

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: October 5, 2011; Ruling No. 2012-3110; Agency: Virginia Community College System; Outcome: Grievant Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Virginia Community College System
EDR Ruling No. 2012-3110
October 5, 2011

The Virginia Community College System (“agency”) has requested a compliance ruling related to the grievant’s July 8, 2011 grievance. The agency alleges that the grievant has failed to comply with the time limits set forth in the grievance procedure for participating in the second-step meeting.

FACTS

On July 8, 2011, the grievant initiated a grievance with the agency, alleging her immediate supervisor had discriminated and retaliated against her. Because the July 8th grievance alleged discrimination and retaliation by the grievant’s immediate supervisor, the agency designated the grievant’s supervisor’s supervisor to act as the agency’s first-step respondent. The grievance advanced to the second resolution step, and the agency scheduled the second-step meeting for August 24, 2011, with the agency’s second-step respondent. The agency also advised the grievant that her immediate supervisor would be attend the meeting as well. The grievant objected to the immediate supervisor’s presence, and just prior to the scheduled second-step meeting, the grievant sent a message to the agency indicating that she waived the face-to-face meeting with the second-step respondent and, in the alternative, requested to meet with the third-step respondent. Consequently, the grievant did not attend the August 24, 2011 second-step meeting.

On August 31, 2011, the agency’s human resource director emailed the grievant and informed her that she could not waive the face-to-face meeting with the second-step respondent unless the grievant had alleged retaliation or discrimination by that individual, which she had not in this particular case. As such, the agency considered the grievant noncompliant with the grievance procedure and notified her that she needed to correct the noncompliance by September 8, 2011. Meanwhile, as a follow-up to the agency’s notice of noncompliance, the second-step respondent contacted the grievant to inform her that she had set aside time on September 7, 2011 for the second-step meeting. The grievant did not attend the September 7th second-step meeting, nor did she respond to the agency’s human resource director by September 8th. Instead, the grievant sent an email to the agency head on September 8, 2011, requesting a meeting with her.

Since more than five workdays have elapsed since the agency's notification to the grievant of her alleged noncompliance, and the grievant has not yet participated in the face-to-face second-step meeting, the agency seeks a compliance ruling from this Department.

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) 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

Under the grievance procedure, the second-step meeting must be held within five workdays of the second-step respondent's receipt of a grievance. The persons who may be present at this meeting are the employee, an individual selected by the employee, the second-step respondent, and an individual selected by the second-step respondent. Either party may call witnesses, but these witnesses may not be present except while providing information. In the event that an employee alleges retaliation or discrimination by an individual who would otherwise serve as the agency's second-step respondent, the employee may either: (1) request that the agency designate another second-step respondent; or (2) waive the face-to-face meeting with the original second-step respondent and receive only a written second-step response to the grievance. If the employee elects to waive the face-to-face meeting with the original second-step respondent, then employee must be allowed to meet with the third-step respondent.⁴

In this case, the agency's second-step respondent is a different individual than the one the grievant's alleges has discriminated and retaliated against her. Therefore, the second-step meeting must be held with the grievant and the agency's second-step respondent, as required by

¹ *Grievance Procedure Manual* § 6.3.

² *See 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.

⁴ *Grievance Procedure Manual* § 3.2.

the grievance procedure.⁵ Moreover, the agency notified the grievant of her noncompliance, but the grievant has yet to participate in the face-to-face second-step meeting with the agency's second-step respondent. Furthermore, although the grievant allegedly objected to her immediate supervisor's participation in the second-step meeting, she has not properly notified the agency head of the alleged noncompliance which is required by the noncompliance procedures of the grievance process.⁶

As the grievant has apparently failed to participate in the second-step meeting in a timely manner, she has failed to comply with the grievance procedure. This Department therefore orders the grievant to correct her noncompliance **within ten work days of the date of this ruling** by (1) notifying her human resources office in writing that she wishes either to conclude her grievance, (2) participate in the second-step meeting with the agency's second-step respondent, or (3) to the extent the grievant has any remaining concerns about noncompliance with the grievance process, notify the agency head of the noncompliance and give the agency five work days to correct the noncompliance. If the grievant does not move forward with the second-step meeting or raise noncompliance concerns, if any, with the agency, then the agency may administratively close the grievance without any further action on its part. The grievance may be reopened only upon a timely showing by the grievant of just cause for the delay (for example, a serious illness, or other circumstances beyond the grievant's control).

This Department's rulings on matters of compliance are final and nonappealable.⁷

Claudia T. Farr
Director

⁵ *Id.*

⁶ See *Grievance Procedure Manual* § 6.3.

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