

Issues: Compliance – Grievance Procedure (Documents and 5-Day Rule); Ruling Date: April 27, 2010; Ruling #2010-2610, 2010-2613; Agency: George Mason University; Outcome: Agency in Compliance, Grievant In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of George Mason University
Ruling No. 2010-2610, 2010-2613
April 27, 2010

The grievant has requested a ruling regarding the alleged noncompliance of George Mason University (the University) in not providing a requested document. In addition, the University also seeks to administratively close the grievance due to the grievant's alleged failure to comply with the time limits set forth in the grievance procedure for advancing or concluding his grievance.

FACTS

This ruling concerns a grievance filed in October 2007. Following apparent inactivity and/or extensions of time in this grievance, on April 6, 2010, the University notified the grievant that no more extensions would be granted. Consequently, on April 6, 2010, the University informed the grievant that he had five workdays (until close of business April 13, 2010) to advance his grievance to the second step or close it. On April 13, 2010, the grievant sent the University a noncompliance letter, raising the issue of an administrative faculty member's job description he had requested but not been provided. The agency states that no such document exists because the individual is a faculty member. Later on April 13, 2010, the University sent the grievant a notice of noncompliance regarding his alleged failure to advance or conclude his grievance within five workdays as requested in the April 6, 2010 e-mail. In its notice of noncompliance, the University stated that it would seek permission to administratively close his grievance if he did not advance or conclude it within five workdays (by April 20, 2010). The grievant submitted a compliance ruling request to this Department on April 19, 2010, due to the University's alleged failure to provide the job description. On April 21, 2010, the University submitted its request for a compliance ruling, seeking permission to close the grievance.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹ 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

¹ *Grievance Procedure Manual* § 6.3.

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 its delay in conforming to EDR's order.³

Alleged Noncompliance by the University – Document Issue

The grievant asserts that the University has not produced a job description for an administrative faculty member. The University states that there is no job description for this individual because she is a faculty member. The University appears to have provided the grievant this individual's last job description when she was a classified employee. The grievant has presented no evidence that the University is withholding a responsive document actually within its custody or control. A party "shall not be required to create a document if the document does not exist."⁴ Thus, the agency cannot be out of compliance with the grievance procedure by not providing a job description that does not exist. As such, there is no basis for this Department to find that the University has failed to comply with the grievance procedure.

Alleged Noncompliance by the Grievant – Failure to Advance or Conclude

The *Grievance Procedure Manual* provides that within 5 workdays of receiving the first-step response, the employee must either continue to the second step, by submitting the grievance package to the second step-respondent, or notify the agency of his/her intention to conclude the grievance.⁵ Certainly the University's desire to move this grievance forward without any further extensions is understandable. However, following the University's April 6, 2010 e-mail, the grievant sent correspondence addressing the document issue discussed above, and on April 19, 2010, submitted his compliance ruling request to this Department, staying the process.⁶ The grievant's assertion of the compliance issue was not an inappropriate or harassing⁷ request under the grievance process. Based on these facts, this Department cannot find the grievant has

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.

⁴ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁵ *Grievance Procedure Manual* § 3.1.

⁶ *Grievance Procedure Manual* § 6.1.

⁷ See *Grievance Procedure Manual* § 2.4 ("An employee's grievance must ... [n]ot be used to harass or otherwise impede the efficient operations of government.") and § 9 (defining "harass" as "[a]ction taken with the intent or purpose of impeding the operations of the agency").

abandoned his grievance⁸ or that he has failed to comply with the grievance procedure at this time.

However, now that the compliance matters have been resolved in this ruling, the grievance should be ready to proceed to the second step. The grievant is directed to forward the grievance to the second step-respondent **within five workdays of receipt of this ruling**. Failure to do so without just cause could result in a finding of noncompliance. In addition, unnecessary delays and/or unreasonable compliance requests could be considered noncompliance or possibly attempts to harass or impede agency operations⁹ leading to closure of the grievance.

This Department's rulings on matters of compliance are final and nonappealable.¹⁰

Claudia T. Farr
Director

⁸ Nonresponsiveness by parties to a grievance does not support the purpose of the grievance process to resolve workplace disputes fairly and promptly. *See Grievance Procedure Manual* § 1.1. Indeed, a grievant's nonresponsiveness could indicate potential abandonment of a grievance.

⁹ *See* Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.

¹⁰ *See* Va. Code §§ 2.2-1001(5), 2.2-3003(G).