

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: October 17, 2011; Ruling No. 2012-3105, 2012-3106; Agency: Virginia Commonwealth University; Outcome: Grievant Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Virginia Commonwealth University
EDR Ruling No. 2012-3105, 2012-3106
October 17, 2011

Virginia Commonwealth University (“agency”) has requested a compliance ruling related to two grievances filed by the grievant on July 26, 2011. 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 grievance.

FACTS

On July 26, 2011, the grievant initiated two expedited grievances with the agency. The agency labeled these grievances “.01” and “.04” respectively. On August 19, 2011, the agency conducted the second resolution step meeting with the grievant regarding both grievances. The agency hand-delivered the second resolution step responses to the grievant’s son at the grievant’s residence on August 23, 2011. The grievant alleges that he did not receive the agency’s second resolution step responses until August 29, 2011.

On August 31, 2011, the agency sent a notice of noncompliance to the grievant by U.S. mail and email, indicating the agency had not received a response from the grievant. Additionally, the agency requested a response from the grievant within five workdays upon receipt of the noncompliance notice, and indicated the agency would seek administrative closure of the .01 and .04 grievances if no response was received. On September 13, 2011, the grievant sent a notice of noncompliance to the agency head, indicating the second step respondent did not properly respond to the second resolution step meeting. However, the agency asserts that it has yet to receive a response from the grievant whether he intends to advance or conclude the .01 and .04 grievances.

Meanwhile, the grievant also made several document requests to the agency during the month of August. On August 17, 2011, the grievant requested to temporarily halt the .01 and .04 grievances until he received all of the previously requested documents from the agency. The agency sent two emails to the grievant on August 18, 2011, and August 22, 2011, indicating all of the requested documents were available upon receipt of a document production fee the agency incurred. On August 31, 2011, the grievant sent a second document request to the agency, and once again requested all of his active grievances be halted. In a September 1, 2011, the agency’s human resource director responded to the grievant’s second document request, stating the

document request was overly broad and that the scope of the request needed to be narrowed. Hence, the grievant provided the agency with a narrowed document request on September 1, 2011. Approximately a week later, the agency responded to the grievant, indicating once again that the requested documents were available upon receipt of a document production search fee. Additionally, the agency informed the grievant that the grievance process would not be halted because the requested documents were available.

The grievant sent an email to this Department on September 13, 2011 email, requesting this Department to rule on whether the agency's document production search fee is compliant with the grievance process. On October 3, 2011, the grievant sent another email to this Department, asserting that the .01 and .04 grievances should not be closed because: (1) the grievant was not properly or timely notified of the alleged noncompliance; (2) the grievances have been temporarily halted awaiting receipt of documents; and (3) the grievant would like a third resolution step meeting.

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 advanced or concluded his grievance, the agency seeks a compliance ruling allowing it to be administratively 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 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

¹ *Grievance Procedure Manual* § 6.3.

² *See 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.

In this case, the grievant appears to have failed to advance or conclude his grievance within five workdays of receiving the agency's second resolution step response, as required by the grievance procedure.⁴ Moreover, the agency notified the grievant of his noncompliance and it produced the requested documents, but the grievant has not advanced or concluded his grievance.

Furthermore, the grievant's document production compliance ruling request to this Department is premature. Under the grievance process, a party requesting documents has the option of demanding, in writing, that the grievance process temporarily halt.⁵ However, the grievance process is only halted until the documents are provided.⁶ In this case, the agency has notified the grievant that the requested documents are available upon receipt of a document production search fee. A requesting party may "be charged the actual cost to retrieve and duplicate the documents."⁷ 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. The same would be true of the grievant's concerns regarding a meeting at the third step, although we are compelled to note that the grievance process requires no such meeting.

As the grievant has apparently failed to advance or conclude his grievance in a timely manner, he has failed to comply with the grievance procedure. This Department therefore orders the grievant to correct his noncompliance **within ten work days of the date of this ruling** by notifying his human resources office in writing that he wishes either to conclude or advance the grievance to the agency head for a qualification determination.⁸ If he does neither, the agency may administratively close the grievance without any further action on its part. The grievance 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).

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."⁹ 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

⁴ See *Grievance Procedure Manual* § 2.4.

⁵ *Grievance Procedure Manual* § 8.2.

⁶ *Id.*

⁷ *Id.*

⁸ Because the .01 grievance and the .04 grievance are expedited grievances, these do not advance to the third resolution step, but instead the grievant may request the agency head to qualify the grievances for hearing. See *Grievance Procedure Manual* § 2.4.

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

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

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

Claudia T. Farr
Director

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