

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: December 2, 2016; Ruling No. 2017-4450; Agency: Department of Corrections; Outcome: Agency 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 2017-4450
December 2, 2016

The Department of Corrections (the “agency”) has requested a compliance ruling related to the grievant’s March 10 and March 15, 2016 grievances. 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 grievances.

FACTS

On or about March 10, 2016, the grievant initiated two grievances with the agency. Subsequently, on March 15, 2016, the grievant initiated a third grievance. The three grievances advanced to the third resolution step, whereupon the third step-respondent issued responses on separate dates in August 2016. The grievant states that she went on “sick leave” on July 23, 2016 and has not yet returned to work.

On or about September 30, 2016, the agency issued the grievant a noncompliance notice. In that notice, the agency stated that the March 10 grievances had been advanced by the grievant to requesting qualification and that the agency head’s qualification decisions were mailed to the grievant on September 8, 2016. That same notice advised the grievant that the March 15 grievance had advanced to the third step and that the third step response was sent to the grievant on August 2, 2016. However, documents provided to EDR by the agency indicate that none of the grievances advanced past the third resolution step, and this has since been confirmed by the agency.¹ The agency has now asked EDR for permission to administratively conclude the grievances for noncompliance.

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

¹ EDR notes that in its request for a noncompliance ruling, the agency again stated that the March 10 grievances had reached the qualification stage. However, in light of EDR’s conclusion, explained below, that the agency’s request is premature with respect to each of the March 10 and March 15 grievances, it is unnecessary for EDR to determine which information provided by the agency is accurate.

² *Grievance Procedure Manual* § 6.3.

³ *See id.*

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 grievant states that she has been out of work on leave since July 23, 2016. Since the time the third step responses were issued in August 2016, the grievant states she has been continuously on leave. Accordingly, the agency's request is premature, as the grievant's five workday period to pursue her grievances to the appropriate next step of each grievance has not yet begun to run. As such, the agency's request to conclude these grievances is denied.

The grievant has advised EDR that she plans to return to work when her medical leave has ended. On her return to work, the five workday period to decide whether to proceed to the next step or conclude each grievance will begin to run, starting on the day after her return.⁵ In the event she fails to advance or conclude her grievances during this period, the agency may again seek permission from EDR to administratively close the grievances through the noncompliance process after providing the grievant a new notice of noncompliance.⁶

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



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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 If the grievant has received the agency head's qualification decision with respect to any of the grievances, she may either advance that grievance by indicating that she wishes to appeal the agency head's decision to EDR or conclude the grievance. With respect to any grievance on which the last action taken was the third step response, that grievance may either be advanced by the grievant indicating that she wishes to advance to qualification or be concluded. To the extent the grievant has not been provided or no longer has a current copy of the most recent version of any of the Grievance Form A's, she should request and receive a duplicate copy from her human resources office.

⁶ *Grievance Procedure Manual* § 6.3.

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