

Issue: Compliance/second-step respondent; Ruling Date: December 15, 2006; Ruling #2007-1503; Agency: Department of Corrections; Outcome: agency not in compliance; EDR qualifies grievance for hearing



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2007-1503
December 15, 2006

By letter dated December 5, 2006, the grievant has requested a compliance ruling from this Department. The grievant asserts that the Department of Corrections (DOC or the agency) has failed to comply with EDR Ruling 2007-1484.

FACTS

On or about September 5, 2006, the grievant initiated an expedited grievance challenging a Group III Written Notice and seeking reinstatement from the resulting termination. The agency offered to have an assistant warden meet with the grievant as the second-step respondent. The grievant sought a meeting with the appropriate second-step respondent, the chief warden of the facility, rather than another official designated by the warden. This Department ruled on that issue of noncompliance in EDR Ruling 2007-1484, dated November 21, 2006. In that ruling, the Director of EDR ordered the agency to have the chief warden of the facility meet face-to-face with the grievant within five workdays of receipt of the ruling. As of December 8, 2006, the agency has failed to provide such a meeting. Indeed, it appears that in the meantime, the agency has returned the grievance Form A to the grievant with a written second-step response, but has yet to provide a face-to-face meeting with the warden.

DISCUSSION

The grievance statute provides that “[a]t least one face-to-face meeting between the employee and management shall be required.”¹ Pursuant to the grievance procedure, when following the expedited process, the single management step meeting occurs with the second-step respondent.² When a party fails to comply with the grievance procedure, EDR may render a decision against the noncomplying party on any qualifiable issue, unless the noncomplying party can establish just cause for its noncompliance. However, rendering such a decision is reserved for the most egregious of circumstances.

As has been stated by this Department, each agency must designate individuals to serve as respondents in the resolution steps. A list of these individuals shall be maintained

¹ Va. Code § 2.2-3003(D).

² *Grievance Procedure Manual* §§ 2.4, 3.2.

by the agency's Human Resources Office and is also available on EDR's website. Pursuant to its statutory responsibilities, EDR has long collected and maintained each agency's designated step respondents. This assures that each agency's management resolution step respondents are appropriate, are known to employees and to EDR, and that this phase of the grievance process is administered consistently and fairly. An agency's careful designation of step respondents, and consistent adherence to those designations, is crucial to an effective grievance process.

In EDR Ruling 2007-1484, issued on November 21, 2006, this Department directed the agency to provide the grievant with the required face-to-face meeting with the approved second-step respondent, the warden of the facility. It is undisputed that the agency has not provided the grievant with this meeting.

In the course of our investigation, this Department asked the facility's Human Resources Officer whether a meeting with the chief warden had been held. As of December 8, 2006, no such meeting had taken place or been scheduled. However, it also became apparent during this conversation that the facility had not received a copy of EDR Ruling 2007-1484. This ruling was sent to the agency's human resources office in Richmond on November 21, 2006. The fact that the agency failed to notify its facility of EDR Ruling 2007-1484 does not excuse this issue of noncompliance. Intended or not, the actions of the agency evince an improper disregard of its responsibility to implement the directives of an EDR ruling on matters of compliance with the grievance procedure.³ In addition, and again, intended or not, the underlying act of unilaterally substituting management step respondents evinces a disregard of the grievance procedure and this Department's long-standing practice.

Accordingly, it is concluded that in this case, the agency failed to comply with a substantial procedural requirement of the grievance procedure without just cause.⁴ For that reason, this Department deems it appropriate to qualify the grievance for hearing, in its entirety. The grievant may elect either to progress immediately to a hearing or to continue through the management resolution steps, at the conclusion of which the agency is directed to qualify the grievance for hearing and request the appointment of a hearing officer

³ It should also be noted at this time, though not the subject of this ruling, that the facility's own actions represent a careless disregard of the grievance procedure. Although the facility appears not to have received Ruling 2007-1484, it did receive this Department's notice of the grievant's request for a compliance ruling. Because such requests for compliance rulings stay the grievance proceedings until resolved, *see Grievance Procedure Manual* § 6.1, the agency should have been operating under the assumption that the grievance was stayed until it received this Department's ruling. Instead, the agency recently sent a notice of noncompliance to the grievant on December 6, 2006, on the basis that the grievance had not been forwarded back to the agency following receipt of the written second-step response. The letter also stated that the grievant must respond within five workdays or the grievance will be "automatically concluded." The facility's letter is not only untimely, given the compliance issue that is the subject of this ruling, but is inaccurate under the grievance procedure. An agency may not automatically conclude a grievance for party noncompliance. Notice of noncompliance must be provided to the grievant and then a ruling from EDR requested before the grievance can be concluded by order of this Department. *Grievance Procedure Manual* § 6.3; *see also* Frequently Asked Question #29 on EDR's website at <http://www.edr.virginia.gov/faqs.htm>.

⁴ Va. Code § 2.2-3003(G).

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(provided the parties do not resolve the grievance prior to qualification). The grievant must advise the agency's human resources office of his choice within ten workdays of the date of this ruling.

If the grievant seeks to proceed immediately to hearing, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B within five workdays of receipt of the grievant's choice. If, however, the grievant wishes to proceed with the management steps, the agency shall have the approved second-step respondent, i.e., the chief warden of the facility, meet with the grievant face-to-face within five workdays of receipt of the grievant's choice, and provide a written response to the grievance within five workdays of the meeting.

In the event the agency fails to comply in whole or in part with the directives set forth in this ruling, the grievant may seek an additional compliance ruling from this Department. The agency is strongly cautioned that any failure in the future to comply with a ruling in this case may result in a decision being rendered in favor of the grievant.⁵ This Department's rulings on matters of compliance are final and nonappealable.⁶

Claudia T. Farr
Director

⁵ *Id.*

⁶ Va. Code § 2.2-1001(5).