

Issue: Compliance – Grievance Procedure – 5 Day Rule; Ruling Date: September 21, 2007; Ruling #2008-1786; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Agency Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Mental Health, Mental Retardation
and Substance Abuses Services
Ruling No. 2008-1786
September 21, 2007

The grievant has requested a compliance ruling in his April 23, 2007 grievance with the Department of Mental Health, Mental Retardation and Substance Abuses Services (DMHMRSAS or the agency). The agency administratively closed the grievance, claiming that the grievant did not timely advance his grievance. For the reasons discussed below, this Department concludes that the agency prematurely closed the April 23rd grievance.

FACTS

The grievant is a Security Officer III. In his grievance he lists that following as the issues:

I have been given more and more duties and responsibilities since I became a Supervisor in 1996. I requested on February 2006 that my EWP be changed to reflect all the extra duties/responsibilities. My EWP was revised to show the changes, approved and signed by the Security Manager and his Supervisor in October 2006. After my EWP was changed, I requested an in-band adjustment to get more money for all of these extra duties and responsibilities I now have in November 2007; just after my 2006 evaluation was completed. The Security Manager advised me on February 3, 2007, that I was not going to get an in-band adjustment for more money. Also, I was advised that he was told to take some of the duties/responsibilities away from me.

In the fact section of his grievance, the grievant asserts that the removal of duties was retaliation for requesting the pay increase. Accordingly, he initiated the instant grievance requesting as relief the following:

My EWP will stay as it is now, reflecting all of my duties/responsibilities I now have[;]
No duties/responsibilities will be taken from me[;]
I will get paid fairly for all of these duties/responsibilities I have performed in the past and get an in-band adjustment for them now and in the future[;]
The position of Assistant Security Manager (Assistant Chief) should be strongly considered for the employee that has the EWP I now have.

The grievance proceeded to the third step and not long after the grievant received the third step response on June 19, 2007, he received news that he would be receiving an in-band pay adjustment. On July, 2, 2007, the grievant expressed concern to the third step respondent that the amount of the adjustment, four percent, was insufficient and that he was unclear as to what “duties comes [sic] with this raise.”¹ While he was awaiting a response from the third step respondent, the HR Director purportedly contacted the grievant about concluding his grievance.² The grievant asserts that while he was still awaiting a response from the Director, the HR Director improperly closed his grievance.³

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.⁴ 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.⁵ For example, if a grievant believes that management has not adequately responded to the issues of his grievance (as the grievant believes in this case), the grievant must notify the agency head of the alleged noncompliance.

Before seeking a compliance ruling from this Department, a 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, he or she 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.

¹ *Id.*

² *Id.*

³ *Id.*

⁴ *Grievance Procedure Manual*, § 6.

⁵ *Grievance Procedure Manual*, § 6.3.

In this case, the grievant does not claim that he has informed the agency head of the purported inadequacy of the third step response, nor has he expressly asked this Department to rule on the response. However, given that the adequacy of response appears to be at the core of this dispute we are compelled to address this issue.⁶

Third Step Response

Under the grievance procedure, the third step respondent must provide a written response within five workdays of receipt of the employee's grievance. The written response must address the issues and relief requested and should notify the employee of his procedural options.⁷

In his grievance, the grievant claims that on February 2006 he requested that management modify his EWP to reflect the new duties and responsibilities he had taken on since 1996. He asserts that his EWP was revised to reflect the new duties but was told that he would not receive an in-band adjustment for his assumption of additional responsibilities. The grievance asserts that he was told that some duties would be removed but the grievant asserts that the removal of duties was retaliation for requesting a pay increase.

The third step respondent addressed these issues and the requested relief by stating in his response that:

[Grievant] presents that he has absorbed a number of duties for which he has not been compensated. These duties are said to include: operational coverage when the Security Manager is out, management of vehicles, management of hospital radios, training of other Officers, assignment of various committees, etc. He states that, while he has had many of these duties for a number of years, they were not included in the EWP reviewed by Human Resources in early 2006. He now believes his EWP is up to date and reflective of his actual duties. He believes that since the other two Lieutenants do not perform these additional duties he should be compensated for them or relieved of them. He states that his current job functions like an "Assistant Chief."

Findings:

The basic issue for me is whether these duties have been reviewed previously by Human Resources. In looking into this it appears that while

⁶ The grievance record provided to this Department does not contain any documentation showing that the grievant notified the agency head (as opposed to the facility head) of any deficiency with the third step response. Normally the issue of the adequacy of the response would appear to be premature for this Department to address. However, as we are required at this point to rule on the closing of the grievance and for the sake of efficiency, we will address the issue of the adequacy of the third step response now.

⁷ See *Grievance Procedure Manual* § 3.3.

some of them are rather longstanding they were not in the EWP reviewed in 2006 when the Security Department was reviewed.

Conclusion:

The EWP of [the grievant] has been reviewed by Human Resources. It appears that the additional duties contained therein warrant an in band adjustment. This will be presented for review and approval by the Central Office Human Resource Department as required for all in band adjustments. I cannot prejudge how that review and approval process will go. Some duties do not lend to being distributed among other Lieutenants; however, I would like Security Manager [] to review the other duties and determine if any of them can be distributed and preserve the department's effective contribution to the [facility's] mission. Committee work and being part of the HEICS chain of command plans do not warrant additional pay and have not been a sufficient basis for salary changes in the past.

This response appears to be an adequate third step response to the grievance. It addresses all issues raised, if not expressly, certainly implicitly. However, it does not fully address the relief requested.⁸ For example, the response does not appear to address the request for back pay for the additional duties performed in the past or consideration of the proposed position of Assistant Security Manager (Assistant Chief). Accordingly, the agency is ordered to respond to the relief requested in the grievance.

The grievant also states that the agency has not answered questions relative to the award of the four percent in-band adjustment, such as what duties the award contemplates. We note that a step response to a grievance is a "point-in-time" response which does not require a follow-up response as circumstances evolve. Here, the third-step respondent appears to have made a measured response to the grievance, pointing out that while an in-band adjustment appeared to be warranted, ultimate approval hinged on the central HR office. At the time that the third step respondent responded to the grievance, the adjustment had not yet been approved and the third step respondent had no reason to address in detail which duties were associated with what was at the time a prospective pay increase. Once approved, the third step respondent had no obligation under the grievance procedure to go back and amend his response, although such clarification is obviously necessary and appropriate from a performance management perspective.

⁸ We note that included as relief the grievant asked that his EWP not be modified and that no duties be removed from his EWP. The third step respondent did address this requested relief by noting that some duties did not lend themselves to being distributed among other Lieutenants but he wanted the Security Manager to review the grievant's duties and determine whether any of the other duties could be distributed and still "preserve the department's effective contribution to the [facility's] mission." Thus, it appears that the third step respondent did sufficiently address this aspect of the relief sought by the grievant.

Closure of the Grievance

An agency may not close an allegedly non-compliant grievance without first seeking a ruling from the EDR Director. Before seeking such a ruling, the agency must inform the grievant, in writing, of the noncompliance and allow the grievant five workdays after receipt of the written notice to correct the noncompliance. If EDR finds that the grievant is out of compliance, EDR will order the grievant to correct the non-compliance. If it is not corrected within the designated timeframe, the agency may close the grievance.⁹

In this case, the agency closed the grievance without first requesting a compliance ruling from this Department. Accordingly, the grievance was prematurely closed.

CONCLUSION

Both parties are directed to reopen and proceed with the April 23, 2007 grievance, in accordance with this ruling. Within five workdays of receipt of this ruling the third step respondent is ordered to address the request for back pay for the additional duties performed in the past or consideration of the proposed position of Assistant Security Manager (Assistant Chief) position. Within five workdays of receiving this response, the grievant must indicate whether he wishes to seek qualification of his grievance or to conclude it. This Department's rulings on matters of compliance are final and nonappealable and have no bearing on the merits of the grievance.¹⁰

Claudia T. Farr
Director

⁹ *Grievance Procedure Manual* § 6.3; *Frequently Asked Grievance Questions*, FAQ # 29, at <http://www.edr.virginia.gov/faqs.htm>

¹⁰ Va. Code § 2.2-1001(5).