

Issue: Compliance – Grievance Procedure (Second Step Meeting); Ruling Date: November 4, 2010; Ruling #2011-2816; Agency: Department of Corrections; Outcome: No Ruling – grievant waived right.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2011-2816
November 4, 2010

The grievant has sought a compliance ruling concerning two of her grievances¹ with the Department of Corrections (the agency) due to the agency's alleged noncompliance in providing a face-to-face meeting.

FACTS

In the grievant's March 24, 2010 and March 31, 2010 grievances, the third step-respondent received the grievance packages on or about September 13, 2010. According to EDR Ruling No. 2010-2685, the grievant was to receive a face-to-face meeting with the third step-respondent instead of the second step-respondent in these grievances. Such a meeting did not occur and the third step-respondent issued a written response to the grievances on or about October 20, 2010. The grievant responded on October 22, 2010, requesting that the agency head qualify her grievances for a hearing. Thereafter, on October 26, 2010, the grievant sought this ruling, indicating that she had not received the face-to-face meeting with the third step-respondent as indicated in EDR Ruling No. 2010-2685.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.² 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.³ 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 To the extent the grievant alleges that this same issue occurred in her third grievance, dated April 20, 2010, that issue is waived as the April 20, 2010 grievance has already been qualified for a hearing and forwarded to this Department by the agency for appointment of a hearing officer. *See Grievance Procedure Manual* § 6.3.

² *Grievance Procedure Manual* § 6.3.

³ *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.⁴

Although the grievant is correct to assert that she should have been able to meet with the third step-respondent, the grievant did not raise this issue with this Department until October 26, 2010, after she sought qualification of her grievances for a hearing from the agency head. It is also unclear whether the grievant provided any notice of noncompliance to the agency on this issue prior to requesting this ruling.⁵ Moreover, when the grievant returned the grievance packages to the agency on October 22, 2010, the grievant noted that she "request[ed] to advance my grievance to the next step." Based on these facts, this Department finds that the alleged noncompliance that occurred when the agency failed to provide a face-to-face meeting with the third step-respondent has been waived by the grievant based on her continuation of the grievance beyond that step.⁶

It is unfortunate that the grievant was never afforded a face-to-face meeting during the resolution steps. However, the agency head has already ruled on the grievant's request to qualify her grievances for a hearing, making a return to a face-to-face meeting at the third resolution step impractical. Further, it is notable that the grievant has not requested a new face-to-face meeting in her ruling request. Rather, she sought to have her grievance "founded" due to the agency's alleged noncompliance. While failing to follow EDR Ruling No. 2010-2685 would be considered noncompliance, in this case it is not substantial enough such that an automatic ruling on the merits of this grievance against the agency would be warranted.⁷

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

Claudia T. Farr
Director

⁴ 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.

⁵ See *Grievance Procedure Manual* § 6.3.

⁶ *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.").

⁷ Indeed, not following EDR Ruling No. 2010-2685 appears to have been an oversight here, rather than intentional. Such an oversight, while not optimal, is somewhat understandable because normally a face-to-face meeting is not required at the third step. See *Grievance Procedure Manual* § 3.3.

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