

Issues: Compliance and Qualification – Grievance Procedure (Resolution Steps and Second Step Meeting); Ruling Date: September 10, 2008; Ruling #2009-2106, 2009-2125; Agency: Department of Motor Vehicles; Outcome: Agency in Compliance, Not Qualified at this time.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Motor Vehicles
Ruling Number 2009-2106, 2009-2125
September 10, 2008

The grievant has requested qualification of her July 17 and 25, 2008 grievances with her former employer, the Department of Motor Vehicles (DMV or the agency), because of the agency's alleged noncompliance with the Grievance Procedure through its delay in responding to her July 25, 2008 grievance.¹ For the reasons set forth below, the grievances are not qualified at this time.

FACTS

The grievant was employed by the agency as an Auditor II. On July 25, 2008, the agency presented the grievant with a Group II Written Notice which, combined with another active Group II Notice (challenged in the July 17th grievance), resulted in the termination of her employment. The grievant challenged the July 25th discipline by initiating an expedited grievance that same day, asserting that the Written Notice and discharge were in retaliation for reporting alleged fraud and misconduct. The grievant requested that she be allowed to (1) bypass her immediate supervisor, (2) initiate her grievance with the second step respondent, (3) waive the face-to-face meeting with the original second step respondent, and (4) receive only a written second step response to the grievance.

It is undisputed that the agency first received the grievant's July 25th grievance on July 28, 2008. The agency explained, however, that it was misplaced in the mailroom and not forwarded to the grievant's supervisor until August 5, 2008. (The agency has provided evidence that it has taken a corrective action to minimize future mishandling of mail.) On August 7, 2008, a representative from the agency's human resource department spoke with the grievant and sent her a follow-up e-mail informing her that the agency would be responding to the grievance the following week.

The agency asserts that between August 6th and August 14th, the agency researched whether it was appropriate, in the case of an expedited grievance, to waive the

¹ It should be noted that the agency alleged the grievant was noncompliant with respect to her July 17th grievance. A separate ruling, EDR Ruling No. 2009-2084, addresses that issue.

second step meeting and issue only a written second step response. The agency further explained that on August 14th, it scheduled a meeting between the Commissioner, Deputy Commissioner, and Human Resources to decide how to respond to the grievance. This meeting was to take place on August 18th. The agency has explained that an earlier meeting was not possible due to scheduling conflicts which included the Deputy Commissioner being out of the country. The agency asserts that during the August 18th meeting, the Commissioner appointed the Deputy Commissioner as the second step respondent to conduct a second step meeting.²

Following the August 18, 2008 meeting, the agency's Human Resource Department attempted to contact the grievant via telephone on August 18th and 19th. On August 19, 2008, the agency received from the grievant a notice of noncompliance addressed to the agency head, dated August 18, 2008.

On August 20, 2008, the agency's Human Resource Department sent a letter to the grievant explaining that "it is in the best interest of both parties to the grievance to have at least one meeting during the management steps; and . . . [t]herefore, DMV requests a meeting at the second step level with . . . [the] Deputy Commissioner." The agency asserts that it still has not heard from the grievant. The grievant has explained that she has not responded because she has been looking for a job and out of town, and because more than 5 days have elapsed since the agency received her grievance.

DISCUSSION

Compliance

The grievant requests qualification of her grievances because of alleged severe non-compliance by the agency.

The grievance procedure requires both parties to address procedural noncompliance through a specific process.³ 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.⁴ 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

² We note that the agency has two Deputy Commissioners. Thus, the agency had to designate which one should respond in this case.

³ *Grievance Procedure Manual* § 6.3.

⁴ *Id.*

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.⁵

In this case, the grievant did not give the agency 5 workdays to correct the non-compliance before seeking her qualification/compliance ruling. However, because 5 days have now lapsed since the agency received the August 18, 2008 notice of noncompliance, we now rule to expedite this somewhat protracted and contentious management step process.

Delay

The grievant objects to the agency's delay in responding to her grievance. Under the grievance procedure, the agency had 5 workdays to respond to the grievance after receiving it. As stated above, it is undisputed that the agency received the July 25th grievance on July 28, 2008. The agency contends that the grievance was mishandled and not properly delivered until August 5, 2008. Further delay was caused by the agency's attempt to determine how to respond, procedurally, to the grievance. Finally, the unavailability of one of the two Deputy Commissioners, who was out of the country, contributed to the delay.

The agency's above described delay, while not condoned by this Department, does not appear to be driven by bad faith or an attempt to delay the grievance process. Furthermore, as reflected below in the "Appropriate Step Respondent" section of this ruling, it appears that the agency has made a good faith effort to process the grievance since the initial delays, by attempting to set up a meeting between the grievant and Deputy Commissioner. Thus, although the agency was initially out of compliance, it is now in compliance.

Appropriate Step Respondent

Under the grievance procedure, each agency must designate individuals to serve as respondents in the resolution steps. A list of these individuals shall be maintained by the agency's Human Resources Office and is also available on EDR's website. Each designated step respondent shall have the authority to provide the grievant with a remedy,

⁵ 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.

subject to the agency head's approval.⁶ 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. Step respondents have an important statutory responsibility to fulfill and should decline to serve only in extenuating circumstances, such as extended illness or serious injury. Further, if a step respondent cannot serve in that capacity pending a particular grievance, management should seek an agreement with the grievant on a substituted step respondent and should put any agreement in writing. The agency has identified the first step respondent as "[a]lways grievant's immediate supervisor," the second step respondent as the "[e]ither Director or District Manager, depending on where the grievance was initiated," and the third step respondent is "[e]ither Assistant Commissioner or Deputy Commissioner."

In EDR Ruling No. 2003-120, this Department explained that one of the basic requirements of the grievance procedure is that there be at least one face-to-face meeting between the employee and management during the management resolution steps.⁷ (This requirement can be waived only if both parties agree, in writing, to waive the meeting.)⁸ Ruling 2003-120 held that under the rules of the expedited process, the meeting must necessarily occur at the second resolution step. We concluded that in expedited cases where the grievant alleges retaliation or discrimination by the second-step respondent (as in this case), and the agency and grievant cannot agree on an acceptable substitute, the person who would otherwise serve as the third step respondent (were the grievance not expedited) shall become the second step respondent.⁹

A meeting with the person who would otherwise serve as the third step respondent, the Deputy Commissioner, is precisely what the agency has requested from the grievant. Thus, the agency is providing that which is required under the grievance procedure. Moreover, as explained above, while the parties can mutually agree to waive the face-to-face meeting, when either party requests one, then it must occur.¹⁰ Here, the

⁶ Va. Code § 2.2-3003(D).

⁷ See Va. Code § 2.2-3003 (D); *Grievance Procedure Manual*, § 3.2.

⁸ See EDR Ruling Number 2003-120. See also *Grievance Procedure FAQ* # 13.

⁹ Under the regular (non-expedited) grievance process, if a grievant alleges discrimination or retaliation by an individual who would otherwise serve as the agency's designated second step respondent, the employee may: (1) request that the agency designate another second step respondent; or (2) waive the face-to-face meeting with the original second step respondent and receive only a written second step response to the grievance. *Grievance Procedure Manual* § 3.2. Further, if the employee elects to waive the face-to-face meeting with the original second step respondent, the employee must be allowed to meet with the third step respondent. *Id.* Since under the expedited process there is no required third resolution step, the range of options available to the parties in this scenario is more limited and is not specifically addressed in the *Grievance Procedure Manual*.

¹⁰ *Id.*

agency appears to be insisting on its right to have the face-to-face meeting with the designated third step respondent, the Deputy Commissioner. Accordingly, the agency is in compliance with respect to its request to have a face-to-face meeting between the grievant and the Deputy Commissioner.

Based on the foregoing, within 5 workdays of receipt of this ruling, the parties shall, in good faith, schedule and conduct a face-to-face meeting between the grievant and the Deputy Commissioner. Within 5 workdays of the meeting, the Deputy Commissioner shall provide his written response.

This Department's rulings on compliance are final and nonappealable.¹¹

Qualification

In light of the above compliance ruling, the grievant's request for qualification is, at this point, premature.¹² Therefore, the grievances are not qualified for a hearing. The grievant may renew her qualification request if the grievances are not resolved through the resolution steps or not qualified by the agency head. (We note that if the grievances are unresolved at the management resolution level, the agency head will presumably qualify them for hearing because they involve formal discipline.)¹³

Claudia T. Farr
Director

¹¹ Va. Code § 2.2-1001.

¹² We note that this Department has used qualification as a sanction in the past for repeated noncompliance. See EDR Ruling 2007-1420. However, in that case, we noted that the agency's actions exhibited "at a very minimum, a carelessness and indifference to the grievant's rights under the grievance procedure." The agency's actions in this grievance have not risen to that level.

¹³ *Grievance Procedure Manual* § 4.1(a).