

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: January 17, 2008; Ruling #2008-1907, 2008-1911, 2008-1912, 2008-1913; Agency: Virginia Department of Health; Outcome: Grievant Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Health
Ruling No. 2008-1907, 2008-1911, 2008-1912, 2008-1913
January 17, 2008

The Department of Health (the agency) seeks a compliance ruling concerning four of the grievant's grievances. The agency alleges that the grievant has failed to comply with the time limits set forth in the grievance procedure for advancing or concluding his grievances.

FACTS

This ruling concerns four grievances: 1) a grievance initiated on September 6, 2007, regarding an August 7, 2007 counseling memo ("Grievance 1"); 2) a grievance initiated on September 6, 2007, alleging the refusal of the grievant's supervisor to grant him leave to attend a conference, discrimination, and retaliation ("Grievance 2"); 3) a grievance initiated on September 17, 2007, seeking the removal of a Written Notice and associated due process memo from the supervisory file of the grievant, and alleging discrimination and retaliation ("Grievance 3"); and 4) a grievance initiated on September 17, 2007, alleging that the grievant's supervisor had not provided him access to the grievant's supervisor file and that certain documents from that file were provided in a redacted form ("Grievance 4).

For Grievances 1 – 3, the second step-respondent provided his responses to the grievant on October 9, 2007. It appears that the responses were received at the grievant's address on October 11, 2007. As to Grievance 4, the first step-respondent provided her response on September 24, 2007.¹ The agency alleges that the grievant has failed to return the grievance packages to the agency to advance or conclude any of the grievances since its management step responses were provided. During this general time period as well, the grievant agreed to enter into mediation with his supervisor regarding matters raised by the grievances, but the parties did not enter into an agreement to put the grievances on hold while the mediation was pending.

¹ The grievant also sent a notice of noncompliance to the agency in relation to Grievance 4 on October 4, 2007. The agency responded to that notice on October 5, 2007, and no other action appears to have taken place on Grievance 4 since that time.

The agency sent the grievant a notice of noncompliance outlining these issues by e-mail on December 11, 2007. In its notice of noncompliance, the agency gave the grievant three options to correct the noncompliance: 1) forward the grievances to the next step, 2) conclude the grievances, or 3) indicate in writing that the grievances should be put on hold until after the mediation is concluded. An electronic return receipt indicates that the e-mail was displayed on the grievant's computer on December 18, 2007. There is no evidence that the grievant pursued any of these options.

Because more than five workdays have elapsed since the notice of noncompliance, and the grievant has not yet cured the noncompliance, the agency seeks a compliance ruling.

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 (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.³ 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.⁴

In this case, the grievant has failed to advance or conclude his grievances within five workdays of receiving the agency's second resolution step responses (Grievances 1 – 3) and first step response (Grievance 4). Moreover, the agency appears to have notified the grievant of his noncompliance, but the grievant has not advanced or concluded his grievances.

It should also be noted that the grievant has entered into mediation with his supervisor. The grievance procedure permits the parties to a grievance to put a grievance on hold if the parties agree to engage in mediation regarding the issues of the grievance.⁵ However, such an

² *Grievance Procedure Manual* § 6.3.

³ *Id.*

⁴ 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.

⁵ *See Grievance Procedure Manual* §§ 1.2, 8.4.

agreement must be in writing to extend the grievance timeframes.⁶ In this case, there is no evidence that such a written agreement was made either before or after the grievant's receipt of the agency's notice of noncompliance.

Because Grievances 1 – 4 have not been put on hold by written agreement pending the mediation, the timelines of the grievance procedure are still active. As such, the grievant has failed to advance or conclude his grievances in a timely manner, which is failure to comply with the grievance procedure.⁷ This Department therefore orders the grievant to correct his noncompliance **within ten workdays of the date of this ruling** by notifying his agency human resources office in writing that he wishes to either conclude his grievances or advance them to the next steps.⁸ If he chooses to advance his grievances, the grievant also has the additional option of asking the agency to enter into a written agreement to put the grievances on hold, i.e., extend the grievance timeframes, to provide time to complete the mediation.⁹ If the grievant fails to notify the agency **within ten workdays of the date of this ruling** whether he wishes to conclude or advance his grievances, the agency may administratively close the grievances without any further action on its part.¹⁰ The grievances may be reopened only upon a timely showing by the grievant of just cause for the delay (for example, a serious illness, or other circumstances beyond the grievant's control).

This Department's rulings on matters of compliance are final and nonappealable.¹¹

Claudia T. Farr
Director

⁶ *Id.*

⁷ *Grievance Procedure Manual* §§ 3.1, 3.2.

⁸ For Grievances 1 – 3, the grievant would be seeking to advance to the third step. In Grievance 4, the next step would be the second step. If the grievant chooses to advance the grievances, he must return the grievance packages to the appropriate step-respondents for further action. *Grievance Procedure Manual* §§ 3.1, 3.2.

⁹ Mediation is voluntary, and thus a viable option only if both parties agree to participate. *Grievance Procedure Manual* §1.2.

¹⁰ If this occurs and the grievances are closed administratively for noncompliance, the closing of the files will not relieve the agency of its duty to implement the relief provided to the grievant by the second step-respondent in Grievance 3.

¹¹ See Va. Code § 2.2-1001(5), 2.2-3003(G).