

Issues: Compliance – Grievance Procedure (5-Day Rule and Second Step Meeting); Ruling Date: August 7, 2009; Ruling #2010-2360; Agency: Virginia Department of Transportation; Outcome: Grievant In Compliance, Agency Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Transportation
Ruling No. 2010-2360
August 7, 2009

Both parties have sought compliance rulings concerning the grievant's April 10, 2009 grievance. The Department of Transportation (the agency) seeks to administratively close the grievance due to the grievant's alleged failure to comply with the time limits set for in the grievance procedure for advancing or concluding her grievance. The grievant challenges the agency's issuance of the second step response without holding the second step meeting.

FACTS

The grievant initiated her expedited grievance, dated April 10, 2009, to challenge various issues, including her termination. The second step-respondent attempted to schedule the second step meeting, leaving messages for the grievant on May 8 and 13, 2009. The meeting was eventually scheduled for May 21, 2009. However, the grievant contacted the second step respondent on May 20, 2009 to indicate that she was not well and could not meet the following day. The second step-respondent asked her to call back on May 26, 2009 to reschedule the meeting. The agency states it did not receive a call from the grievant on that day. However, it appears the grievant e-mailed the second step-respondent late on May 26, 2009. She requested an extension of time to reschedule the meeting. The grievant stated that she was having difficulty obtaining medication she needed because of problems with her insurance. She stated that she needed the medication to be able to meet. The agency denied the grievant's request for an extension and the second step-respondent provided a written response to the grievance on June 1, 2009.

Because the grievant failed to return the grievance package to the agency to advance or conclude the grievance within five workdays of receiving the second step response, the agency mailed the grievant a notice of noncompliance on June 11, 2009, by first class and certified mail. The grievant responded to the notice of noncompliance in a letter dated June 17, 2009, indicating her intent to proceed with the grievance and desire to meet with the second step-respondent. The agency stated that a meeting would not be held because the second step-respondent had issued a response to the grievance already. The grievant sent a notice of noncompliance to the agency head on June 25, 2009. Both parties now seek compliance rulings regarding these events.

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

The *Grievance Procedure Manual* provides that “[w]ithin 5 workdays of the second-step respondent’s receipt of the grievance, the second-step meeting must be held.”⁴ While there is no express requirement in the grievance procedure that each party cooperates with the scheduling of the second step meeting, certainly such cooperation is expected. However, this is not a case in which the grievant has failed to cooperate. Rather, the grievant indicated her desire to meet, but stated that she was unable due to her current condition and issues with insurance coverage. As those issues have apparently resolved, she has now asked to proceed with the second step meeting.

Generally, if a second step meeting is scheduled at an agreed time and the grievant fails to attend the meeting, one course the agency could pursue would be to issue the written response without the meeting.⁵ As such, it is understandable why the agency did so here. However, in this case the grievant’s inability to participate in the meeting appears to have been for just cause and, as such, excusable. The agency should not have simply issued the second step response given the grievant’s situation. Thus, this grievance prematurely advanced beyond the second step meeting and must be returned to

¹ *Grievance Procedure Manual* § 6.3.

² *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 *Grievance Procedure Manual* § 3.2.

⁵ See EDR Ruling No. 2008-2002.

that stage. The grievant has not been noncompliant with the grievance process in this case.⁶

This Department therefore returns this grievance to the second step and orders the parties to hold the second step meeting. The meeting must be held **within ten workdays of the date of this ruling** unless there is just cause for delay by either party. Following the second step meeting, the agency must provide a new written response within five workdays of the meeting.⁷

This Department's rulings on matters of compliance are final and nonappealable.⁸

Claudia T. Farr
Director

⁶ As stated above, the agency argues that the grievant failed to advance or conclude her grievance within five workdays of receiving the second resolution step response. However, because of the compliance issues raised by the grievant relating to the second step meeting, the agency's argument is moot.

⁷ See *Grievance Procedure Manual* § 3.2.

⁸ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).