

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: October 17, 2011; Ruling No. 2012-3114, 2012-3115, 2012-3116, 2012-3117, 2012-3118;
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 Nos. 2012-3114, 2012-3115, 2012-3116, 2012-3117, 2012-3118
October 17, 2011

Virginia Commonwealth University (“agency”) has requested a compliance ruling related to five 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 participating in the second-step meeting.

FACTS

On July 26, 2011, the grievant initiated five expedited grievances with the agency. The agency labels these grievances “.03,” “.05,” “.06,” “.07,” and “1A” respectively. Because the second resolution step meetings were not scheduled within five workdays of the agency’s receipt of the five grievances, the grievant sent a notice of noncompliance to the agency head on August 15, 2011, alleging the agency had not timely scheduled the second-step meetings. On August 16, 2011, the agency emailed the grievant, inquiring whether it could hold a single second resolution step meeting for all five grievances. On August 17, 2011, the agency responded to the grievant’s notice of noncompliance, indicating that the second step respondent had been on leave, and hence, he was unavailable to schedule the meetings within the required five workdays. Then, on August 22, 2011, the agency made a second attempt to schedule the second-step meetings for the five grievances. That same day, the grievant sent an email to the agency, stating that he agreed to have one second resolution step meeting for the .02, .03, .04, .05, .06, and .07 grievances.

On August 23, 2011 and August 26, 2011, the agency sent two scheduling emails to the grievant inquiring about his available dates. On August 31, 2011, the grievant sent an email to the agency, indicating he intended to schedule the second resolution step meetings, but only after he received the previously requested documents. On September 19, 2011, the agency sent another email to the grievant, once again attempting to schedule the second resolution step meetings for “all remaining grievances dated July 26, 2011.” The agency asserts the grievant has yet to schedule the meetings.

While the parties 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 the 1A grievance, was made on August 4, 2011. On August 12, 2011, the grievant made a second document request for documents pertaining to his

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.04 grievance.¹ That same day the agency emailed the grievant that the documents pertaining to his 1A grievance were available, but that the agency would not provide the documents to the grievant until he paid the \$216.66 document production search fee.

On August 17, 2011, the grievant requested to temporarily halt all his grievances until he received all the requested documents. In an August 18, 2011 email, the agency's human resource manager denied the grievant's request to halt the grievance process, stating that the grievant had either received or had been notified that the requested documents were available upon receipt of funds. In an August 22, 2011 email, the agency's human resource manager informed the grievant for a second time that the requested documents were available upon receipt of funds. The grievant responded on August 22, 2011, indicating he would pay for the requested documents the following week.

On August 31, 2011, the grievant sent a third document request to the agency and once again requested to temporarily halt the grievances until he received the previously requested documents from the agency. In a September 1, 2011 email, the agency's human resource director responded to the grievant's third 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.

On September 2, 2011, the grievant emailed a letter to the agency, stating he would make payment and pick-up some of the requested documents during the week of September 5, 2011. Because the grievant did not pick-up the requested documents, the agency sent the grievant an email on or around September 7, 2011, indicating that the requested documents were available upon receipt of a \$216.66 document production search fee. Additionally, the agency once again informed the grievant that it would not halt the grievance process because the requested documents were available.

On September 15, 2011, the agency sent a notice of noncompliance to the grievant by U.S. mail, indicating the agency had not received a response from the grievant. The agency asserts that the grievant has yet to pay for the requested documents, nor has it received a response from the grievant indicating whether he intends to advance or conclude the five grievances.

On October 3, 2011, in an email addressed to this Department, the grievant indicated that he has "been trying to schedule 2nd step meetings for these grievances" and requested that this Department allow the second resolution step meetings to be scheduled.

Since more than five workdays have elapsed since the agency's purported notification to the grievant of his alleged noncompliance, and the grievant has not yet advanced or concluded his grievances, the agency seeks a compliance ruling allowing it to be administratively close the grievance.

¹ The .04 grievance is addressed in EDR Ruling No. 2012-3105, 2012-3106.

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 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 September 15, 2011 letter from the agency to the grievant appears to inform the grievant that it considers him to be noncompliant with the document discovery procedures of the grievance process. It does not appear to expressly and unequivocally notify the grievant of the grievant's alleged noncompliance with scheduling the second-step meetings for grievances labeled .03, .05, .06, .07 and 1A. 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 five 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.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 \$216.66 document production search fee. A

² *Grievance Procedure Manual* § 6.3.

³ *See 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 *Grievance Procedure Manual* § 8.2.

⁶ *Id.*

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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.

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.”⁸ 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 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.⁹

Claudia T. Farr
Director

⁷ *Id.*

⁸ *Grievance Procedure Manual* § 2.4; *see also* Va. Code § 2.2-3003(C).

⁹ *See* Va. Code §§ 2.2-1001(5); 2.2-3003(G).