

Issue: Compliance-Resolution Steps; Ruling Date February 8, 2002; Ruling #2001-222;
Agency: Department of State Police; Outcome: Both agency and grievant out of
compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of the State Police
Ruling Number 2001-222
February 8, 2002

The grievant has requested a compliance ruling in the October 30, 2001 grievance he initiated with Department of the State Police. The grievant claims that the agency is in noncompliance because the second-step respondent received a copy of his grievance before the grievant advanced it to the second resolution step. Additionally, the grievant claims that the second-step respondent added additional claims to the grievance. The grievant also contends that he was not allowed to have the opportunity to have an attorney present at his second-step meeting.

FACTS

On October 30, 2001, the grievant initiated a grievance alleging that his supervisors, the second-step respondent in particular, had racially retaliated against him. He claims they did so by upholding a complaint lodged against him by an African-American driver pulled over by the grievant during a routine traffic stop. The driver complained that during the traffic stop the grievant: (1) was rude and discourteous, and (2) made racial comments during the encounter. The grievant is a Caucasian.

The first-step respondent received the grievance and denied the relief requested on November 5, 2001. On November 6, 2001, after receiving a copy of the grievance from the first-step respondent, the second-step respondent met with the grievant to informally discuss his grievance.

On November 7, 2001, the grievant notified the agency head that the first-step respondent was in noncompliance. The grievant asserted that the agency was out of compliance with the grievance procedure because the second-step respondent was provided a copy of the grievance before the grievant advanced it to the second resolution

step. On November 10, 2001, the grievant presented his grievance to the second-step respondent.

On November 13, 2001, the second-step respondent issued his "Response to Grievance" in which he reversed his earlier finding that both allegations leveled by the motorist were valid. The second-step respondent sustained the allegation of rude and discourteous behavior but concluded the charge of making racial comments was unfounded. On November 15, 2001, the agency offered to hold a second meeting during which the grievant would be permitted to have his lawyer present.

On the morning of November 19, 2001, the grievant advanced his grievance to the third resolution step. The grievant asserts that on the evening of November 19, 2001, he received a letter from the agency, dated November 15, 2001, offering to grant him another meeting with the second-step respondent. Grievant states that he attempted to contact the agency's human resource director on the 19th, and left a message indicating that he had already advanced his grievance, and that another meeting would be moot because the second-step respondent had already made his decision.

On November 27, 2001, the agency head's designee wrote the grievant to inform the grievant that if he still believed that the agency was out of compliance, he should request a compliance ruling from this Department. On November 30, 2001, the grievant requested 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 purported noncompliance, and resolve any compliance problems voluntarily without this Department'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. If the agency fails to correct the alleged noncompliance, the grievant may request a ruling from this Department. Should this Department find that the agency violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department may resolve the grievance in the grievant's favor unless the agency can establish just cause for its noncompliance.

I. The Second-Step Respondent's Advance Receipt of the Grievance

¹ See *Grievance Procedure Manual* § 6, pages 16-18.

The grievant claims that the agency failed to comply with the grievance procedure because a copy of the grievance was provided to the second-step respondent before the grievant advanced it to the second resolution step. The grievance procedure does not prohibit the second-step respondent from having access to the grievance before the grievant advances it to the second resolution step. In fact, under certain circumstances, such as here where violations of civil rights are alleged, the agency has a duty to promptly investigate such allegations and immediately institute effective remedial measures if the accusation is validated.² Accordingly, this Department finds that the second-step respondent was not out of compliance with the grievance procedure by accessing the grievance as he did.

II. Alteration of the Grievance

The grievant also claims the second-step respondent has violated §2.4 of the *Grievance Procedure Manual* by reversing his earlier determination that the allegations leveled by the motorist were founded. The second-step respondent's reversal did not expand or otherwise alter the grievance. Instead, the second-step respondent's shift merely suggests that the second-step respondent, upon further reflection, reached an opposite conclusion from his original one. Such a reversal does not constitute non-compliance with the grievance process.

III. Absence of a Second-Step Meeting

The grievant claims that that he did not have the opportunity to have an attorney present at his second-step meeting. As explained below, the evidence shows that a second resolution step meeting, though offered by the agency, was never held. Therefore, the grievant is entitled to a second-step meeting.

The grievance procedure provides for three management resolution steps once a grievance is initiated. The grievance procedure provides for a second-step resolution

² Cf. *Swenson v. Potter*, 2001 U.S. App. LEXIS 25902 (9th Cir. 2001). (“[t]he most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified”). An investigation is a key step in the employer's response. See *Swentek v. USAIR, Inc.*, 830 F.2d 552, 558 (4th Cir. 1987) (employer obliged to investigate complaint and to present a reasonable basis for its subsequent action). See also *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). If the employer fails to take corrective action after learning of an employee's sexually harassing conduct, or takes inadequate action that emboldens the harasser to continue his misconduct, the employer can be deemed to have “adopted the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy.” *Faragher* at 789. The same principles regarding the necessity of prompt corrective action described in the above cited sexual harassment cases also apply to claims of racial harassment. See *Robinson v. Valmont Industries*, 238 F.3d 1045 (8th Cir. 2001).

meeting, for the purposes of fact-finding, which must be held within 5 workdays of the second-step respondent's receipt of the grievance.³ Furthermore, the grievance procedure provides, in part, that the employee, the second-step respondent, and individuals selected by the employee and second-step respondent, may be present at this meeting.⁴ The second-step respondent must then provide a written response addressing the issues and relief requested and should notify the employee of his procedural options.⁵

Although the second-step respondent met informally with grievant prior to the grievant's advancing his grievance to the second step, such a meeting was not a violation of the grievance process. However, such a meeting does not serve as a substitute for the second-step meeting where the parties may call witnesses and are allowed representation of their choosing. The agency, apparently acknowledging that the grievant was never afforded a "true" second-step meeting, offered to schedule another meeting with the second-step respondent during which the grievant's attorney could be present. The grievant replied that he thought a second meeting would be moot because the second-step respondent had already formed his decision.

There is no evidence here of bad faith by either party. However, it is apparent that a second-step meeting never occurred. Therefore, within five workdays of his receipt of this ruling, the grievant may request the agency to conduct a second-step meeting. If the grievant makes a timely request, then the agency must conduct a second-step meeting within five workdays of the grievant's request, or as the parties mutually agree.⁶ This Department's rulings on matters of compliance are final and nonappealable.⁷

Sincerely,

Neil A. G. McPhie, Esquire
Director

³ *Grievance Procedure Manual* §3.2, page 8.

⁴ *Id.*

⁵ *Grievance Procedure Manual* §3.2, pages 8-9.

⁶ *Grievance Procedure Manual*, §3.2, page 8. (If both parties conclude that a second-step meeting would be moot then they may waive, in writing, the second-step meeting and continue with the grievance process. However, if either party believes that a second-step meeting would be beneficial, then that party is entitled to demand and receive a second-step meeting.)

⁷ Va. Code § 2.2-1001(5).