

Issue: Compliance/5-day rule; Ruling Date: April 16, 2003; Ruling #2003-046; Agency: Department of Education; Outcome: Agency out of compliance; grievance reopened.



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Education
Ruling Number 2003-046
April 16, 2003

The grievant has requested a compliance ruling regarding her January 24, 2002 grievance with the Department of Education. The agency asserts that the grievant did not respond to its request that she conclude her grievance, and on that basis, closed it administratively.

FACTS

Until her disability retirement effective July 1, 2002, the grievant was employed as a Music Specialist, K-12. On January 24, 2002, she initiated the present grievance alleging that she was disabled and that the agency had failed to accommodate her disability. As a result of symptoms associated with her disability, the grievant's last day of active employment was on January 28, 2002, when she departed on leave.

The grievance proceeded through the respondent steps unresolved. On June 21, 2002, the grievant requested that the agency place her grievance on hold pending the outcome of a disability retirement claim, to which the agency agreed. On December 27, 2002, the agency forwarded a letter to the grievant asking that she conclude her grievance since her disability retirement had been approved effective July 1, 2002. The grievant did not conclude her grievance or otherwise respond, and on February 11, 2003, the grievant was notified that her grievance had been administratively closed due to noncompliance.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹ That process assures that the parties first communicate with each other about the 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 grievant is the noncompliant party and fails to correct the alleged noncompliance within five work days of receiving the notice of noncompliance, this Department has long held that the agency may administratively close the grievance by notifying the grievant in writing (i) that the grievance has been administratively closed, and (ii) that the grievant may challenge the closing of her grievance by requesting a compliance ruling from this Department.²

Due to the particular facts of this case, this Department concludes that the agency prematurely closed the grievance. As discussed below, the agency closed the grievance before it gave the grievant the prerequisite notice of noncompliance.

On December 27, 2002, the agency sent the grievant a letter asking her to conclude her grievance because she had been granted disability retirement. Significantly, this letter did not present the grievant with the options of closing *or continuing* her grievance.³ Furthermore, the letter made no mention of noncompliance nor did it specify that she had five workdays in which to correct any alleged noncompliance. When the grievant did not respond to the agency's request to conclude her grievance, it subsequently informed her, on February 11th, that it was administratively closed.

Because the parties had agreed to place the grievance process on hold, it appears that the agency's December 27th letter was an attempt to get the grievance process back on track for what the agency presumed would be a closure. However, the December 27th letter was not a notice of noncompliance. Only after the grievant received the letter putting the grievance back on track, and failed to conclude or advance her grievance within five workdays, could a condition of noncompliance arguably arise. At that time, the agency should have sent a letter notifying the grievant of her noncompliance: the failure to close *or advance* the grievance within five days after learning that the grievance was no longer on hold.⁴

¹ *Grievance Procedure Manual*, § 6, pages 16-18.

² *Grievance Procedure Manual*, § 6.3, page 17.

³ While the agency apparently believed that the issues raised in the grievance had been adequately resolved through the grievance process, the grievant evidently did not. Moreover, absent some uncorrected procedural non-compliance by grievant or lack of access to the grievance process, the grievant, not the agency, determines whether to close her grievance.

⁴ Any such notice of noncompliance must explicitly state the nature of the noncompliance, that the grievant has five workdays in which to correct the noncompliance and that failure to do so could lead to the grievance being administratively closed.

Here, the agency did not provide the grievant with a notice of noncompliance following her failure to timely respond to its December 27th letter. Thus, the grievance was prematurely closed. Accordingly, the grievance is reopened and the grievant must, within five workdays of receipt of this ruling, inform the agency of her intention to either conclude or resume her grievance. This Department's rulings on compliance are final and nonappealable.⁵

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⁵ Va. Code § 2.2-1001 (5).