

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: October 30, 2007; Ruling #2008-1835; Agency: Department of Correctional Education; Outcome: Grievant In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Correctional Education
Ruling No. 2008-1835
October 30, 2007

The Department of Correctional Education (the agency) seeks a compliance ruling concerning the grievant's July 27, 2007 grievance. The agency alleges that the grievant has failed to comply with certain requirements of the grievance procedure.

FACTS

On June 29, 2007, the agency issued a Group I Written Notice with termination to the grievant for allegedly violating agency policy 5-9. The grievant challenged this Written Notice in a grievance dated July 27, 2007. The Grievance Form A was sent to the agency head on July 27, 2007 by certified mail. It was received by the agency no later than July 31, 2007. On August 23, 2007, the grievant sent a notice of noncompliance to the agency head, which stated, in part, that she had not received any response to her grievance as of that date. The agency contends it had no knowledge of the filing of the July 27, 2007 grievance.

DISCUSSION

The agency has requested that this ruling "preempt" the grievant from raising a noncompliance argument as to the agency's alleged failure to respond to the July 27, 2007 grievance. The agency further requests that the grievance be administratively closed. To support its argument, the agency states that the grievant has waited over two months to pursue the July 27, 2007 grievance. Because of this delay, the agency asserts that the grievant would be too late to challenge any noncompliance on the agency's part that may have occurred in not responding to the July 27, 2007 grievance. We disagree.

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹ That process assures that the parties first

¹ *Grievance Procedure Manual* § 6.3.

communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department's (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.² If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from the EDR Director, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for the delay in conforming to EDR's order.³

In this case, the agency's request for a compliance ruling is premature. The agency has presented no evidence that it first gave the grievant written notice of her alleged noncompliance. As such, the agency's ruling request is not ripe for determination and must be denied. Moreover, even if the agency had satisfied the prerequisites under the grievance procedure, there is no basis to grant the agency's request. While the grievance procedure requires that "claims of noncompliance should be raised immediately,"⁴ the grievant has not delayed in this case such that she has waived this issue of noncompliance because the grievance has not advanced to the next management resolution step.

Additionally, this Department is compelled to note that there is no dispute that the agency received the July 27, 2007 grievance on July 31, 2007.⁵ Even if the agency had no prior knowledge of the grievance, it clearly does know about the grievance now. It is the policy of the Commonwealth that grievances be resolved promptly and fairly.⁶ Now that the agency without question has received sufficient knowledge of the grievance, it

² *Id.*

³ While in cases of substantial noncompliance with procedural rules the grievance statutes grant the EDR Director the authority to render a decision on a qualifiable issue against a noncompliant party, this Department favors having grievances decided on the merits rather than procedural violations. Thus, the EDR Director will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, this Department will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

⁴ *Grievance Procedure Manual* § 6.3.

⁵ The agency argues that because a member of its personnel staff signed for the grievance and it was never received by the Director of Internal Affairs pursuant to internal practice, it was not submitted properly by the grievant. However, the grievance was addressed to the agency head. Though grievances are normally initiated with the grievant's immediate supervisor, this Department has consistently held that a grievance initiated in a timely manner but with the wrong management representative will not bar a grievance for noncompliance. *E.g.*, EDR Ruling No. 2006-1373; EDR Ruling No. 2006-1114; EDR Ruling No. 2004-645; EDR Ruling No. 2001-230. As such, it would appear that the agency received the grievance in an acceptable manner.

⁶ Va. Code § 2.2-3000(A); *Grievance Procedure Manual* § 1.1.

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must proceed with the management steps and respond to the grievance in a timely fashion.

This Department's rulings on matters of compliance are final and nonappealable.⁷

Claudia T. Farr
Director

⁷ See Va. Code § 2.2-1001(5), 2.2-3003(G).