

Issue: Compliance/5 day rule; Ruling Date: March 6, 2003; Ruling #2003-026; Agency:
Norfolk State University; Outcome: Grievant in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Norfolk State University/No. 2003-026
March 6, 2003

The grievant has requested a compliance ruling in her October 16, 2002 grievance with Norfolk State University (the University). The grievant claims that the second step respondent exceeded an agreed upon time extension. For the reasons discussed below, we conclude that the University has remedied any non-compliance with the grievance procedure. Therefore, assuming that the grievant desires to continue with her grievance, the grievance should advance in accordance with the rules set forth in the Grievance Procedure Manual.¹

FACTS

At the time of the events relating to this grievance, grievant was employed as an Education Support Specialist II. On October 16, 2002, the grievant initiated a grievance challenging a Group III Written Notice for falsification of records, dated September 20, 2002.² On October 28, 2002, the grievant advanced her grievance to the second resolution step, the Acting Vice President for Academic Affairs. However, on October 31, 2002, the grievant requested an extension due to a "medical procedure" stating that "[u]pon my return I will contact your office so that we can continue this in a timely manner."³ The second step respondent, after a call from the grievant on December 9, 2002 stating she had returned to work, scheduled the second step meeting for December 18, 2002.⁴ Following the meeting, the second step respondent notified the grievant that she had "decided to recommend a cessation of all actions against [her] until a more extensive investigation" could be completed, and directed the grievant to the Human Resource Director regarding any questions.⁵ By memorandum, the grievant informed the Human Resource Director that she had granted the second step respondent an extension

¹ During this investigation, the grievant informed this Department that she had received the second step response, but that noncompliance issues remained because the third step response has not replied within the required timeframe. She informed this Department that she would send that noncompliance ruling request with supportive documents to this Department. Further, the grievant said she had been terminated, had grieved her termination, and had raised a noncompliance issue with this second grievance as well.

² See Written Notice issued 9/20/02.

³ See Memorandum from grievant to Acting Vice President for Academic Affairs dated October 31, 2002.

⁴ See Correspondence from the Acting Vice President for Academic Affairs to the grievant Subject: Grievance Step II dated December 13, 2002.

⁵ See Correspondence regarding October 16th Employee Grievance dated December 18, 2002.

of “an additional five workdays within which to issue the written second step response.”⁶ Accordingly, the new deadline was January 8, 2002. On January 7, 2002, the second step respondent sent the results of her investigation to the Human Resource Director, but not to the grievant. On January 13, 2003, the grievant wrote a noncompliance letter to the agency head.⁷ On January 22, 2003, the written second step response was sent to the grievant.⁸ On February 5, 2003, the grievant requested a ruling by this Department.⁹

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹⁰ That process assures that the parties first communicate with each other about the purported noncompliance, and resolve any compliance problems voluntarily without this Department’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. If the agency fails to correct the alleged noncompliance, the grievant may request a ruling from this Department. Should this Department find that the agency violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department may resolve the grievance in the grievant’s favor unless the agency can establish just cause for its noncompliance.

In addition, the grievance procedure requires that all claims of noncompliance be raised immediately.¹¹ If a party proceeds with the grievance after becoming aware of the other party’s procedural violation, the complaining party may waive the right to challenge the noncompliance at a later time.¹² Moreover, this Department has long held that it is incumbent upon each employee to know her responsibilities under the grievance procedure. Neither a lack of knowledge about the grievance procedure or its requirements, nor reliance upon general statements made by agency management or human resources will relieve the grievant of the obligation to raise a noncompliance issue immediately, as provided in the grievance procedure, upon becoming aware of a possible procedural violation.

The grievant, aware that she had not yet received the second-step written response, wrote the required letter of noncompliance on January 13, 2002. Upon receipt of this notice, the agency had five additional workdays, or until January 20, 2002 to respond. The agency did not respond until January 22, 2002, two days beyond the required timeframe. However, the agency had responded prior to the grievant’s February 5, 2003 ruling request to this Department, thereby rendering the noncompliance issue

⁶ See Memorandum Re: Employee Grievance dated December 23, 2002.

⁷ See Memorandum Re: Grievance/Second Step Resolution Response, dated October 16, 2002.

⁸ See Second Step Resolution Response dated January 22, 2003.

⁹ See Facsimile Transmittal dated February 5, 2003.

¹⁰ See *Grievance Procedure Manual* § 6, pages 16-18.

¹¹ *Grievance Procedure Manual* § 6.3, page 17.

¹² *Id.*

moot.¹³ Moreover, by advancing her grievance to the third resolution step prior to the issuance of this ruling, the grievant essentially waived her right to further contest the agency's purported non-compliance with the 5-day rule at the second step.¹⁴ The parties are advised that if the grievant desires to continue with her grievance, the grievance should proceed in accordance with the rules set forth in the Grievance Procedure Manual.

CONCLUSION

For the reasons discussed above, this Department concludes that the University has corrected, *as to the second step*, any noncompliance with the grievance procedure. The University is strongly urged to take all actions necessary to assure that employees and management step-respondents are correctly informed of their rights and obligations under the grievance procedure and to avoid future instances of noncompliance. This Department's rulings on matters of compliance are final and nonappealable and have no bearing on the substantive merits of the grievance.¹⁵

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Director

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¹³ Generally speaking, if a party has corrected any purported non-compliance prior to this Department's (EDR) receipt of a ruling request, we typically consider the non-compliance to be cured and, thus, there is no reason for EDR to take further action. An exception might be a case in which the non-compliant party has violated a substantial procedural requirement of the grievance procedure. In such cases, this Department has the authority to render a decision against the non-complying party on any qualifiable issue. *Grievance Procedure Manual* § 6.3(5), page 17. EDR would generally consider such an action only where the non-compliant party engaged in bad faith or significantly prejudiced the other party. This is not such a case. The parties are, however, advised that the time requirements of the grievance procedure are to be followed, and that repeated disregard of procedural rules *could* serve as evidence of bad faith.

¹⁴ *Grievance Procedure Manual* § 6.3, pg. 17.

¹⁵ Va. Code § 2.2-1001(5).