

Issue: Compliance/grievant asserts that first step-respondent refuses to respond to grievance and that agency is improperly insisting that grievant use the expedited grievance process; Ruling Date: December 30, 2004; Ruling #2004-925; Agency: Virginia Commonwealth University; Outcome: grievance is in compliance; grievant needs to close or advance grievance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Virginia Commonwealth University
Ruling Number 2004-925
December 30, 2004

The grievant requests a compliance ruling in his November 5, 2004 grievance with Virginia Commonwealth University (VCU or the agency). The grievant asserts that the first step-respondent refuses to respond to his November 5, 2004 grievance and that the agency is improperly insisting that he use the expedited grievance process.

FACTS

The grievant is employed as a housekeeping employee with VCU. On October 14, 2004, the grievant received a Group II Written Notice with termination for failure to complete a special cleaning assignment as directed. The grievant challenged the disciplinary action by initiating a grievance with VCU's Human Resources Office on November 5, 2004. That same day, the Human Resources Office faxed the grievance to the second step-respondent for appropriate handling under the expedited grievance process.

On November 8, 2004, the second step-respondent called the grievant's home to schedule the required second step meeting. The second step-respondent left a message for the grievant that the second step meeting would be held on November 10, 2004 at 1:00 p.m. When the grievant failed to call or appear for the meeting at the scheduled time, the second step-respondent sent the grievant a letter advising him that he needed to contact the second step-respondent no later than November 16, 2004 to schedule the second step meeting. On November 15, 2004, the grievant advised the second step-respondent that he did not wish to proceed with his grievance by way of the expedited process, but, alternatively, wanted to use the regular grievance process. As such, the second step-respondent forwarded the grievance to the first step-respondent on November 15, 2004. The first step-respondent responded to the grievance on November 15, 2004 and mailed the response to the grievant the following day.

Also on November 16, 2004, the grievant sent a notice of noncompliance to the agency head for the first step-respondent's failure to respond to the grievance as well as a letter requesting that the agency designate someone else to serve as the second step-respondent. The agency head responded to the noncompliance issue on November 19,

2004 and advised the grievant that the first step-respondent has responded and thus, the agency is in compliance with the grievance process. In a November 22, 2004 letter, the agency advised the grievant of his options regarding his desire to replace the designated second step-respondent with another individual.¹

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 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.³ For example, if the grievant believes that an agency has inappropriately refused to accept his grievance (as the grievant believed in this case), a grievant must notify the agency head of the alleged noncompliance.

Before seeking a compliance ruling from this Department, the grievant must allow the agency five workdays after receipt of the written notice to correct any noncompliance. If after five workdays the grievant believes that the agency has failed to correct the alleged noncompliance, the grievant may request a ruling from this Department. Furthermore, 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.⁴

Under the grievance procedure, "[a]s a general rule, an employee must initiate a grievance with the first step-respondent, who is generally his immediate supervisor."⁵ In turn, the first step-respondent must accept the grievance, enter the date of receipt on the Form A, and notify the agency's human resource office of the grievance.⁶ Additionally, within 5 workdays of receipt of the grievance, the first step-respondent must provide a written response on the Form A or an attachment.⁷ A grievance involving termination, however, may be initiated with the second step-respondent under the single management step expedited process.⁸

¹ The agency informed the grievant that he could either meet with an alternate second-step respondent selected by the agency, or he could receive only a written response from the designated second-step respondent and meet instead with the designated third-step respondent for the face-to-face fact-finding meeting.

² *Grievance Procedure Manual* § 6.1.

³ *Grievance Procedure Manual* § 6.3. In a case where the agency is purportedly out of compliance, the notification of noncompliance is directed to the agency head.

⁴ *Id.*

⁵ *See Grievance Procedure Manual* § 2.4.

⁶ *Grievance Procedure Manual* § 3.

⁷ *Id.*

⁸ *Grievance Procedure Manual* § 2.4.

In the present case, the grievant challenges his immediate supervisor's refusal to accept and respond to his November 5, 2004 grievance as well as the agency's unilateral decision to bypass the first step-respondent and advance the grievance to the second step-respondent under the expedited grievance process. It does not appear that the first step-respondent refused to accept and respond to the November 5, 2004 grievance as alleged but rather, was not given the initial opportunity to respond because the human resources office forwarded the grievance to the second step-respondent upon receipt.

The question remains however whether the agency violated the grievance procedure by bypassing the first step-respondent and forwarding the grievance to the second step-respondent. Although not expressly set forth in the grievance procedure, the privilege of deciding whether to utilize the expedited process generally lies with the grievant. Therefore, although it would appear that the agency was attempting to benefit the grievant by processing the grievance under the expedited process, such a decision was not the agency's to make. However, while this Department does not condone VCU's noncompliance, in this case, any harm that may have accrued to the grievant as a result of the agency's attempt to process the grievance under the expedited procedure has been corrected by the first step-respondent's subsequent acceptance and first management resolution step-response dated November 15, 2004. As such, the issues to which the grievant now object have essentially been corrected. Most importantly, the grievant has not cited to any prejudice suffered as a result of the agency noncompliance.

Accordingly, within 5 workdays of receipt of this ruling, the grievant must notify the agency that he wishes to either conclude his November 5, 2004 grievance or advance it by exercising one of two options offered by the agency. This grievance does not make a determination about the merits of the November 5, 2004 grievance, only that it is in compliance with the grievance procedure. This Department's rulings on matters of compliance are final and nonappealable.⁹

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⁹ Va. Code § 2.2-3003(G).

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