

Issue: Compliance – Grievance Procedure (Second Step Meeting); Ruling Date: December 8, 2010; Ruling No. 2011-2842; Agency: State Board of Elections; Outcome: Agency In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of State Board of Elections
Ruling No. 2011-2842
December 8, 2010

The grievant has requested a ruling regarding the alleged noncompliance with the grievance procedure by the State Board of Elections (the “agency”) by not providing their additional questions from the second-step meeting to the grievant within a timely manner. This ruling finds the agency has properly complied with the provisions of the grievance procedure and the issue is moot.

FACTS

On October 15, 2010, this Department issued a Compliance Ruling which required the grievant to make a decision whether he wanted to attend a face-to-face meeting with the deputy agency head and receive a written response by that individual, or in the alternative, respond to written questions with no face-to-face meeting and receive a written response from the agency head.¹ The grievant elected to have a face-to-face meeting with the deputy agency head. This meeting was held on October 28, 2010, with the deputy agency head, the grievant, and the grievant’s representative. Before the meeting concluded, the grievant’s representative allegedly indicated he had another appointment and could not stay for the conclusion of the meeting. Therefore, both parties agreed the deputy agency head would send written questions to the grievant for his written response to cover those issues which they were unable to discuss. On November 8, 2010, the deputy agency head sent an email to the grievant apologizing for the delay in sending the questions and indicated the questions would be sent to him shortly. On November 18, 2010, the grievant emailed a letter to the agency indicating he had not received the additional questions to date and notified the agency of its noncompliance pursuant to §3.2 of the grievance procedure. According to the agency’s email traffic history, the agency did not receive the grievant’s email until Saturday, November 20, 2010, at 2:51 a.m. On Monday, November 22, 2010, the agency emailed the grievant the list of questions.

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

¹ EDR Ruling No. 2011-2803.

² *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.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) 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

Here, the grievant sent notice to the agency of the alleged noncompliance on November 18, 2010. However, as evident by the agency's email traffic history, the agency did not actually receive the email notification until Monday, November 22, 2010. Upon receipt, the agency immediately corrected its noncompliance by sending the list of questions to the grievant that same day. Therefore, the agency has corrected any noncompliance and any issue of purported noncompliance is now rendered moot. Note, however, that 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 five workday rule could result in a decision against the noncompliant party.⁵ **Within five workdays of receipt of this ruling**, the grievant shall respond to the written questions. The agency will then have **five workdays** from the date the agency receives the grievant's responses to respond to the grievant's answers, address the issues and relief requested, and notify the grievant of his procedural options.

This Department's rulings on matters of compliance are final and nonappealable.⁶

Claudia T. Farr
Director

³ *Id.*

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, e.g.*, EDR Ruling Nos 2003-049 and 2003-053, 2007-1470, 2007-1420, 2010-2536.

⁶ *See* Va. Code §§ 2.2-1001(5); 2.2-3003(G).