

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: May 22, 2012;
Ruling No. 2012-3346; Agency: Department of Minority Business Enterprise;
Outcome: Grievant Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Minority Business Enterprise
EDR Ruling Number 2012-3346
May 22, 2012

The Department of Minority Business Enterprise (“agency”) has requested a compliance ruling related to the grievant’s July 1, 2009 grievance. 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 1, 2009, the grievant initiated a grievance with the agency. The agency gave the grievant its first resolution step response on December 6, 2011. On February 21, 2012, the agency emailed a memorandum of noncompliance to the grievant, 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 memorandum.

On February 24, 2012, the grievant emailed the agency, indicating that he had not received the emails in support of his July 1, 2009 grievance that he had requested in a prior meeting with the agency head. Moreover, he stated that he would not advance the July 1, 2009 grievance to the second resolution step until those emails were supplied by the agency. On February 27, 2012, the agency emailed the grievant, indicating that the emails requested had been provided to the grievant. Furthermore, the agency indicated that the grievant’s November 2, 2011 Freedom of Information Act (FOIA) request that was sent to Mrs. C was different than the grievant’s email document request that had been discussed in a prior meeting with the agency head, and therefore, the agency was treating each request separately.

On March 5, 2012, the grievant emailed the agency, informing it that he still needed “all emails requested under the Freedom of Information Act” before he would advance his July 1, 2009 grievance. The agency responded to the grievant via email on March 5, 2012, indicating that the grievant had to pay a document retrieval fee for the requested FOIA documents before the agency would produce the requested documents. On March 27, 2012, the grievant responded to the agency via email, asking how much the document retrieval fee was and questioning why certain emails were not produced prior to his FOIA request. On April 11, 2012, the agency emailed the grievant a clarification memorandum, detailing the difference between the emails requested in support of the July 1, 2009 grievance and the grievant’s November 2, 2011 FOIA

request. The agency asserts that the emails requested in support of the July 1, 2009 grievance have been provided to the grievant. Furthermore, the agency asserts that the documents requested under the grievant's November 2, 2011 FOIA request have not been produced because the grievant has yet to pay the document retrieval fee.

On April 11, 2012, the agency emailed a second memorandum of noncompliance to the grievant, once again indicating that the agency had not received a response from the grievant regarding his July 1, 2009 grievance and that the grievant had five workdays upon receipt of the noncompliance memorandum to respond.

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 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

In this case, the grievant appears to have failed to advance or conclude his grievance within five workdays of receiving the agency's first resolution step response, as required by the grievance procedure.⁴ Moreover, the agency notified the grievant of his noncompliance, but the grievant has not advanced or concluded his grievance. Furthermore, the agency has provided the emails in support of his July 1, 2009 grievance that the grievant requested during his meeting

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.

⁴ *See Grievance Procedure Manual* § 3.1.

with the agency head. To the extent the grievant believes that he has not received all of the requested emails that he alleges he requested during his meeting with the agency head, the grievant must first notify the agency head of the alleged procedural violations, as required by the grievance procedure.

We are compelled to note, however, that the grievant has requested several additional documents from the agency pursuant to the Freedom of Information Act. This Department has no authority to enforce the provisions of the Virginia Freedom of Information Act. Rather, a person denied the rights and privileges conferred by FOIA must seek enforcement of FOIA's provisions in a court of law.⁵ Accordingly, we will not address the grievant's claim that the agency has failed to comply with FOIA in this ruling.

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 second step. If he does not, 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).

This Department's rulings on matters of compliance are final and nonappealable.⁶

Claudia T. Farr
Director

⁵ See Va. Code § 2.2-3713(B).

⁶ See Va. Code §§ 2.2-1001(5); 2.2-3003(G).