

Issue: Compliance – Grievance Procedure (other issue); Ruling Date: February 13, 2018; Ruling No. 2018-4677; Agency: Department of Social Services; Outcome: Agency 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 Social Services
Ruling Number 2018-4677
February 13, 2018

The Department of Social Services (the “agency”) has requested a compliance ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) to clarify the conditions for holding second step meetings to address three grievances filed by the grievant. The grievant has also requested a compliance ruling from EEDR in relation to his grievances, on the basis that the agency failed to comply with the time limits set forth in the grievance procedure for scheduling the second step meetings.

FACTS

The grievant initiated two grievances with the agency on January 9, 2018, and a third grievance on January 17, 2018. The grievant has advanced all three grievances to the second step. The grievant began an approved absence from work on January 19 and filed a claim for short-term disability (“STD”) benefits under the Virginia Sickness and Disability Program (“VSDP”),¹ which has since been approved. As of the date of this ruling, the grievant has not returned to work.

The agency contacted the grievant on January 25 to advise him that his grievances would be temporarily placed on hold during his absence on VSDP leave. The grievant responded that he wished to proceed with the second step meetings for the grievances, and the agency requested a doctor’s note clearing the grievant to participate in the meetings. The grievant has declined to provide a doctor’s note to the agency and argues that the grievance procedure does not require him to do so as a condition of participating in the meetings. The agency has requested a compliance ruling from EEDR to address whether, and under what conditions, the grievances may proceed at this time.

While this ruling was pending, the grievant also requested a ruling from EEDR to address alleged noncompliance with the grievance procedure by the agency in relation to his pending grievances. More specifically, the grievant asserts that the agency failed to schedule the second step meetings within five workdays of receiving his grievances. The grievant further contends that the agency’s request for medical documentation as a condition of scheduling the meetings and its request for a ruling from EEDR to resolve the matter constitute substantial procedural

¹ See Va. Code § 51.1-1100 *et seq.*; DHRM Policy 4.57, *Virginia Sickness and Disability Program*.

noncompliance with the grievance procedure, and asks EEDR to render a decision against the agency on the issues raised in the grievances.

DISCUSSION

Agency's Request for Clarification Regarding the Second Step Meeting

The grievance process is intended to provide the parties with an expeditious way to resolve workplace issues.² In furtherance of this goal, the five workday rule requires the parties to a grievance to take appropriate action, depending on the procedural stage of the grievance, within five workdays of receipt of the grievance.³ Thus, for example, a grievant must advance or conclude his grievance within five workdays of receiving each step response, and each step-respondent is required to issue his or her response within five workdays of receiving the grievance. The *Grievance Procedure Manual* defines “workdays” as the “[n]ormal work schedule (excluding authorized leave time) for the individual responsible for taking the required action.”⁴

The second step-respondent is responsible for scheduling the second step within five workdays of receiving the grievance.⁵ After the grievant advanced the grievances to the second step, the agency contacted him to notify him that it would place the grievances on hold until he returned from VSDP leave. Ordinarily, a grievant would not be required to proceed with a grievance while he is on an approved absence from work. However, there is nothing in the grievance procedure to prevent the parties from proceeding in such a case if the grievant wishes to do so.⁶ Here, the grievant has indicated that he wishes to proceed with the second step meetings for his grievances despite his absence on VSDP leave. Under these circumstances, EEDR cannot conclude that the grievance process must be automatically stayed until the grievant returns to work from VSDP leave.

However, the grievant's medical condition is also a factor that must be considered by the agency in this case. Participation in the grievance process is considered to be an approved work-related activity.⁷ The grievant is currently out of work on VSDP leave, and is therefore unable to perform work-related activities at this time. Though the grievant is correct that no provision of the grievance procedure explicitly authorizes the agency to require a doctor's note from the grievant to participate in the second step meeting, the provisions of DHRM Policy 4.57, *Virginia Sickness and Disability Program*, also apply in this instance to the grievant's use of VSDP leave. In general, an agency cannot require or permit an employee to perform work-related functions while he is on VSDP leave.⁸ Furthermore, an employee returning to work from VSDP leave must

² See *Grievance Procedure Manual* § 1.1.

³ See *id.* §§ 3.1, 3.2, 3.3.

⁴ *Id.* § 9.

⁵ *Id.* § 3.2.

⁶ See EDR Ruling No. 2014-3881.

⁷ See *Grievance Procedure Manual* §§ 8.6, 8.8.

⁸ See DHRM Policy 4.57, *Virginia Sickness and Disability Program*.

present a doctor's note indicating that he is cleared to return to work.⁹ For these reasons, EEDR finds that the agency's request for a doctor's note from the grievant indicating that he is able to participate in the second step meetings is appropriate in this instance.

As a result, the grievant must provide the medical documentation requested by the agency if he wishes to proceed with the face-to-face second step meetings for his three grievances at this time. Should the grievant choose not to do so, the meetings may not be held until such time as the grievant is cleared by a doctor to return to work.¹⁰

Grievant's Claim of Agency Noncompliance

The grievant disputes the agency's request for a doctor's note as a condition of scheduling the second step meetings and argues that the meetings should have been scheduled within five workdays.¹¹ The grievant appears to have properly notified the agency of its alleged noncompliance with regard to scheduling the second step meetings and allowed an additional five workdays for the issue to be corrected, as required by Section 6.3 of the *Grievance Procedure Manual*. The agency has not yet scheduled or held the second step meetings, however, because it requested this ruling from EEDR to address the propriety of its request for medical documentation, as discussed above. In cases where a compliance dispute arises between the parties to a grievance, it would be unreasonable to expect either party to proceed before the dispute has been resolved, because a party who "proceed[s] with the grievance after becoming aware of a procedural violation . . . generally forfeits the right to challenge the noncompliance at a later time."¹² Here, the agency has delayed scheduling the second step meetings while seeking a ruling from EEDR to resolve a genuine question of compliance with the grievance procedure. Further, the submission of a compliance ruling request "will normally stop the grievance process temporarily."¹³ Under these circumstances, EEDR declines to find that the agency has failed to comply with the grievance procedure.

In addition, the grievant further argues that the agency's request for a doctor's note, and its subsequent request for a compliance ruling from EEDR to resolve this dispute, should be considered substantial noncompliance with the grievance procedure. As relief, the grievant requests that EEDR render a decision against the agency on the issues raised in his grievances. Although the grievance statutes grant EEDR the authority to render a decision on a qualifiable issue against a noncompliant party in cases of substantial noncompliance with the grievance procedure,¹⁴ EEDR favors having grievances decided on the merits rather than procedural violations. Thus, EEDR will *typically* order noncompliance corrected before rendering a decision

⁹ *Id.*

¹⁰ Should the parties select an alternative mutually agreeable way to proceed with the grievances, it would be appropriate to do so. See *Grievance Procedure Manual* § 8.4. For example, if not otherwise inconsistent with VSDP policy, it may be possible for the grievant to attend the the second step meeting(s) remotely by phone (or other electronic communication method) without medical documentation. In addition, the parties could agree to waive the face-to-face meeting(s) and the grievances could proceed forward without delay.

¹¹ See *Grievance Procedure Manual* § 3.2.

¹² *Id.* § 6.3.

¹³ *Id.* § 6.1.

¹⁴ Va. Code § 2.2-3003(G).

against a noncompliant party. As discussed above, the agency's request for medical documentation in this case is reasonable under the circumstances. The agency's delay in scheduling the second step meetings, if it can be considered noncompliance, does not rise to the level that would justify a finding of substantial noncompliance or the extreme sanction sought by the grievant in case. Accordingly, the relief requested by the grievant is denied.

CONCLUSION

For the reasons set forth above, the grievant is directed to contact the agency **within five workdays of the date of this ruling** to indicate whether he will provide a doctor's note authorizing him to participate in the second step meetings face-to-face and, if so, when he expects to do so. If the grievant does not contact the agency, or if the grievant notifies the agency that he will not provide the requested medical documentation, the grievances must be temporarily stayed until the grievant returns to work, absent mutual agreement by the parties on an alternative way forward.

EEDR's rulings on matters of compliance are final and nonappealable.¹⁵



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

¹⁵ See *id.* §§ 2.2-1202.1(5), 2.2-3003(G).