

Issue: Compliance-Resolution Steps; Ruling Date: August 5, 2002; Ruling #2002-034; Agency: Virginia Polytechnic Institute and State University; Outcome: agency not in compliance with grievance procedure; grievant waived rights by proceeding through steps.



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Virginia Polytechnic Institute and State University  
No. 2002-034  
August 5, 2002

The grievant has requested a compliance ruling in her December 10, 2001 grievance with Virginia Polytechnic Institute and State University (the University) which contests management's evaluation of her annual performance. The grievant claims that the wrong individuals served as the first and third-step respondents and that she did not receive the required second-step meeting.

For the reasons discussed below, we conclude that the University did not comply with the requirements of the grievance procedure. However, by proceeding through all three management resolution steps without first contesting the agency's noncompliance as provided under the grievance procedure, the grievant waived her right to later challenge the agency's compliance or to thereby receive an automatic decision in her favor on the substantive merits of any qualifiable issue.

FACTS

At the time of the events relating to this grievance, grievant was employed as a Public Relations Coordinator. Her immediate supervisor was the department head. On October 8, 2001, grievant received her first annual performance evaluation. Dissatisfied with the evaluation and other related actions taken by her immediate supervisor, the grievant filed an appeal for review with the acting Dean of the College in which she worked. On October 19, 2001, the grievant met with the acting Dean to discuss her performance evaluation. The grievant's performance evaluation was subsequently revised; however, she remained dissatisfied with the outcome.

It is undisputed that in November 2001, prior to the initiation of her grievance, the human resources office gave a copy of the *Grievance Procedure Manual* to the grievant and informed her that the first-step respondent would be her immediate supervisor (in this case, the department head), her second-step respondent would be the Dean of the College, and the third-step respondent would be the Provost. These designations appear to be in accordance with Virginia Tech's Grievance Respondents list as well. The grievant maintains that she objected to management, at that time, both verbally and in writing, to having her immediate supervisor serve as the first-step respondent. She also states that later that month, she met with an attorney regarding her concerns about her immediate supervisor serving as the first-step respondent, but then advanced her grievance to the first management resolution step, in part on the advice of her attorney.

Subsequently, the grievant attempted to advance her grievance to the acting Dean of the College for the second resolution step. However, no second-step meeting was held. The grievant

asserts that after she received only a written second-step response, she contacted human resources to inquire about the need for a face-to-face meeting. The grievant maintains that human resources told her that while there should have been a second-step meeting, she should proceed to the third step anyway. The agency states that the second-step respondent, the acting Dean, did not conduct the meeting, in part because he had met with the grievant during the performance evaluation appeal process and felt that another meeting was unnecessary. Although aware that she did not receive the second-step meeting, the grievant advanced her grievance to the third management resolution step.

At some point, the University had determined that the Provost could not serve as the third-step respondent and, as such, the Assistant Provost would be substituting for him. Later still, the University decided that the Vice Provost for Academic Affairs would replace the Assistant Provost as the third-step respondent, and so informed the grievant. Thus, at the third management resolution step, there was a substitute third-step respondent. The grievant claims that although she knew the Vice Provost for Academic Affairs was not the designated third-step respondent, she went to the meeting anyway to comply with grievance procedure time limitations. The Vice Provost for Academic Affairs responded as the third-step respondent on January 23, 2002.

On January 29, 2002, the grievant sent a notice of noncompliance to the agency head alleging that (i) her immediate supervisor should not have been her first-step respondent, (ii) no second-step meeting was held, and (iii) the wrong individual had served as the third-step respondent. By letter dated January 30, 2002, the agency head denied any noncompliance, stating that (i) the grievant had agreed to the Vice Provost of Academic Affairs serving as the third-step respondent; (ii) although it would have been appropriate for the second-step respondent to meet with the grievant, the only remedy for the lack of a meeting at the second-step would be to advance the grievance to the next step; and (iii) the grievant had been informed of the grievance procedure prior to filing her grievance.

### DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>1</sup> 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 alleged noncompliance, the grievant may request a ruling from this Department. Then, 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 on the merits in the grievant's favor unless the agency can establish just cause for its noncompliance.

Further, the grievance procedure requires that all claims of party noncompliance be raised immediately.<sup>2</sup> Thus, if Party A proceeds with the grievance after becoming aware of Party B's

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<sup>1</sup> See *Grievance Procedure Manual* § 6, pages 16-18.

<sup>2</sup> *Grievance Procedure Manual* § 6.3, page 17.

procedural violation, Party A may waive the right to challenge the noncompliance at a later time.<sup>3</sup> Further, this Department has long held that it is incumbent upon each employee to know her responsibilities under the grievance procedure. Neither a lack of knowledge about the grievance procedure or its requirements, nor reliance upon general statements made by agency management or human resources will relieve the grievant of the obligation to raise a noncompliance issue immediately, as provided in the grievance procedure, upon becoming aware of a possible procedural violation.

#### I. First Management Resolution Step

Prior to the first management resolution step, the grievant was aware of a possible procedural violation with regard to the first-step respondent; however, she waited until the grievance had progressed through all three management resolution steps before raising an issue of noncompliance as provided in the grievance procedure. As such, the grievant has waived her right to challenge the designated first-step respondent.

We are compelled to note, however, that while the first-step respondent is generally the immediate supervisor (even if his or her actions led to the grievance), there are express exceptions to this general rule. For instance, a grievant must be allowed to initiate the grievance with the next level supervisor if, as in this case, the grievance alleges discrimination or retaliation by the immediate supervisor.<sup>4</sup> Thus, the grievant here had the option of initiating her grievance with the next level supervisor, which in this case, would have been the acting Dean of the College in which she worked.

#### II. Second Management Resolution Step

Management's view that a second step meeting is not required in this case (due to a meeting held prior to the filing of the grievance) is plainly incorrect. Failure to conduct a second-step meeting as provided by the grievance procedure constitutes party noncompliance, and could result in a decision on the merits in the grievant's favor, unless the grievant effectively waives her right to a meeting with the second-step respondent.<sup>5</sup> Here, at the second management resolution step, the grievant became aware of this procedural violation (no second step meeting), but then advanced her grievance to the third resolution step anyway, failing to raise an issue of noncompliance with the agency head or with this Department until after she had received the third-step response. As such, the grievant waived her right to challenge the absence of a second-step meeting.

#### III. Third Management Resolution Step

The grievant has also waived her right to object to having the Vice Provost for Academic Affairs serve as the third-step respondent. The grievant was informed prior to the third management resolution step that the Vice Provost for Academic Affairs would be the third-step respondent. This

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<sup>3</sup> *Id.*

<sup>4</sup> *Grievance Procedure Manual* § 2.4, page 7. Note that the "next level supervisor" is not necessarily the same individual as the second step respondent.

<sup>5</sup> *Grievance Procedure Manual* § 3.2, page 9

Department concludes that the grievant agreed to the substitution by proceeding with the meeting with the substituted third-step respondent. As such, the grievant cannot now challenge the substitution.

We are compelled to point out, however, that an institution'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 carry out and should decline to serve only in extenuating circumstances such as illness. Further, if a designated step respondent cannot serve in that capacity pending a particular grievance, management should seek agreement with the grievant of a substituted step respondent and should put any such agreement in writing. This Department's AdviceLine (1-888-23ADVICE) is also available toll-free to provide guidance on procedural issues to all state employees and agency managers including any party to a grievance or a party representative.

### CONCLUSION

For the reasons discussed above, this Department concludes that the University failed to comply with the grievance procedure in this case. However, by advancing her grievance through all three management steps before contesting the agency's noncompliance as provided in the grievance procedure, the grievant effectively waived her right to receive an automatic decision in her favor on the substantive merits of her grievance.

The grievant has five workdays from receipt of this ruling to conclude her grievance or advance it to the University President for a qualification determination. The University is strongly urged to take all actions necessary to assure that employees and management step respondents are correctly informed of their rights and obligations under the grievance procedure and to prevent future instances of noncompliance. This Department's rulings on matters of compliance are final and nonappealable and have no bearing on the substantive merits of the grievance.<sup>6</sup>

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<sup>6</sup> Va. Code § 2.2-1001(5).