

Issue: Compliance – Grievance Procedure (Second Step Meeting); Ruling  
Date: August 31, 2009; Ruling #2010-2383; Agency: Department of  
Corrections; Outcome: Agency Not In Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Corrections  
Ruling Number 2010-2383  
August 31, 2009

The grievant has requested a compliance ruling regarding his May 19, 2009 grievance with the Department of Corrections (the agency). The grievant claims that the agency held a noncompliant second step meeting.

FACTS

The grievant forwarded the grievance package to the second step-respondent on or about June 12, 2009. The Grievance Form A indicates the second step-respondent received the grievance on July 2, 2009. The second step-respondent had the grievant come to his office on the same day to have the second step meeting. It does not appear that the grievant was given advance notice of the meeting.

At the meeting, the grievant raised questions about the scheduling of the meeting and his inability to have his chosen representative attend as he did not know the meeting was going to be held that day. The second step-respondent indicated that the grievant should have notified him that he had a representative.<sup>1</sup> The second step-respondent states he also offered to postpone the meeting. The second step-respondent states that the grievant chose to proceed with the meeting anyway.

The grievant disputes the second step-respondent's description of the meeting in certain respects. The grievant states that after he raised the issue of having his representative at the meeting and disclosed the identity of his representative, the second step-respondent ended the meeting, told the grievant to leave, and said that he would respond to the grievance. The grievant states that he was not asked whether he wanted to postpone the meeting to have his representative present at a later date. After the meeting, the grievant raised the scheduling of the meeting and the inability of his representative to attend as an issue of noncompliance. The grievant requests a compliance ruling.

DISCUSSION

Under the grievance procedure, a grievant is entitled to have an individual present with him or her at the second step meeting.<sup>2</sup> Because the second step-respondent did not provide advance notice of the meeting, the grievant was unable to have his chosen

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<sup>1</sup> Even though nothing in the grievance package might indicate that a grievant has a representative who might accompany him/her in the second step meeting, such notice is not required.

<sup>2</sup> *Grievance Procedure Manual* § 3.2.

representative attend the meeting with him. Scheduling a second step meeting in a manner that would prohibit a party from having his chosen representative attend could be noncompliance with the provisions of the grievance procedure in some cases.<sup>3</sup> However, if he was asked whether he wanted to postpone the meeting because his representative was not present, the grievant's purported decision to move forward with the meeting anyway, with knowledge of the agency's alleged noncompliance in scheduling the meeting, could be seen as effectively waiving any alleged noncompliance that may have occurred that prevented his representative from attending.<sup>4</sup> This issue depends, therefore, on the resolution of the disputed facts.

The second step-respondent indicates that he asked the grievant whether he wanted to postpone the meeting to allow the representative to attend and the grievant decided against that course of action. However, the grievant's recollection disputes the second step-respondent's description of the meeting. According to the grievant, the meeting ended once the issue about the representative was raised, and the grievant did not continue with and consent to the meeting without his representative. These statements of facts directly conflict.

While the statements of the grievant and the second step-respondent directly conflict, what is not disputed is that the agency scheduled a second step meeting in a manner that would not have allowed the grievant to have any representative present. In light of this scheduling action on the part of the agency, which conflicts with the purpose and intent of the grievance procedure,<sup>5</sup> the disputed facts concerning the grievant's possible waiver will be resolved in the grievant's favor. Therefore, this grievance must be returned to the second step and a new meeting scheduled in a reasonable manner as to allow the grievant to have his chosen representative present. **Within five workdays of receipt of this ruling**, a new second step meeting must be scheduled. The second step-respondent must provide a new written response following the meeting.

This Department's rulings on matters of compliance are final and nonappealable.<sup>6</sup>

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Claudia T. Farr  
Director

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<sup>3</sup> See *id.*

<sup>4</sup> See *Grievance Procedure Manual* § 6.3 ("All claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one may forfeit the right to challenge the noncompliance at a later time."); see also, e.g., EDR Ruling No. 2004-752 (determining that grievant waived any challenge to agency's alleged noncompliance concerning the second step meeting when, with knowledge of the alleged noncompliant conduct beforehand, the grievant proceeded with the meeting anyway); EDR Ruling No. 2003-042 (same); EDR Ruling No. 2002-036 (same).

<sup>5</sup> See *Grievance Procedure Manual* § 3.2.

<sup>6</sup> See Va. Code §§ 2.2-1001(5), 2.2-3003(G).