

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: November 5, 2015; Ruling No. 2016-4260; Agency: VCCS; Outcome: Agency Not 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 2016-4260
November 5, 2015

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management in relation to her grievance with the Virginia Community College System (the “agency”). The grievant alleges the agency has failed to comply with the grievance procedure in the handling of her September 30, 2015 grievance.

FACTS

The grievant is employed by the agency as a Human Resource Analyst at a community college. Her supervisor, one of the college’s vice presidents, has been designated by the agency as the second step-respondent for employees in the grievant’s chain of management. On or about September 30, 2015, the grievant initiated a grievance with the agency challenging such issues as alleged “harassment, disruptive behavior, unprofessional behavior, [and] discriminatory comments” from her supervisor. The grievant marked the appropriate box on the Grievance Form A to indicate that she “decided not to present this grievance to [her] immediate supervisor” because she was alleging discrimination or retaliation by that individual. The grievant filed the grievance directly with the college president, the agency’s designated third step-respondent.

After the college president did not provide a response within five workdays, the grievant notified the college president that the agency was not in compliance with the grievance procedure on October 14, 2015. On the same day, the college president issued a response to the grievance, stating that “the college must reserve the prerogative to address workplace issues in a manner that it deems most appropriate” The college president directed the grievant to first attempt to resolve her concerns directly with her supervisor and explained that if this attempt was unsuccessful, another vice president would “be assigned the responsibility to conduct the grievance process” at the second step. The college president indicated that he would issue a response at the third step if necessary.

The grievant requested a ruling from EDR on or about October 23, 2015, alleging that the agency failed to provide her with a response to the grievance within five workdays. The grievant also seeks guidance from EDR as to whether she must meet with her supervisor and attempt to resolve the issues presented in the grievance, even though she marked the appropriate section on

the Grievance Form A to initiate the grievance with the next level of agency management due to alleged discrimination or retaliation from that individual.

DISCUSSION

Agency's Response to the Grievance

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

At this point, it cannot be said that the agency has provided the grievant with a response that "address[es] the issues and the relief requested" or "notif[ies] the employee of his/her procedural options."⁴ As the agency has not provided the grievant with a written response to her grievance in a timely manner, it has failed to comply with the grievance procedure. In fashioning a directive to correct the noncompliance under the particular circumstances of this case, EDR must also address the agency's designation of step-respondents and provide the parties with guidance regarding the path the grievance should follow through the management resolution steps.

Designation of Step-Respondents

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 EDR's website. Each designated step-respondent shall have the authority to provide the grievant with a remedy, subject to the agency

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* §§ 3.1, 3.2, 3.3.

head's approval.⁵ Pursuant to its statutory responsibilities, EDR 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 EDR, and that this phase of the grievance process is administered consistently and fairly.

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, such as extended illness or serious injury. Further, if a step-respondent cannot serve in that capacity pending a particular grievance, management should seek an agreement with the grievant on a substituted step-respondent and should put any agreement in writing. Absent an agreement between the parties, the agency must adhere to the designated list of step-respondents. When higher level employees file grievances, however, modifications to the standard process are necessary.⁶

In this case, the grievant's immediate supervisor would have normally been the second step-respondent for the agency. In such a situation, the first and second steps of the grievance process collapse into a single step,⁷ which would be handled as the second resolution step of a grievance.⁸ As such, there would be no independent first step in this grievance and only two management resolution steps. This is a simple and somewhat common result and is consistent with EDR's longstanding practices.⁹

In this case, however, the grievant is challenging alleged discrimination and harassment from her supervisor, who, as discussed above, would typically serve as the second step-respondent. For grievances alleging discrimination or retaliation, the grievance procedure allows a grievant to decline such meetings with the claimed perpetrator of retaliation or discrimination, in an effort to avoid discouraging alleged victims of discrimination or retaliation from coming forward with their complaints.¹⁰ 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."¹¹ This procedural rule was intended to effectuate a principle long recognized by the courts in discrimination and retaliation lawsuits: that requiring

⁵ See Va. Code § 2.2-3003(D).

⁶ See EDR Ruling No. 2013-3583. In addition, Number 16 of EDR's Grievance FAQs, which are available at <http://www.dhrm.virginia.gov/employmentdisputeresolution/grievancefaqs>, discusses this type of situation.

⁷ See *id.*

⁸ See *Grievance Procedure Manual* § 3.2.

⁹ E.g., EDR Ruling No. 2009-2321 n.1.

¹⁰ *Grievance Procedure Manual* § 3.2.

¹¹ *Id.*

such a meeting could have a chilling effect on an employee's exercise of his or her rights under an employer's complaint procedure, and should be avoided.¹²

Applying these procedural rules to the facts of this case, EDR directs the parties to begin the grievance at the second step. The grievant may elect to have a face-to-face meeting with an alternate step-respondent instead of her supervisor and, if her issues are not resolved, continue to the third step. In the alternative, the grievant may waive the second step meeting with her supervisor and receive only a written second step response. If the grievant elects to receive a written response from her supervisor, a meeting with the third step-respondent must be held. Though we understand the agency's position that the grievant and her supervisor may be the two individuals who are in the best position to resolve the issues presented in the grievance, it cannot require the grievant to meet with her supervisor before allowing her to proceed with the grievance process.¹³ By filing the grievance, the grievant has invoked the rights available to her under the grievance procedure. In this case, the grievant is entitled to either meet with an alternate step-respondent or receive a written response from her supervisor and meet with the third step-respondent, and the agency must allow her to do so.

Mediation

In addition, the parties may wish to consider whether mediation may be a viable option to pursue as a method of resolving some of the issues in this case. EDR's Workplace Mediation Program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved. The parties may contact EDR at 888-232-3842 for more information about EDR's Workplace Mediation Program.

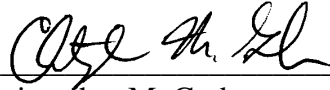
CONCLUSION

For the reasons set forth above, the grievant is directed to notify the agency whether she wishes to meet with an alternate second step-respondent or waive the meeting and receive a written second step response from her supervisor **within five workdays of the date of this ruling**. The parties must then proceed through the management resolution steps in a manner that is consistent with the grievant's choice and as discussed in this ruling.

¹² See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986). In *Meritor*, the United States Supreme Court held that an employer could be held liable for a supervisor's discriminatory harassment of an employee, notwithstanding the existence of a grievance procedure and the employee's failure to use it. As the Court noted, it was "not altogether surprising that respondent failed to invoke the [bank's grievance] procedure and report her grievance to [her supervisor, the alleged perpetrator]." *Id.* at 73. The Court also concluded that the employer's defense in the case would have been "substantially stronger" if its procedures had been "better calculated to encourage victims of harassment to come forward." *Id.*

¹³ This does not, however, mean that a grievant cannot be directed to meet with his or her supervisor to discuss the issues presented in a grievance, even when discrimination or retaliation is an issue. Such a meeting cannot, however, be required as a condition of allowing a grievance to proceed through the management resolution steps.

EDR's rulings on matters of compliance are final and nonappealable.¹⁴



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¹⁴ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).