

Issue: Compliance – Grievance Procedure (Second Step Meeting); Ruling Date:  
December 29, 2016; Ruling No. 2017-4463; Agency: Virginia Museum of Fine Arts;  
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 Virginia Museum of Fine Arts  
Ruling Number 2017-4463  
December 29, 2016

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management in relation to his October 19, 2016 grievance with the Virginia Museum of Fine Arts (“the agency”). The grievant alleges that the agency has failed to comply with the grievance procedure.

FACTS

On or about October 19, 2016, the grievant initiated an expedited grievance with the agency to challenge his separation from employment, which was apparently effective October 9, 2016. Following receipt of the grievance, the agency’s Human Resources Director spoke with the grievant’s attorney by phone about the substance of the grievance in calls occurring on or around October 25 and November 1. In the meantime, the grievant had obtained employment at a different state agency beginning on October 10. After discovering this fact following his separation, the agency states that it has taken steps to process the grievant’s move to the new state agency as a transfer. Consequently, the Human Resources Director felt that the grievance was effectively resolved. During discussions with the Human Resources Director, the grievant’s attorney states that she requested the usual meeting with the single management step-respondent. However, no such meeting ever occurred.

On November 18, 2016, the grievant’s attorney provided a notice of noncompliance to the agency head indicating that the face-to-face meeting required by the grievance procedure had not occurred. In the notice of noncompliance, the grievant’s attorney stated that she had been informed by the Human Resources Director on November 2 that the grievance would be provided to a representative at the Office of the Attorney General (OAG) to respond. On December 12, 2016, a letter from the OAG representative was sent to the grievant’s attorney, which stated: “I have reviewed your November 18, 2016 letter to [the Human Resources Director]. I see no merit to the allegations. [The grievant’s] grievance is closed.” Following receipt of the OAG correspondence, the grievant has sought this compliance ruling.

## DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

The *Grievance Procedure Manual* provides that the single management step of an expedited grievance involves a face-to-face meeting with the single management step-respondent.<sup>4</sup> The agency did not provide the grievant with such a meeting in this case, which is noncompliant with the grievance procedure. However, the Human Resources Director, while not the single management step-respondent, did provide the grievant's attorney with opportunities to discuss the matter by phone. Given the nature of the grievant's separation from employment, it is likely that the Human Resources Director would be a primary resource for the concerns raised in this grievance as she likely had the most direct involvement with the events leading to the grievant's separation. Therefore, while not technically compliant with the grievance procedure, EDR sees no purpose to sending the matter back to the agency for the required face-to-face meeting in this instance when extensive discussions, though ultimately not successful at attaining resolution, have already occurred.<sup>5</sup>

However, the statement from the OAG representative that the grievant's grievance is closed is in error. The *Grievance Procedure Manual* only authorizes an agency to unilaterally close a grievance in limited circumstances, generally involving a lack of access to the grievance procedure or initiation noncompliance,<sup>6</sup> none of which appear to be at issue here. There is no authority for an agency to close a grievance solely because it lacks "merit." Noncompliance of this nature is significant, though not substantial enough to support awarding full relief as

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<sup>1</sup> *Grievance Procedure Manual* § 6.3.

<sup>2</sup> *See id.*

<sup>3</sup> 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.

<sup>4</sup> *Grievance Procedure Manual* §§ 3.2, 3.4.

<sup>5</sup> The grievant's counsel has also indicated that proceeding toward the hearing phase at this point is acceptable.

<sup>6</sup> *See Grievance Procedure Manual* §§ 2.3, 2.4.

requested by the grievant's attorney.<sup>7</sup> Rather, though the OAG representative's purported closure of this grievance is inappropriate, any harm is easily corrected in this instance through this ruling.

On account of this noncompliance, EDR deems it appropriate to bypass any remaining agency-level steps in the expedited grievance process and advances the grievance to an EDR qualification ruling. If the grievant wishes to pursue his grievance, he, or his attorney, must submit a request for a qualification ruling to EDR **within ten workdays of the date of this ruling**. EDR will then issue a ruling on whether the grievance should qualify for a hearing.

EDR's rulings on matters of compliance are final and nonappealable.<sup>8</sup>



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<sup>7</sup> See Va. Code § 2.2-3003(G).

<sup>8</sup> See *id.* §§ 2.2-1202.1(5), 2.2-3003(G).