

Issue: Compliance-Resolution Steps; Ruling Date: August 30, 2002; Ruling #2002-036;
Agency: Virginia Polytechnic Institute and State University; Outcome: agency out of
compliance; grievant proceeded through all steps.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Virginia Polytechnic Institute and State University
No. 2002-036
August 30, 2002

The grievant has requested a compliance ruling in her December 10, 2001 grievance with Virginia Polytechnic Institute and State University (Virginia Tech or the University). The grievant claims that the first, second and third-step respondents were incorrect, 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 an Executive Secretary Senior. Her immediate supervisor was the department head. On October 9, 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 with the acting Dean of the College in which she worked. Sometime thereafter, the grievant met with the acting Dean to discuss her performance evaluation. The grievant's performance evaluation was subsequently minimally revised; however she remained dissatisfied with the outcome.

It is undisputed that prior to initiation of her grievance, the human resources office met with and informed the grievant 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 in which she worked, 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. Although unsure due to the passage of time, the grievant believes that the *Grievance Procedure Manual* was probably also given to her at this meeting. On December 9, 2001, the day before she initiated her grievance, the grievant met with an attorney regarding her concerns about the designated step respondents. The grievant proceeded with her grievance, based in part on the advice she was given by her attorney.

The grievant claims that on the deadline day of the second-step response, she contacted the human resources office to inquire about her second step meeting. The grievant maintains that she was told that the second-step meeting is at the prerogative of the second-step respondent and that she would be receiving a response in the mail. After receiving the second-step response, the grievant claims that she contacted the human resources office again regarding her second-step meeting, but was not given an answer as to why she was denied a meeting. 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. The facts are in dispute regarding whether the University informed the grievant of these changes prior to her third step meeting. In any event, at the commencement of the third step meeting, the grievant became aware that the Vice Provost for Academic Affairs would serve as the third step respondent, and she proceeded with the meeting anyway. The Vice Provost issued a third step response on January 23, 2002.

On January 30, 2002, the grievant sent a notice of noncompliance to the agency head alleging that all three step-respondents were incorrect and that she had not received a second-step meeting. By letter dated February 7, 2002, the agency head denied any noncompliance, stating that (i) the first and second-step respondents were correct; (ii) the grievant had agreed to the Vice Provost of Academic Affairs serving as the third-step respondent in place of the Assistant Provost; and (iii) although it would have been appropriate for the second-step respondent to meet with the grievant, the only remedy for lack of a meeting at the second management resolution step is to advance the grievance on to the next step.

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

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

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.

In addition, the grievance procedure requires that all claims of noncompliance be raised immediately.² Thus, if Party A proceeds with the grievance after becoming aware of Party B's procedural violation, Party A may waive the right to challenge the noncompliance at a later time.³ 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 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.⁴ 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

Once again, the grievant was aware of a possible procedural violation with regard to the second-step respondent; nonetheless, she waited until the grievance had progressed through all three management resolution steps before raising an issue of noncompliance. As such, the grievant has waived her right to challenge the designated second-step respondent.

² *Grievance Procedure Manual* § 6.3, page 17.

³ *Id.*

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

Moreover, even if she had not waived her right to challenge the University's compliance in this instance, the second step respondent in her case (the Dean of the College) was the proper individual to serve: he was previously designated by the University, and there was no claim by the grievant that he had discriminated or retaliated against her.⁵

Finally, we emphasize that 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.⁶ 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 management 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 aware at the commencement of the third management resolution step that the Vice Provost for Academic Affairs would be the third-step respondent. This 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 fulfill 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 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

⁵ See *Grievance Procedure Manual* § 3.2, page 9 (allowing grievants to request a substitute second-step respondent where the grievant claims that the designated respondent had discriminated or retaliated against her).

⁶ *Grievance Procedure Manual* § 3.2, page 9.

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 resolution steps before raising an issue of noncompliance, 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.⁷

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⁷ Va. Code § 2.2-1001(5).