

Issue: Compliance/5-day rule/reasonable accommodation; Ruling date: July 25, 2003;  
Ruling #2003-042; Agency: Virginia Polytechnic Institute and State University;  
Outcome: grievant waived rights by proceeding; agency's actions contravenes grievance  
procedure; either party can request face-to-face meeting



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Virginia Polytechnic Institute and State University  
Ruling Number 2003-042  
July 25, 2003

The grievant has requested a compliance ruling in the grievance that he initiated on December 8, 2002 with Virginia Polytechnic Institute and State University (the agency or the University). The grievant contends that the agency has violated substantial procedural requirements of the grievance procedure by forcing him to meet with a management resolution step-respondent who the grievant alleges has discriminated against him on the basis of his disability. He requests that this Department render a decision against the agency on the qualifiable issues presented in his grievance.

FACTS

The grievant was employed by the University until his layoff on January 6, 2003. On November 8, 2002, he received his annual performance evaluation with an overall rating of **Below Contributor**. On December 8, 2002, the grievant initiated a grievance alleging that management's evaluation of his performance was arbitrary or capricious, discriminatory, and retaliatory. Additionally, he claimed that management violated federal and state law, and misapplied policy.

Based upon his claim of retaliation by his immediate supervisor, the grievant invoked his right to initiate his grievance with the next level supervisor, who would normally serve as the second-step respondent.<sup>1</sup> The grievant further claimed that this second-step respondent had supported his supervisor's discriminatory and retaliatory actions. Therefore, he wished to waive the face-to-face second-step meeting and receive only a written response.<sup>2</sup> Additionally, the grievant requested a disability accommodation to receive written replies at all grievance stages.<sup>3</sup>

On December 16, 2002, at the next level supervisor's insistence, the grievant attended a meeting to discuss the details of his grievance. The meeting apparently was not conducted under the rules governing second step meetings, which allow the parties to be accompanied by a person of choice and to call witnesses. On January 21, 2003, the

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<sup>1</sup> See *Grievance Procedure Manual* § 2.4, page 7.

<sup>2</sup> See *Grievance Procedure Manual* § 3.2, pages 8-9.

<sup>3</sup> See *Grievance Procedure Manual* § 8.7, page 22. Written replies are required at all stages.

grievant notified the agency head that the agency had violated a significant procedural requirement of the grievance procedure by forcing him to meet and discuss face-to-face the charges in his grievance with his next level supervisor, who the grievant claimed had participated in the discrimination and retaliation against him. On January 27, 2003, the agency head responded that by attending the contested meeting prior to raising the noncompliance claim, the grievant had forfeited the right to challenge the alleged noncompliance. Additionally, the agency claims that it had no medical documentation in the file indicating that avoidance of face-to-face meetings was a reasonable accommodation.

### DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>4</sup> That process assures that the parties first communicate with each other about the 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.<sup>5</sup>

For example, if a grievant believes that an agency is about to violate the rules regarding the second-step meeting, before proceeding with the meeting, the grievant must notify the agency head in writing of the alleged noncompliance and allow the agency five workdays after receipt of the written notice to correct any noncompliance. If after five workdays the grievant believes that the agency has failed 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.<sup>6</sup> Importantly, all claims of party noncompliance must be raised immediately.<sup>7</sup> 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.<sup>8</sup>

#### The Second-Step Meeting

In this case, the grievant invoked his right under the grievance procedure to waive a face-to-face meeting with the second-step respondent, but then later attended a meeting

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<sup>4</sup> *Grievance Procedure Manual* § 6, pages 16-18.

<sup>5</sup> *Grievance Procedure Manual* § 6.3, page 17

<sup>6</sup> EDR would generally consider such an action only where the party in substantial noncompliance had engaged in bad faith or significantly prejudiced the other party through the noncompliance. *See, e.g.*, EDR Ruling No. 2003-026. This does not appear to be such a case. There is insufficient evidence of (i) bad faith on the next level supervisor's part in requiring the meeting or (ii) substantial prejudice to the grievant as a result of the meeting.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

with that individual to discuss his grievance, without formally contesting that meeting beforehand through the noncompliance process outlined above. The grievant knew or should have known of a potential procedural problem with the meeting, because he had previously cited to the grievance procedure as a reason to avoid such a face-to-face meeting. By proceeding with the meeting anyway, the grievant effectively waived his right to contest it later.<sup>9</sup>

We are nevertheless compelled to note an important issue. Management and employees generally have an equal interest in and entitlement to at least one face-to-face meeting during the management resolution steps. But in grievances alleging retaliation or discrimination, the grievance procedure specifically 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 complaint.<sup>10</sup> This procedural rule was intended to effectuate a principle long recognized by the courts in discrimination and retaliation law suits: that requiring such a meeting could have a chilling effect on an employee's exercise of his rights under an employer's complaint procedure, and should be avoided.<sup>11</sup> Thus, an agency should refrain from insisting that an unwilling grievant meet and discuss, however informally, the substance of his grievance with any step respondent or other individual who the grievant has accused of retaliation or discrimination.<sup>12</sup>

Management's insistence here that the grievant meet and discuss with an alleged perpetrator the substance of the discrimination and retaliation claims contained in his grievance contravenes the basic policies underlying these court opinions and the employee's rights under the grievance procedure. Thus, in this case, University management should have allowed the grievant to discuss his complaint with an individual other than one of the individuals claimed to have participated in the alleged discrimination and retaliation. The grievant could have been offered a substitute second-step respondent or been allowed to proceed straight to the designated third-step respondent for purposes of a face-to-face meeting and response.

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<sup>9</sup> This is consistent with our prior rulings. See, e.g., EDR Rulings Nos. 2002-034 and 2002-036.

<sup>10</sup> *Grievance Procedure Manual* § 3.2 pages 8-9.

<sup>11</sup> See, e.g., *Meritor Savings 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.]" *Meritor* 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.* Similarly, guidance posted on the Equal Employment Opportunity Commission's web site counsels that an alleged harasser should not have any direct or indirect control over an employer's investigation of a complaint. See <<<http://eeoc.gov/docs/harassment-facts.html>>>

<sup>12</sup> This does not impair management's ability to meet with the grievant to discuss issues **unrelated** to the grievance. Indeed, the mere filing of a grievance does not entitle an employee to refuse entirely to communicate with management about workplace issues.

### Disability Accommodation

The grievant also cited his disability as additional justification not to attend a face-to-face meeting.<sup>13</sup> Under the grievance procedure, the agency must provide reasonable accommodation for disabled persons participating in the grievance process.<sup>14</sup> This provision of the grievance procedure is intended to ensure that disabled employees are able to fully participate in the grievance process; for instance, circumstances might warrant a sign interpreter for a hearing impaired employee. However, the accommodation provision was not intended to allow an employee to unilaterally limit his participation in the grievance process. As discussed, an agency is generally entitled to a face-to-face meeting between the grievant and an appropriate member of management. When either party insists on such a meeting with an appropriate member of management, if the grievant has (1) a physical or mental impairment that substantially limits a “major life function,”<sup>15</sup> (2) a record of such impairment, or (3) is regarded as having such an impairment, the agency must provide reasonable accommodation(s) that allow the grievant to participate in the second-step meeting.

In this case, the grievant asserts that he has a disability and therefore needs to receive only written responses to his grievance. If the agency insists on a face-to-face meeting with an appropriate member of management, it must reasonably accommodate the grievant to allow him to effectively participate in that meeting. While this Department has no knowledge of any specific accommodations that might be reasonable in this particular instance, certainly frequent breaks or recording the meeting might be considered available reasonable accommodations. In sum, should either party still desire a face-to-face meeting involving an appropriate member of management, that party is entitled to such a meeting. And if the grievant is entitled to an ADA accommodation, the agency must reasonably accommodate him so that he can actively and effectively participate in the meeting.

### CONCLUSION

For the reasons discussed above, this Department concludes that by proceeding with the meeting with the next level supervisor before contesting the agency's noncompliance as provided in the grievance procedure, the grievant effectively waived his right to contest that meeting.

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<sup>13</sup> It is not entirely clear whether the grievant seeks to avoid the second-step meeting altogether or only one in which the originally designated second-step respondent would participate. In a July 1, 2003 e-mail correspondence to this Department, the grievant stated that “I’m willing to meet with whomever necessary to resolve this issue.”

<sup>14</sup> *Grievance Procedure Manual* § 8.7, page 22.

<sup>15</sup> According to the Americans With Disabilities Act (ADA), a “major life function” includes functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. § 1630.2 (i).

The parties are advised that within five workdays of the receipt of this ruling, they should notify one another of any desire to hold a faced-to-face meeting. Should either party desire such a meeting, then it should be held consistent with the terms of the grievance procedure and this ruling. If neither party desires a meeting, then the grievant may advance or conclude his grievance. This Department's rulings on matters of compliance are final and nonappealable, and have no bearing on the substantive merits of this case.<sup>16</sup>

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Claudia T. Farr  
Director

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<sup>16</sup> Va. Code § 2.2-1001 (5).