

Issue: Compliance/5-day rule; grievance issue/discipline/unsatisfactory performance; Ruling Date: April 12, 2005; Ruling #2005-989; Agency: Department of Juvenile Justice; Outcome: agency has corrected non-compliance with the grievance procedure.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling No. 2005-989
April 12, 2005

On March 18, 2005, the grievant, through her attorney, requested a compliance ruling in her March 3, 2005 grievance with the Department of Juvenile Justice (DJJ or the agency). The grievant alleges that the agency has failed to comply with the time limits set forth in the Grievance Procedure Manual and that she is therefore entitled to a ruling in her favor on the merits of her grievance.

FACTS

The grievant is employed by the agency as a Rehab Counselor II. On February 22, 2005, the grievant received a Group I Written Notice for inadequate or unsatisfactory job performance. The written notice was issued by the Assistant Superintendent of the facility to which the grievant was assigned.

On March 3, 2005, the grievant submitted a grievance challenging the Written Notice to the agency's second-step respondent. On her Grievance Form A, the grievant indicated that she was electing not to present the grievance to her immediate supervisor because of discrimination or retaliation by that supervisor. The second-step respondent subsequently forwarded the grievance to the correct first-step respondent—the assistant superintendent, who is the supervisor of the grievant's immediate supervisor.¹ The assistant superintendent apparently received the grievance on March 9, 2005.

On March 11, 2005, the grievant, through her attorney, gave written notice of noncompliance to the agency head. This notice challenged an alleged failure by the agency to respond to the grievance within five work days of receipt. The agency states that on March 14, 2005, the assistant superintendent met with the grievant to discuss her grievance; the grievant denies that she met with anyone from the agency regarding her grievance after her notice of

¹ Where, as here, a grievant alleges discrimination or retaliation by her immediate supervisor, the Grievance Procedure Manual allows the grievant to initiate his or her grievance with the next level supervisor. *Grievance Procedure Manual* § 2.4. The Manual does not allow the grievant in such a case to make a unilateral decision to initiate the grievance at the second-step level, thus bypassing the first resolution step. We note that some of the grievant's apparent confusion as to the correct procedure may be caused by a disagreement between the agency and the grievant as to the identity of her immediate supervisor. The grievant, through her attorney, has identified the Assistant Superintendent as her "direct supervisor"; in contrast, the agency has advised this Department that the Assistant Superintendent is not the grievant's immediate supervisor, but rather her immediate supervisor's supervisor.

noncompliance. On March 15, 2005, the assistant superintendent prepared a first-step response to the grievance, in which he denied the grievant's request to rescind the written notice, but the agency did not mail this response to the grievant until March 21, 2005.

On March 18, 2005, the grievant's attorney requested a compliance ruling from this Department. Citing prior noncompliance by the agency, the grievant's counsel asks this Department to order that the written notice be rescinded as a remedy for the agency's "blatant disregard of her rights."

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 purported 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. If the party fails to correct the alleged noncompliance, the other party may request a ruling from EDR. Should EDR find that the agency violated a substantial procedural requirement, EDR may render a decision against the noncomplying party on any qualifiable issue, unless the noncomplying party can establish just cause for its noncompliance. Rendering such a decision is reserved for the most egregious of circumstances.

In this case, it is clear that the agency failed to comply with the time limits set forth in the Grievance Procedure Manual. While the agency's failure to respond to the grievance prior to the grievant's March 11, 2005 notice of noncompliance is understandable (given the grievant's erroneous submission of her grievance to the second-step respondent), the agency's failure to respond in a timely manner after receipt of that notice is not. By its own admission, the agency did not mail the first-step response to the grievant until March 21st, six work days after the agency received the grievant's notice of noncompliance and eight work days after receipt of the grievance by the first-step respondent. We note that the agency has offered no explanation for its delay.

However, while this Department does not condone the agency's failure to provide a timely first-step response, we do not find that it was so egregious in nature as to justify an award on the merits on the grievant's behalf. Any harm that may have accrued to the grievant has been cured by the written response mailed to the grievant on March 21, 2005 and received by the grievant on March 26, 2005. Although the grievant is understandably frustrated by the agency's actions, she has not shown that she suffered any significant prejudice as a result of the agency's noncompliance. We caution the agency, however, that future noncompliance with the grievance procedure, with respect to this or any other grievance, may result in a decision against the agency on any qualifiable issue.

CONCLUSION

² See *Grievance Procedure Manual* § 6.3.

For the reasons discussed above, this Department concludes that the agency has corrected, as to the first step, any noncompliance with the grievance procedure. The agency 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 merits of the grievance.³

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Director

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³ Va. Code § 2.2-1001(5).