, indicating that the two grievances shall be consolidated for a single hearing.<sup>1</sup> This ruling further explained that unless the parties agreed to waive the remaining resolution steps for the September 3 Written Notice grievance, it must progress through all management resolution steps. The ruling also indicated that if the grievance was otherwise resolved or closed prior to hearing, the stay regarding the dismissal grievance would be lifted, allowing the case to proceed on the grievance regarding the September 25 Written Notice alone.

Accordingly, in the grievance regarding the September 3 Written Notice, a written third step response was issued to the grievant on or about December 10, 2013. On January 9, 2014, the agency mailed a letter of noncompliance to the grievant, indicating that the agency had not received a response from the grievant as to whether she wished to conclude the grievance or advance the grievance for qualification. Additionally, the agency requested a response from the grievant within five workdays upon receipt of the noncompliance letter, and indicated the agency would seek to conclude the grievance if no response was received. Since more than five workdays have elapsed since the agency's notification to the grievant of her alleged noncompliance, and the grievant has not yet advanced or concluded her grievance, the agency seeks a compliance ruling allowing it to administratively close the grievance.

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<sup>1</sup> EDR Ruling No. 2014-3761, 2014-3762.

## DISCUSSION

The grievance 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 EDR'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.<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 EDR, 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 grievant appears to have failed to advance or conclude her grievance within five workdays of receiving the third step response as required by the grievance procedure.<sup>5</sup> Moreover, the agency notified the grievant of her noncompliance, but the grievant has not advanced or concluded her grievance.

As the grievant has apparently failed to advance or conclude her grievance regarding the September 3 Written Notice in a timely manner, she has failed to comply with the grievance procedure. EDR therefore orders the grievant to correct her noncompliance **within ten work days of the date of this ruling** by notifying her human resources office in writing that she wishes either to conclude her grievance or advance her grievance for qualification. If she does not, the agency may administratively close the grievance without any further action on its part. Should this grievance be administratively closed, the grievant's case will proceed to hearing solely regarding the September 25 Written Notice and the associated termination, and the September 3 Written Notice will stand and not be at issue in the hearing. The agency is directed to notify EDR should the closing of this grievance occur, so that EDR may then proceed with the appointment of a hearing officer regarding the September 25 Written Notice and termination alone. This grievance may be reopened only upon a timely showing by the grievant of just cause for the delay (for example, a serious illness, or other circumstances beyond the grievant's control).

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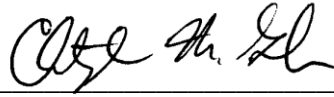
<sup>2</sup> *Grievance Procedure Manual* § 6.3.

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

<sup>4</sup> While in cases of substantial noncompliance with procedural rules the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party, EDR favors having grievances decided on the merits rather than procedural violations. Thus, EDR 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, EDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

<sup>5</sup> *See Grievance Procedure Manual* § 3.3.

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



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<sup>6</sup> See Va. Code §§ 2.2-1202.1(5); 2.2-3003(G).