

Issue: Compliance – Grievance Procedure (Second Step Meeting); Ruling Date: April 24, 2018; Ruling No. 2018-4707; Agency: Virginia Information Technologies Agency; Outcome: Agency in Compliance.



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

COMPLIANCE RULING

In the matter of the Virginia Information Technologies Agency
Ruling Number 2018-4707
April 24, 2018

The grievant has requested a compliance ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management in relation to alleged noncompliance with the grievance procedure by the Virginia Information Technologies Agency (the “agency”).

FACTS

On or about January 23, 2018, the grievant initiated a grievance with the agency. The Executive Director is the designated second step-respondent for this grievance.¹ After the grievant advanced the grievance to the second step, agency management appears to have informed the Executive Director that its outside legal counsel would attend the second step meeting as a supporter/counselor. The Executive Director told agency management that she did not wish to participate in the second step meeting with the agency’s outside counsel present, and that she would prefer to have a representative from the Office of the Attorney General attend the meeting instead. After receiving this communication from the Executive Director, agency management notified the grievant that it had designated the Deputy Chief Information Officer (the “Deputy CIO”) as an alternate second-step respondent to preside over the second step meeting in place of the Executive Director, and that its outside counsel would attend the meeting as a supporter/counselor.

The grievant requested a compliance ruling from EEDR on April 12, 2018, alleging that agency management improperly substituted an alternate second step-respondent without approval from EEDR. In addition, the grievant requests that the Deputy CIO “not be allowed to serve as second step-respondent” due to his alleged “pervasive and severe actions” surrounding the issues raised in her grievance. The grievant further contends that the agency’s outside

¹ The agency’s designation of step-respondents listed on EEDR’s website reflects that the Executive Director would typically serve as the third step-respondent. However, it is sensible, though not required by the grievance procedure, for the agency to provide the grievant with the face-to-face meeting that occurs at the second step with a member of management higher than her immediate supervisor: the Executive Director in this case. Given this slight modification to the steps in this grievance, the second and third steps would collapse into a single step that would be conducted similar to the second step with the face-to-face meeting. Accordingly, in this grievance, there will be no separate third step. Once the meeting and response are completed at the second step, the grievant’s next option will be to seek qualification of her grievance from the agency head.

counsel should not be permitted to attend the second step meeting because agency management is allegedly attempting to intimidate, harass, and/or retaliate against her through its outside counsel.

DISCUSSION

Agency's Designation of Alternate Second Step-Respondent

Under the grievance procedure, each agency must designate individuals to serve as respondents in the resolution steps. A list of these individuals shall be maintained by the agency's Human Resources Office and is also available on EEDR's website. Each designated step-respondent shall have the authority to provide the grievant with a remedy, subject to the agency head's approval.² Pursuant to its statutory responsibilities, EEDR has long collected and maintained each agency's designated step-respondents. This assures that each agency's management resolution step-respondents are appropriate, known to employees and to EEDR, and that this phase of the grievance process is administered consistently and fairly. Section 8.9 of the *Grievance Procedure Manual* further provides that, "[i]f the agency seeks to change the designation of respondents, the agency must make such a request to EEDR" and "[t]he agency's proposed change will not be effective until approved by EEDR." An agency's careful designation of step-respondents, and consistent adherence to those designations, is crucial to an effective grievance process. Step-respondents have an important statutory responsibility to fulfill and should decline to serve only in extenuating circumstances.

Here, the Executive Director is the designated second step-respondent for this grievance. However, the Executive Director notified agency management that she would not participate in the meeting with the agency's outside counsel present. Under these circumstances, EEDR finds that the Executive Director essentially became unable to serve in the role assigned to her under the grievance procedure.³ When an agency's designated step-respondent is unable to fulfill her role, the agency must select an alternate step-respondent. There is no requirement under the grievance procedure that the agency receive approval from EEDR to designate an alternate step-respondent in such a situation, or that the grievant and the agency agree on the identity of the substituted step-respondent.⁴ As a result, EEDR cannot conclude that the agency failed to comply with the grievance procedure by designating the Deputy CIO as an alternate second step-respondent in place of the Executive Director.⁵

In her request for a compliance ruling, the grievant alleges that the Deputy CIO has engaged in discrimination, retaliation, and/or harassment, and should thus be disqualified from

² See Va. Code § 2.2-3003(D).

³ Agency management could have ordered the Executive Director to participate in the meeting with its outside counsel present, but there is no requirement under the grievance procedure that an agency must do so.

⁴ The parties may, "upon mutual agreement, . . . modify other pre-qualification rules during the management resolution steps," which could include "substituting a step-respondent." *Grievance Procedure Manual* § 8.4. In this case, however, the parties have not discussed substituting a step-respondent upon mutual agreement, but rather disagree as to the appropriate method of designating an alternate second step-respondent because the Executive Director is unable to participate in the meeting for the reasons discussed above.

⁵ Further, the Deputy CIO is at a suitable level of management to conduct such a second step meeting.

serving as the second step-respondent for her grievance. In cases where “an employee alleges retaliation or discrimination by an individual who would otherwise serve as the agency’s second-step respondent,” she may either “[r]equest that the agency designate another second-step respondent” or “[w]aive 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, the employee must be allowed to meet with the third-step respondent.”⁶

Having reviewed the grievance record and balanced the interests of the parties, EEDR finds that the Deputy CIO may serve as the second step-respondent. The grievant understandably disagrees with the agency’s decisions and argues that agency management, as a whole, has engaged in discrimination, retaliation, and/or harassment against her. She does not, however, appear to allege that the Deputy CIO has engaged in any specific improper conduct in relation to the grievance, other than generalized assertions that the Deputy CIO is the “orchestrator of the unlawful actions against” her. Moreover, the grievance procedure does not expect step-respondents to serve as disinterested parties.⁷ Allowing the disqualification of step-respondents solely because of their managerial actions or position in the agency’s chain of command would throw the resolution step process into chaos, if not render it wholly ineffectual. For these reasons, EEDR concludes that the grievant has not sufficiently alleged improper conduct by the Deputy CIO to invoke her right to meet with an alternate step-respondent. Accordingly, the second step meeting must proceed with the Deputy CIO as second step-respondent, unless the parties reach some agreement otherwise.

Outside Counsel’s Attendance at the Second Step Meeting

The grievant further challenges the agency’s decision to have its outside counsel attend the second step meeting as a supporter/counselor. Both the grievant and the second step-respondent may each select an individual to attend the second step meeting, whose role is “essentially one of supporter and counselor.”⁸ The grievance procedure does not place any limitation on the identity of the parties’ selected individuals.⁹ In some cases, the second step-respondent may select an individual to attend without additional guidance or approval from agency management. There is nothing inherently improper, however, with agency management selecting a specific individual who will attend the meeting in that role. In this case, agency management has determined that its outside counsel will attend the meeting as a supporter/counselor, regardless of which management official is designated as the second step-respondent.

Although EEDR has considered the grievant’s claim that the agency’s outside counsel has engaged in intimidating, harassing, and/or retaliatory conduct, this assertion appears to be based largely on her disagreement with the outside counsel’s position on matters raised in the grievance. The outside counsel’s advocacy on behalf of the agency’s position and interests in

⁶ *Grievance Procedure Manual* § 3.2.

⁷ *See, e.g.*, EDR Ruling Nos. 2006-1279, 2006-1315; EDR Ruling No. 2004-916.

⁸ *Grievance Procedure Manual* § 3.2.

⁹ *See id.*

relation to the grievance do not, on their own, support a conclusion that the outside counsel has acted inappropriately or should otherwise be prohibited from participating in the second step meeting as an observer/supporter at this time. While the grievant may disagree with the agency's choice of supporter/counselor, the agency's decision is not inconsistent with the requirements of the grievance procedure.

CONCLUSION

Based on the foregoing, EEDR finds that the agency has substantially complied with the requirements of the grievance procedure. To proceed with the grievance, the parties are directed to schedule the second step meeting **within five workdays of receipt of this ruling**, unless they reach an agreement otherwise. Although there is no basis at this time for EEDR to determine that either agency management and/or the agency's outside counsel have failed to comply with the grievance procedure, both parties should be mindful that the second step meeting "should not be adversarial or treated as a hearing," and that the purpose of the meeting is "fact finding" with the goal of promoting "open discussion of the grievance issues."¹⁰

EEDR's rulings on matters of compliance are final and nonappealable.¹¹



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¹⁰ See *id.*

¹¹ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).