

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: February 1, 2009; Ruling #2010-2515; 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 the Department of Corrections
Ruling No. 2010-2515
February 1, 2010

The grievant seeks a compliance ruling regarding his four grievances with the Department of Corrections (the agency). The grievant alleges that the third step-respondent has failed to comply with the time limits set forth in the grievance procedure for responding to the grievances.

FACTS

The grievant advanced his four grievances to the third resolution step on December 29, 2009, by hand-delivery to the facility at which he worked. The facility provided the grievance materials to the third step-respondent, who received them on or around January 6, 2010, according to the agency. The third step-respondent reportedly spoke with the grievant to seek an extension on January 11, 2010. The grievant asked that he be provided with a written request for an extension. The agency states that such a written request was sent to the grievant by fax on January 13, 2010. In the meantime, the grievant had sent a notice of noncompliance to the agency head on January 12, 2010, regarding the third step-respondent's failure to respond to his grievances. The agency has reportedly received no further communication from the grievant about granting the requested extension of time. As of January 21, 2010, the third step-respondent had yet to provide a written response to the four grievances.

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

¹ *Grievance Procedure Manual* § 6.3.

² *Id.*

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.

Upon receiving the grievant's notice of noncompliance on January 12, 2010, the third step-respondent was required to respond to the grievances within five workdays.³ Given the intervening state holidays, the third step-respondent should have responded by January 21, 2010. It does not appear that the third step-respondent had provided a written response by that time.

As the agency has apparently failed to respond to the four grievances in a timely manner, it has failed to comply with the grievance procedure.⁴ This Department therefore orders the agency to correct this noncompliance **within ten workdays of the date of this ruling** by having the third step-respondent provide written responses to the four grievances if he has not already done so.

In addition, the grievant seeks a ruling on the merits of his grievance due to the agency's "outrageous delays, stall tactics, and repeated non-compliance." 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,⁵ 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.

This Department finds no indication of any bad faith on the part of the agency at the third resolution step. Indeed, it appears the third step-respondent sought an extension of time to allow for a review of the background materials for this case, which involves four grievances and multiple disciplinary actions.⁶ Seeking extra time to review these materials seems reasonable and appropriate given the issues involved and would appear to enable the third step-respondent to address the grievances with better knowledge of the underlying facts. There is no indication of bad faith warranting relief on the merits.

³ See *Grievance Procedure Manual* § 6.3.

⁴ See *Grievance Procedure Manual* § 3.3.

⁵ See Va. Code § 2.2-3003(G).

⁶ See EDR Ruling Nos. 2010-2440, 2010-2447, 2010-2452.

This Department addressed many of the grievant's earlier claims of noncompliance in EDR Ruling Nos. 2010-2440, 2010-2447, 2010-2452. In that ruling, this Department found limited concerns of noncompliance by the agency.⁷ Further, while there appear to have been some minor delays in this case, they appear to have resolved once identified.⁸ This Department cannot conclude that the agency's conduct has substantially violated the grievance procedure, much less that the agency has been motivated by bad faith or a gross disregard of the grievance procedure. No award of relief is warranted at this time.⁹

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

Claudia T. Farr
Director

⁷ *See id.*

⁸ Further, it appears that a significant portion of the history in this case involved the time it took for this Department to process and address the grievant's various noncompliance requests in EDR Ruling Nos. 2010-2440, 2010-2447, 2010-2452.

⁹ While the agency's actions in this case do not warrant a finding on the merits at this time, this Department notes that the grievance process is intended to provide the parties with an expeditious way to resolve workplace issues and therefore adherence to the 5 workday rule is crucial. The noncompliance provisions of the grievance process are not, and were never intended to be, a mechanism to allow the parties to extend the 5 workday rule. As such, this Department does not condone any party failing to comply with the time limits set forth in the grievance process and strongly cautions that repeated disregard for the 5 workday rule could result in a decision against the noncompliant party. *See, e.g.*, EDR Ruling ## 2003-049 and 2003-053, 2007-1470, 2007-1420.

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