

Issue: Compliance – Grievance Procedure (Second Step Meeting); Ruling Date: July 9, 2012; Ruling No. 2012-3380; Agency: Department of Alcoholic Beverage Control; Outcome: Grievant Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

COMPLIANCE RULING

In the matter of the Department of Alcoholic Beverage Control
EDR Ruling Number 2012-3380
July 9, 2012

The Virginia Department of Alcoholic Beverage Control (“agency”) has requested a compliance ruling related to the grievant’s May 23, 2012 grievance. The agency alleges that the grievant has failed to comply with the time limits set forth in the grievance procedure by not timely attending the second resolution step meeting.

FACTS

On May 23, 2012, the grievant initiated an expedited grievance with the agency. Within five workdays of receipt of the grievance, the agency’s second step-respondent contacted the grievant to arrange the second resolution step meeting. After the agency did not receive a response from the grievant, the second step-respondent sent a letter to grievant on May 31, 2012, indicating which dates he was available for the meeting. The second resolution step meeting was scheduled for June 6, 2012.

On June 6, 2012, the grievant contacted the second step-respondent and requested he designate a different second step-respondent because the grievant had filed a prior discrimination and retaliation complaint against him. Moreover, the grievant did not appear at the June 6, 2012 second resolution step meeting. Therefore, the agency rescheduled the second resolution step meeting for June 8, 2012, but it refused to designate a different second step-respondent because “no issues were raised in the [May 23, 2012] grievance in regard to [named second step-respondent] and that [named second step-respondent] is the appropriate second-step respondent.”

On June 11, 2012, after the grievant failed to appear at the June 8, 2012 second resolution step meeting, the agency sent a notice of noncompliance to the grievant, indicating the agency considered the grievant noncompliant due to his failure to appear at both previously scheduled second resolution step meetings. Additionally, the agency requested the grievant correct his noncompliance within five workdays upon receipt of the letter of noncompliance.

On June 19, 2012, the grievant’s attorney’s administrative assistant contacted the second step-respondent to reschedule the meeting, but the second step-respondent allegedly informed the administrative assistant that he would only reschedule the meeting with the grievant directly. As

such, the grievant contacted the agency's employee relations manager and left a voicemail indicating that he was having difficulty in rescheduling the second resolution step meeting with the second step-respondent. Later that day, the second step-respondent left a voicemail with grievant, indicating he was available to meet on June 20, 2012 at 4:00 p.m.

On June 20, 2012, the grievant sent a notice of noncompliance to the agency, alleging that the agency was noncompliant by not designating a different second step-respondent. On June 21, 2012, the grievant sent a second notice of noncompliance to the agency, alleging that the agency was noncompliant in attempting to reschedule the second resolution step meeting with less than twenty-four hours notice.

Since more than five workdays have elapsed since the agency's notification to the grievant of his alleged noncompliance, and the grievant has yet to schedule his second resolution step meeting with the agency's designated second step-respondent, the agency seeks a compliance ruling from EDR.

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 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 EDR, 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

The *Grievance Procedure Manual* provides that "[w]ithin 5 workdays of the second-step respondent's receipt of the grievance, the second-step meeting must be held."⁴ The agency alleges that the grievant has violated this portion of the grievance procedure by failing to appear at two previously scheduled meetings and then failing to respond to the agency's inquiries to reschedule. To the contrary, the grievant alleges that he has made several attempts to schedule

¹ *Grievance Procedure Manual* § 6.3.

² *See id.*

³ While in cases of substantial noncompliance with procedural rules the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party, EDR favors having grievances decided on the merits rather than procedural violations. Thus, EDR 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, EDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

⁴ *Grievance Procedure Manual* § 3.2.

the meeting, but it is “difficult and almost impractical to expect a meeting to take place with less than 24 hours notice.” Although there is no specific provision in the grievance procedure expressly requiring parties to cooperate with the scheduling of the second resolution step meeting, certainly such cooperation is expected. Non-responsiveness by parties to a grievance does not support the purpose of the grievance process to resolve workplace disputes fairly and promptly.⁵

To the extent the grievant believes that agency is noncompliant with the grievance procedure because it refuses to designate a different second step-respondent, we are compelled to note that the only exception to not meeting with the agency’s designated second step-respondent is when the existing grievance in question alleges retaliation or discrimination by the second step-respondent.⁶ The grievant’s May 23, 2012 grievance does not appear to make these allegations. Furthermore, if the grievant desires a compliance ruling from EDR regarding this issue, he must first give written notice of the alleged noncompliance to the agency head and allow the agency five days to correct any noncompliance. Only after the grievant has satisfied this procedural prerequisite will EDR address any claim of noncompliance.

As the grievant has apparently failed to attend two previously scheduled second resolution step meetings, he has failed to comply with the grievance procedure. EDR therefore orders the grievant to contact the agency’s designated second step-respondent **within five work days of the date of this ruling** to either provide his availability (and presumably his attorney’s availability) for a rescheduled second resolution step meeting or notify the agency’s human resources office that he wishes to conclude his grievance. If the grievant continues to be non-responsive to the agency’s past requests to reschedule the second resolution step meeting, the agency could simply select a meeting date and notify the grievant. If the grievant does not appear for the meeting, the agency could simply respond to the grievance in writing without the input of the grievant during a face-to-face meeting.⁷

EDR’s rulings on matters of compliance are final and nonappealable.⁸



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⁵ See *Grievance Procedure Manual* § 1.1.

⁶ Frequently Asked Grievance Questions, No. 13, at <http://www.dhrm.virginia.gov/EDR/faqs.htm>. However, if compelling evidence of discrimination or retaliation by the designated second step-respondent were presented, even if not the subject of the current grievance, it would make sense that a grievant should not have to engage in a face-to-face meeting with that individual. No such evidence has been presented here beyond a discussion of an allegation.

⁷ If the agency provides a response without first meeting with the grievant, however, the agency will waive the right to allege noncompliance by the grievant in not coming to the meeting. Number 13 of the Frequently Asked Grievance Questions on EDR’s website provides that “any party to a grievance has a right to insist on the second-step meeting, and if either party demands it, then the second-step meeting generally must take place.” Frequently Asked Grievance Questions, No. 13, <http://www.dhrm.virginia.gov/EDR/faqs.htm>.

⁸ See Va. Code §§ 2.2-1202.1(5); 2.2-3003(G).