

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: September 16, 2013; Ruling No. 2014-3713; Agency: Department of Juvenile Justice; Outcome: No Ruling - premature.



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

COMPLIANCE RULING

In the matter of the Department of Juvenile Justice
Ruling Number 2014-3713
September 16, 2013

The Department of Juvenile Justice (the agency) has requested a compliance ruling related to the grievant's May 13, 2013 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 May 13, 2013, the grievant initiated a grievance with the agency. On June 21, 2013 the agency forwarded the third step response to the grievant. The grievant went out of work on August 4, 2013 and subsequently went on VSDP leave on August 12, 2013. At the time she went out of work, the grievant had not advanced or concluded her grievance following the third step. On August 14, 2013, the agency mailed a letter of noncompliance to the grievant, indicating the agency had not received a response from her and advising her that she had five workdays to cure her noncompliance. The agency has now asked EDR for permission to administratively conclude the grievance for noncompliance.

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 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.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 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

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 EDR's order.³

In this case, the grievant has been out of work since August 4, 2013. Between the time of the agency's written notice of noncompliance on August 14, 2013, and the agency's request for a compliance ruling, the grievant has been continuously out of work. Accordingly, the agency's request is premature, as the grievant's five workday period to cure her noncompliance has not yet begun to run. As such, the agency's request to conclude this grievance is denied.

The grievant has advised EDR that she plans to return to work on or about September 18, 2013. Having been advised of her alleged noncompliance through this ruling at a minimum, on her return to work, the five workday period will begin to run, starting on the day after her return. In the event she fails to advance or conclude her grievance during this period, the agency may again seek permission from EDR to administratively close the grievance.

EDR's rulings on matters of compliance are final and nonappealable.⁴



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³ 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.

⁴ See Va. Code §§ 2.2-1202.1(5); 2.2-3003(G).