

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: May 23, 2016;
Ruling No. 2016-4256; Agency: Department of Behavioral Health and Environmental
Services; 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 Behavioral Health and Developmental Services
Ruling Number 2016-4356
May 23, 2016

The Department of Behavioral Health and Developmental Services (the agency) has requested a compliance ruling related to the grievant's March 9, 2016 grievance. The agency alleges that the grievant has failed to comply with the time limits set forth in the grievance procedure for advancing or concluding his grievance, and further, that he has failed to provide requested documents as required by the grievance procedure.

FACTS

The grievant was employed by the agency as an Information Technology Specialist II.¹ On or about March 9, 2016, he initiated a grievance to challenge his interim performance evaluation and accompanying performance improvement plan. The grievant claims that the performance improvement plan is "unachievable" and cites to certain medical issues he is experiencing in his grievance. On March 15, 2016, the agency's Employee Relations Manager requested documentation regarding his medical conditions, to include evidence of how the conditions may have affected his performance and information regarding any requested workplace accommodations. The agency indicates that the grievant has not responded, nor has he supplied the requested documentation.

Nevertheless, the grievance proceeded through the management resolution steps. On April 14, 2016, the agency held a second step meeting with the grievant, during which the request for documentation was discussed. The agency issued its second step response to the grievant on April 21, 2016. On May 6, 2016, the agency sent, via email, a letter of noncompliance to the grievant, indicating that the agency had not received a response from him as to whether he wished to advance or conclude the grievance, or a reply regarding the requested documentation. Additionally, the agency requested a response from the grievant within five workdays upon receipt of the noncompliance letter.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.² 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

¹ The agency indicates that the grievant has not been employed with the agency since March 10, 2016.

² *Grievance Procedure Manual* § 6.3.

in writing and allow five workdays for the opposing party to correct any noncompliance.³ 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.⁴

In this case, the grievant appears to have failed to advance or conclude his grievance within five workdays of receiving the agency's second resolution step response, as required by the grievance procedure.⁵ Moreover, the agency notified the grievant of his noncompliance, but the grievant has not advanced or concluded his grievance.⁶

As the grievant has apparently failed to advance or conclude his grievance in a timely manner, he has failed to comply with the grievance procedure. The Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management therefore orders the grievant to correct his noncompliance **within ten work days of the date of this ruling** by notifying his human resources office in writing, using the Grievance Form A, that he wishes either to conclude the March 9, 2016 grievance or request qualification for hearing. If he does not, the agency may administratively close the grievance without any further action on its part. The 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). If either party has any questions about the next steps required for this case to proceed, please contact EDR's AdviceLine at 1-888-232-3842.

EDR's rulings on matters of compliance are final and nonappealable.⁷ Because the grievant has not, as of this date, advanced or concluded his grievance to the third resolution step, EDR does not reach the issue of whether he is out of compliance with the grievance procedure for his alleged failure to produce requested documents.



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³ See *id.*

⁴ 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.

⁵ See *Grievance Procedure Manual* § 3.2.

⁶ While the grievant may have indicated an intent to proceed with the grievance in a subsequent e-mail to the Employee Relations Manager, the grievant has not indicated the choice to advance his grievance on the Grievance Form A as required by the *Grievance Procedure Manual*. *Id.*

⁷ See Va. Code §§ 2.2-1202.1(5); 2.2-3003(G).