

Issues: Compliance – Grievance Procedure (Documents and Second Step Meeting);
Ruling Date: December 30, 2009; Ruling #2010-2469, 2010-2487; Agency:
Department of Corrections; Outcome: Agency in Compliance, Grievant in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Numbers 2010-2469, 2010-2487
December 30, 2009

Both the grievant and the agency have requested rulings regarding each party's alleged noncompliance with the grievance procedure.

FACTS

The grievant currently has two grievances pending with the agency. In her December 4, 2008 grievance ("performance evaluation grievance"), she is challenging a performance evaluation, while her January 2, 2009 grievance ("termination grievance") challenges a Group III Written Notice with termination. In EDR Ruling Nos. 2009-2272, 2009-2289, this Department primarily addressed the grievant's allegations regarding the agency's failure to produce requested documents in the termination grievance. The grievant asserts in this current ruling request that the agency failed to produce documents as to one of the requests (Request No. 18) to which this Department ordered the agency to provide a response. The grievant also argues that the agency's continued noncompliance constitutes substantial noncompliance warranting an award of relief on the merits of her grievance.

The agency's allegations of noncompliance concern the grievant's apparent refusal to proceed to the second step meeting in either of the two grievances. In both grievances, following correspondence about document productions, party activity on the grievances apparently ceased in or around June 2009. The agency then contacted the grievant by letter dated November 3, 2009, requesting that a second step meeting be scheduled. The agency states that the grievant has not agreed to proceed to that step. Consequently, the agency alleges the grievant has failed to comply with the grievance procedure by not pursuing her grievance to the second step meeting and seeks to close the grievances.

In addition to these ruling requests, the grievant seeks to stay the performance evaluation grievance until the termination grievance is resolved. The grievant argues that the outcome of the termination grievance could effectively resolve the performance evaluation 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

¹ *Grievance Procedure Manual* § 6.3.

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 parties' various requests for rulings are address separately below.

Grievant's Request for Relief on the Merits

The grievant asserts that the agency has failed to produce documents pursuant to her Request No. 18 in the termination grievance. By letter dated December 10, 2009, the agency acknowledged its oversight and produced documents to the grievant pursuant to that request. As such, the agency has now complied with this portion of EDR Ruling Nos. 2009-2272, 2009-2289, rendering the grievant's argument moot.

Further, the grievant has again requested an automatic ruling on the merits due to the agency's alleged substantial noncompliance. This Department addressed this same claim in EDR Ruling Nos. 2009-2272, 2009-2289, finding that the agency's conduct did not rise to that level. At this stage, the only additional allegation of noncompliance is that the agency mistakenly omitted a response to Request No. 18 in its document production. This Department will generally only order relief on the merits of a grievance for substantial noncompliance when a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure. Here, it appears that when notified of its error, which appears to be nothing more than an oversight, the agency corrected the problem promptly. Because it does not appear the agency has engaged in bad faith conduct or a gross disregard for the grievance procedure, there is no basis to award relief at this time.

Agency's Request for Closure

The agency's request for a compliance ruling regarding the grievant's alleged failure to participate in the second step meeting is premature. The agency has presented no evidence that it

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.

first gave the grievant written notice of the alleged noncompliance.⁴ As such, the agency's ruling request is not ripe for determination and must be denied. Moreover, even if the agency had satisfied the prerequisites under the grievance procedure, there would be no basis to grant the agency's request at this time.

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."⁵ Further, while the grievance procedure does not expressly require the grievant to cooperate with the scheduling of the second step meeting, certainly such cooperation is implied. Nonresponsiveness by parties to a grievance does not support the purpose of the grievance process to resolve workplace disputes fairly and promptly.⁶ Indeed, a grievant's nonresponsiveness could indicate potential abandonment of a grievance. However, the facts here do not appear to reflect abandonment.

Although very little may have happened between June 2009 and November 2009 in either of these grievances, once the agency sought to schedule the second step meeting, additional correspondence was received from the grievant. This correspondence referenced the ongoing issues with the production of documents and the grievant's demand that the process for the termination grievance be halted until resolution of the compliance matters. Under these facts, there is no basis to find that the grievant has abandoned her grievances.

Grievant's Request to Stay Performance Evaluation Grievance

The grievant has requested that this Department stay the performance evaluation grievance until the termination grievance is concluded. While the parties may certainly agree to put the performance evaluation grievance on hold themselves, this Department sees no basis to impose such an order in this case.

CONCLUSION

For the reasons set forth, the parties' requests for relief are denied. Now that the compliance matters and the basis for the grievant's request to halt the termination grievance process have been resolved in this ruling, it appears that the termination grievance would be ready to proceed to a second step meeting. Similarly, the performance evaluation grievance would appear to be ready to proceed as this Department is unaware of any pending compliance issues. This Department's rulings on matters of compliance are final and nonappealable.⁷

Claudia T. Farr
Director

⁴ See *Grievance Procedure Manual* § 6.3.

⁵ *Grievance Procedure Manual* § 3.2.

⁶ See *Grievance Procedure Manual* § 1.1.

⁷ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).