

Issue: Compliance – grievance procedure (5 day rule); Ruling date: January 16, 2019; Ruling No. 2019-4838; Agency: Department of Corrections; 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 Corrections
Ruling Number 2019-4838
January 16, 2019

The Department of Corrections (the “agency”) has requested a compliance ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management in relation to the grievant’s August 6, 2018 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 her grievance.

FACTS

On or about August 6, 2018, the grievant initiated a grievance with the agency. The second step response was sent to the grievant by certified mail on September 5. The tracking information provided by the agency indicates that the second step response was delivered to the grievant’s address on September 8. Having received no further response from the grievant indicating whether she wished to advance or conclude the grievance, the agency states that it sent a notice of noncompliance to her on October 5. However, the agency is unable to produce a copy of its notice of noncompliance or other verification that the notice was actually mailed to the grievant. Based on the grievant’s alleged noncompliance with the grievance procedure, the agency seeks a compliance ruling allowing it to administratively close the grievance.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹ That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without EEDR’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.² If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from EEDR, 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 EEDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its

¹ *Grievance Procedure Manual* § 6.3.

² *See id.*

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 EEDR's order.³

In this case, the agency's request for a compliance ruling appears to be premature because it has not provided evidence to demonstrate that it first notified the grievant in writing of the alleged procedural violation. Ordinarily, this is a situation in which EEDR would direct the agency to give written notice of the alleged noncompliance to the grievant and allow the grievant five workdays to correct any noncompliance before seeking a compliance ruling. Based on a review of the information submitted by the parties, however, it is evident that the grievant has not taken any action to proceed with her grievance for an extended period of time. Indeed, over four months have passed since the second step response was delivered to the grievant's address, and it has been over three months since the agency allegedly mailed its notice of noncompliance.

Accordingly, and in the interest of expeditiously resolving the issues raised in the grievance, the grievant is ordered to contact her human resources office and indicate whether she wishes either to conclude the grievance or advance to the third step **within ten workdays of the date of this ruling.**⁴ If she 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).

EEDR's rulings on matters of compliance are final and nonappealable.⁵



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³ While in cases of substantial noncompliance with procedural rules the grievance statutes grant EEDR the authority to render a decision on a qualifiable issue against a noncompliant party, EEDR favors having grievances decided on the merits rather than procedural violations. Thus, EEDR 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, EEDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

⁴ See *Grievance Procedure Manual* § 3.2.

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