

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: September 3, 2015; Ruling No. 2016-4224; Agency: Department of Social 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 Social Services
Ruling Number 2016-4224
September 3, 2015

The Department of Social Services (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 February 9, 2015 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 February 9, 2015, the grievant initiated a grievance to challenge the agency’s selection process for a position in which she unsuccessfully competed. In connection with the grievance, the grievant submitted a request for documents to the agency relating to the selection process. The agency sought a compliance ruling from EDR to determine what documents it was required to produce in response to the grievant’s request. In EDR Ruling Number 2015-4130, issued July 24, 2015, EDR ordered the agency to produce certain documents. On July 27, the agency states that it provided the grievant with documents as directed by EDR. Having received no further response from the grievant after that date, the agency sent, by email, a notice of noncompliance to her on August 14.¹ In its notice of noncompliance, the agency requested a response from the grievant within five workdays of her receipt of the notice. Since more than five workdays have elapsed since the grievant received notice of her alleged noncompliance and she has not yet advanced or concluded her 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

¹ For purposes of this ruling, we will assume the grievant received the agency’s emailed notice of noncompliance because there is nothing to indicate that it may have been sent to an incorrect email address or was otherwise improperly addressed. *Cf., e.g.,* Washington v. Anderson, 236 Va. 316, 322, 373 S.E.2d 712, 715 (1988) (holding that the mailing of correspondence, properly addressed and stamped, raises a presumption of receipt of the correspondence by the addressee).

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 agency requested a compliance ruling from EDR to address issues relating to the production of documents, which stayed the grievance process.⁵ Once EDR Ruling Number 2015-4130 was issued on July 24, 2015, the grievance process resumed.⁶ After the agency apparently complied with EDR's order to produce additional documents, the grievant was under a duty to either advance or conclude the grievance within five workdays, as required by the grievance procedure.⁷ It appears that the grievant has not done so. Moreover, the agency notified the grievant of her noncompliance and the grievant has not advanced or concluded her grievance.

As the grievant has apparently failed to advance or conclude her grievance in a timely manner, she has failed to comply with the grievance procedure. We therefore order the grievant to correct her noncompliance **within ten workdays of the date of this ruling** by notifying her human resources office in writing that she wishes either to conclude the grievance or proceed to the third resolution step. 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).

EDR's rulings on matters of compliance are final and nonappealable.⁸



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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 *Grievance Procedure Manual* § 6.1.

⁶ See *Grievance Procedure Manual* §§ 6.1, 8.2.

⁷ See *Grievance Procedure Manual* § 3.2.

⁸ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).