

Issue: Compliance – Grievance Procedure (2nd Step Meeting); Ruling Date: April 1, 2013; Ruling No. 2013-3543; Agency: Virginia Community College System; Outcome: Agency in Compliance.



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

COMPLIANCE RULING

In the matter of the Virginia Community College System
Ruling Number 2013-3543
April 1, 2013

The grievant has requested a compliance ruling in his January 16, 2013 grievance with the Virginia Community College System (the agency) on whether the agency is out of compliance with the grievance procedure. The grievant contends that the agency's second step-respondent violated Sections 1.9 and 3.2 of the *Grievance Procedure Manual* (the "Manual") during the second resolution step meeting.

FACTS

The grievant initiated a grievance on January 16, 2013. The grievance proceeded through the first resolution step, and the grievant's second resolution step meeting occurred on February 8, 2013. The grievant alleges that the agency's second step-respondent did not comply with the provisions of the *Manual* during the second resolution step meeting when he allegedly acted as an advocate and representative for the agency instead of acting as a neutral facilitator of the meeting. In addition, the grievant alleges the second step-respondent did not conduct himself in an even-handed manner, nor did he "seek to find facts in a balanced manner" during the meeting. Moreover, the grievant alleges that the meeting was unbalanced when "[t]he supervisor of the employee, whom the grievance was about, was the selected party to accompany [the second step-respondent] throughout the entire meeting" and the second step-respondent allegedly limited the grievant's introduction of relevant information.

The grievant submitted a ruling request, dated February 20, 2013, to the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management to address the alleged noncompliance. In a phone call with EDR, the grievant admitted he did not submit a notice of noncompliance to the agency head, but instead sent a notice of the noncompliance to the second step-respondent on February 11, 2013, and assumed the second step-respondent would send the notice of noncompliance to the agency head. On February 12, 2013, the grievant forwarded the February 11, 2013 e-mail notice to the university president, and stated he had no intention for the university president to act upon the February 11, 2013 e-mail.

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 the 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, which 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

In this case, the grievant's request for a compliance ruling is premature because the grievant has not shown that he first notified the agency head in writing of the alleged violation and gave the agency five workdays to correct the purported noncompliance, as required by the grievance procedure.⁴ The grievant is therefore advised that if he still desires a compliance ruling from EDR, he must first give written notice of the alleged noncompliance to the agency head and allow the agency five workdays to correct any noncompliance. Only after the grievant has satisfied this procedural prerequisite will EDR address any claim of noncompliance.

However, even assuming for purposes of this ruling only that the grievant's February 12, 2013 e-mail to the university president was acceptable notice of noncompliance to the agency head, the alleged conduct of the agency's second step-respondent during the second management step meeting has not violated any provision of the *Manual*. The grievance procedure does not expect the second step-respondent to serve as a disinterested party.⁵ As we explained in EDR Ruling No. 2004-916:

Although a step respondent should conduct the meeting in an even-handed manner and with an open mind, he is a member of management, not a neutral party. While we recognize the frustration for grievants that may result from this, allowing the disqualification of step respondents because of their

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* § 6.3.

⁵ *See* EDR Ruling No. 2006-1279, 2006-1315.

managerial actions would throw the resolution step process into chaos, if not render it wholly ineffectual. Further, while the resolution step process involves only the parties to a grievance, the hearing process allows grievants an opportunity to present qualifying claims to a neutral, third-party hearing officer.

Accordingly, we do not find noncompliance as to the grievant's claims.

The grievant and the agency should be mindful that the second resolution step meeting is a meeting between parties to a grievance, and that both sides bring to that meeting their perspectives, experiences, and understandings. Although a step-respondent should conduct the meeting in an even-handed manner and with an open mind, he or she is a member of management and, like the grievant, is not a neutral party.⁶ Indeed, the management resolution phase of the grievance process was designed to allow the parties to the dispute to exchange information and attempt to resolve the issues themselves, without the assistance of a neutral third party.

The grievant also alleges the agency gave the appearance of an unbalanced meeting when it allowed the grievant's supervisor to accompany the second step-respondent at the second resolution step meeting. Section 3.2 of the *Manual* allows a second step-respondent to select the person who may be present with him or her at the second resolution step meeting. EDR's Frequently Asked Grievance Questions (FAQ) No. 18 states that "[b]oth parties are limited to a single accompanying individual" at the second resolution step meeting, and that accompanying individual may be anyone.⁷ As such, we do not find the agency was noncompliant by having the grievant's supervisor accompany the second step-respondent at the second resolution step meeting.

Finally, the grievant alleges that he "could not speak of any matters related to additional documentation or attachments that were included in the grievance" during the second resolution step meeting. It appears the matter the grievant wanted to discuss concerned a salary dispute. The second step-respondent asserts that at the beginning of the second management step meeting, he read the five issues identified in the grievant's January 16, 2013 grievance and asked the grievant if they accurately represented the issues of the grievance, to which the grievant responded they did. Furthermore, he asserts that during the meeting "the grievant was permitted to follow lines of questioning on matters that were not identified in the original grievance," but he was not allowed to raise a salary issue because it was not identified as an issue in his original grievance.

Pursuant to Section 2.4 of the *Manual*, the agency must consider the grievant's Grievance Form A and any attachments throughout the entire grievance process. However, "[o]nce the grievance is initiated, challenges to additional management actions or omissions cannot be

⁶ See, e.g., EDR Ruling No. 2008-1991 and EDR Ruling No. 2008-1870.

⁷ EDR Frequently Asked Grievance Question No. 18, available at <http://www.dhrm.virginia.gov/EDR/faqs.htm>.

added.”⁸ Furthermore, Section 3.2 of the *Manual* states that a second step-respondent cannot “prohibit an employee from disclosing **relevant** information not previously provided.”⁹

In this case, the grievant alleges that he could not speak about additional documentation, but he does not specifically state what documentation he was prohibited from introducing at the second resolution step meeting. The second step-respondent alleges “both parties were permitted to ask witnesses a wide-ranging series of questions and to follow-up on the other party’s questions to elicit clarifying or additional information in order to arrive at a better understanding of the parties’ positions relative to the issues addressed in the grievance.” Even assuming for purposes of this ruling only that the grievant’s allegation is accurate, we note that the second management step meeting was nearly four hours long and the grievant admitted that he attached approximately 200 pages of supporting documentation to his grievance. Given the generous amount of time the grievant had at the second resolution step meeting, as well as the grievant’s extensive supporting documentation, we do not see how the alleged conduct of the agency’s second step-respondent during the second resolution step meeting violated any provisions of the *Manual*. Accordingly, we do not find noncompliance as to the grievant’s claims.

EDR’s rulings on matters of compliance are final and nonappealable.¹⁰



Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁸ *Grievance Procedure Manual* § 2.4.

⁹ *Grievance Procedure Manual* § 3.2 (emphasis added).

¹⁰ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).