

Issues: Compliance – Grievance Procedure (5-Day Rule, Documents and Second Step Meeting); Ruling Date: December 16, 2009; Ruling #2010-2486; Agency: University of Virginia Health System; Outcome: Agency In Compliance (5-Day Rule), No Ruling on other issues.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the University of Virginia Health System
Ruling No. 2010-2486
December 16, 2009

The grievant has sought a compliance ruling concerning her grievance with the University of Virginia Health System (the agency) due to the agency's alleged noncompliance in handling this grievance. For the following reasons, there is no basis to award relief at this time.

FACTS

In this expedited grievance, the second step meeting occurred on October 15, 2009. The grievant alleges that she was prevented from having an individual of her choice attend the meeting with her. The agency denies this allegation. The grievant raised this issue in a notice of noncompliance dated November 11, 2009. The agency responded on December 1, 2009, offering to hold a new second step meeting, which the grievant declined.

On November 12, 2009, the grievant requested documents from the agency. The grievant raised the agency's alleged failure to produce these documents in a letter to the agency dated November 20, 2009. Additionally, the grievant alleges the agency failed to submit a Form B to this Department in a timely manner. On December 8, 2009, EDR received the grievant's requests for a compliance ruling regarding these matters.

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)

¹ *Grievance Procedure Manual* § 6.3.

² *Id.*

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 Each of the grievant's allegations of noncompliance are addressed separately below.

Second Step Meeting

Under the grievance procedure, a grievant is entitled to have an individual present with him or her at the second step meeting.⁴ The grievant alleges that the agency prevented her from having such an individual attend the second step meeting. Even assuming the grievant's allegation is true, the second step meeting in this matter occurred on October 15, 2009. The grievant did not raise this issue with the agency until November 11, 2009, or with this Department until December 8, 2009. By November 11, 2009, the agency head had already rendered a qualification decision. Indeed, when the grievant returned the grievance package to the agency on October 27, 2009, the grievant noted that she "want[ed] to continue to the grievance hearing." Further, the agency states that it later offered to provide the grievant with a new second step meeting, which the grievant declined. Based on these facts, this Department finds that any alleged noncompliance that occurred with the second step meeting has been waived by the grievant based on her continuation of the grievance beyond the second step⁵ and denial of the agency's offer of a cure.

Request for Documents

The grievant requested documents from the agency in a letter dated November 12, 2009. The grievant notified the agency of its alleged failure to produce the documents on November 20, 2009. However, the grievant did not request that this Department issue a compliance ruling on this issue until after the grievance had been qualified for a hearing and submitted for appointment of a hearing officer.

Because the grievance has been qualified for hearing, the grievant must raise the matter with the hearing officer to request an order for the production of documents she is still seeking.⁶

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 *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).

⁶ *See Rules for Conducting Grievance Hearings* § III(E); *see also* § V(B) (allowing a hearing officer to impose an adverse inference against a party failing to produce documents).

Therefore, this issue regarding production of documents is not ripe for determination by this Department.⁷ If the grievant disagrees with the hearing officer's decision or order, an objection should be made to the hearing officer, and a ruling from EDR must be requested in writing.⁸

Delay – Submission of Form B

The grievant asserts that the agency failed to submit a Form B to request appointment of a hearing officer within five workdays, as required by Section 4.2 of the *Grievance Procedure Manual*. The grievant alleges that the agency sent the Form B to this Department on the seventh workday. However, as indicated above, the allegedly noncompliant party is generally given an additional five workdays to correct any noncompliance following receipt of a notice of noncompliance. In this case, the agency had cured any alleged noncompliance well before any notice of noncompliance was sent by the grievant.⁹ As such, the grievant's argument is moot.

This Department's rulings on matters of compliance are final and nonappealable.¹⁰

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Director

⁷ See *Grievance Procedure Manual* § 6.3.

⁸ *Id.*

⁹ Further, the alleged minor delay would not constitute substantial noncompliance with the grievance procedure.

¹⁰ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).