

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: December 19, 2015; Ruling No. 2015-4067; Agency: Department of Corrections; 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 Corrections
Ruling Number 2015-4067
December 19, 2014

The Department of Corrections (the “agency”) has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management in relation to the grievant’s August 14, 2014 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.

FACTS

On or about August 14, 2014, the grievant initiated a grievance with the agency. The agency’s first step response was dated August 22, and mailed by certified mail to the grievant on or about November 21.¹ The certified mail receipt indicates that the first step response was delivered on or about November 22. It does not appear that the grievant has either advanced or concluded his grievance since that date. As more than five workdays have elapsed since the grievant presumably received the first step response and he has not yet advanced or concluded his grievance, 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.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 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

¹ This grievance was previously the subject of a compliance ruling from EDR. *See* EDR Ruling No. 2015-4036. In that ruling, EDR determined that the agency’s request to administratively close the grievance was premature because the grievant had not received a copy of the first step response. It appeared that the first step response had been sent to the grievant by certified mail on August 29, but was returned as unclaimed. *See id.*

² *Grievance Procedure Manual* § 6.3.

³ *See id.*

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 agency's request for a compliance ruling appears to be premature because it has not shown that it first notified the grievant in writing of the alleged procedural violation. There is no indication that the agency provided the grievant with a notice of noncompliance informing him that his grievance is not in compliance with the grievance procedure after the first step response was delivered under the November 21 letter and the grievant failed to respond within five workdays. Ordinarily, this is a situation in which EDR would direct the agency to give written notice of the alleged noncompliance to the grievant and allow the grievant five work days 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 more than five workdays have elapsed since the agency provided the grievant with the first step response and the grievant has not responded.⁵ In the interest of expeditiously resolving the issues raised in this grievance, the grievant is therefore ordered to correct his noncompliance **within ten workdays of the date of this ruling** by notifying his human resources office in writing that he wishes either to conclude the grievance or advance to the second step.⁶ 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).

EDR's rulings on matters of compliance are final and nonappealable.⁷



Christopher M. Grab
Director
Office of Employment Dispute Resolution

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 While the agency did mail the grievant a notice of noncompliance prior to seeking its first compliance ruling related to this grievance, *see* EDR Ruling No. 2015-4036, it does not appear that a similar notice was mailed prior to its request for this ruling.

⁶ *See Grievance Procedure Manual* § 3.1.

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