

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: October 17, 2011; Ruling No. 2012-3085, 2012-3086, 2012-3087, 2012-3088, 2012-3089, 2012-3090; Agency: Virginia Commonwealth University; Outcome: Agency Not in Compliance.

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*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Virginia Commonwealth University  
EDR Ruling No. 2012-3085, 2012-3086, 2012-3087, 2012-3088, 2012-3089, 2012-3090  
October 17, 2011

Virginia Commonwealth University (“agency”) has requested a compliance ruling related to four grievances filed by the grievant on April 28, 2011, and two grievances filed by the grievant on April 30, 2011. The agency alleges that the grievant has failed to comply with the time limits set forth in the grievance procedure for participating in the second-step meeting.

FACTS

On April 28, 2011, the grievant initiated four grievances with the agency, and on April 30, 2011, he initiated two grievances with the agency. The agency labeled these grievances “1,” “2,” “3,” “4,” “5,” and “6” respectively. All six grievances allege the grievant’s immediate supervisor discriminated or retaliated against him.

On July 28, 2011, the agency emailed the grievant, inquiring whether it could hold a single second resolution step meeting for all six grievances. On August 5, 2011, the grievant declined the agency’s request and insisted on holding six individual second resolution step meetings for each of the grievances. For efficiency purposes, the agency once again requested to address all six grievances in one second resolution step meeting on August 8, 2011. On August 15, 2011, the grievant sent a notice of noncompliance to the agency head, indicating the agency was noncompliant by not scheduling the second resolution step meetings for the six grievances within a timely manner. The agency responded to the grievant’s notice of noncompliance on August 17, 2011, indicating that the second step respondent had been on leave, and hence, he was unavailable to schedule the meetings within the five workdays. The agency made additional attempts to schedule the second resolution step meetings for the six grievances, but it asserts the grievant has yet to schedule the meetings.

While the agency and the grievant were attempting to schedule the second resolution step meetings during the month of August, the grievant also made several document requests to the agency. His first document request, which pertained to a separate grievance, was on August 4, 2011. Because the grievant allegedly did not receive a response from the agency, he requested to temporarily halt grievances one through six on August 11, 2011 until he received the requested documents. On August 12, 2011, the agency informed the grievant the requested documents

were all available upon receipt of a \$216.66 document production search fee the agency incurred. A week later, in an August 18, 2011 email, the agency's human resource manager informed the grievant that it would not halt the grievance process for grievances one through six because the requested documents were available. Hence, the agency informed the grievant he had "five days to make payment for the requested documents and to either advance or close grievances 1 thru 6." The agency did not receive a response from the grievant.

The agency sent a notice of noncompliance to the grievant by mail and email on August 31, 2011, stating that because the grievant had received prior notification of noncompliance from the agency in an August 18<sup>th</sup> email, and because the grievant failed to pay for his requested documents or indicate whether he intended to advance or conclude the six grievances within five workdays of the August 18<sup>th</sup> email, the agency had closed the six grievances labeled 1, 2, 3, 4, 5, and 6.

On September 12, 2011, in an email addressed to this Department, the grievant indicated that he wishes to "continue on to the 2<sup>nd</sup> step responder for fact finding meetings" and that he has "continued in good faith to schedule meetings on these (and others) grievances with the 2<sup>nd</sup> step responder."

Since more than five workdays have elapsed since the agency's notification to the grievant of his alleged noncompliance, and the grievant has not yet participated in the second-step meeting, the agency seeks a compliance ruling from this Department.

### DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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<sup>1</sup> *Grievance Procedure Manual* § 6.3.

<sup>2</sup> *See Id.*

<sup>3</sup> 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

In this case, the agency's request for a compliance ruling is premature because the agency has not shown that it first notified the grievant in writing of the alleged procedural violation in express and unequivocal language, as required by the grievance procedure. Specifically, the August 18<sup>th</sup> email from the agency to the grievant appears to be the agency's response to the grievant's request to halt the grievance process and in response to the grievant's allegations of agency noncompliance regarding the scheduling of the second resolution step meeting. It does not appear to expressly and unequivocally notify the grievant of the grievant's alleged noncompliance with the second-step meeting for grievances labeled one through six. The agency is therefore advised that if it still desires a compliance ruling from this Department, it must first give written notice of the alleged noncompliance to the grievant and allow the grievant five days to correct any noncompliance. Only after the agency has satisfied this procedural prerequisite will this Department address any claim of noncompliance.

We note, however, that it appears the grievant intends to advance these six grievances to second-step meetings as soon as he receives the documents he requested from the agency. Under the grievance process, a party requesting documents has the option of demanding, in writing, that the grievance process temporarily halt.<sup>4</sup> However, the grievance process is only halted until the documents are provided.<sup>5</sup> In this case, the agency has notified the grievant that the requested documents are available upon receipt of a \$216.66 document production search fee. A requesting party may "be charged the actual cost to retrieve and duplicate the documents."<sup>6</sup> Therefore, to the extent the grievant believes the agency is out of compliance in producing the requested documents, he must first notify the agency head in writing of the alleged noncompliance before seeking a ruling from this Department. It does not appear from this Department's review of the documents submitted by both parties that the agency head has been notified of any such alleged noncompliance.

Finally, we are compelled to note that it appears that the processing of the grievances has become exceedingly contentious. The grievance procedure provides that a grievance cannot "be used to harass or otherwise impede the efficient operations of government."<sup>7</sup> While neither the number, timing, potential frivolous nature of the grievances, nor related burden to an agency are controlling factors in themselves, those factors could, in some cases, support an inference of harassment cumulatively or in combination with other factors. Likewise, excessive delay in responding to a grievance, unreasonable charges for documents and disregard of clear grievance rules by an agency could be indicative of or lack of good faith by an agency. We do not mean to imply that we have found evidence of bad faith or an intent to harass by either party. However, the parties are cautioned to exercise good faith in dealing with one another. To the extent that both parties feel a neutral third party may help resolve these document and scheduling issues, this Department offers facilitation as one option and encourages both parties to consider it. If

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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.

<sup>4</sup> *Grievance Procedure Manual* § 8.2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Grievance Procedure Manual* § 2.4; see also Va. Code § 2.2-3003(C).

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both parties are interested in facilitation, they are directed to contact this Department for further information regarding the facilitation process.

It should be noted that the agency is not required to grant the grievant separate meetings for each grievance. Notwithstanding the language of § 8.5 of the *Grievance Procedure Manual*, an agency may schedule a single meeting to address multiple grievances. No particular amount of time need be set aside for such a meeting. The key is that there be sufficient time to address the issues raised in each of the grievances. Lastly, the parties are urged to consider consolidation of all or some of these grievances to expedite processing through the management steps.

This Department's rulings on matters of compliance are final and nonappealable.<sup>8</sup>

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Claudia T. Farr  
Director

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<sup>8</sup> See Va. Code §§ 2.2-1001(5); 2.2-3003(G).