

Issue: Compliance/management steps; Ruling Date: March 25, 2003; Ruling #2003-056 and 2003-060; Agency: Department of Military Affairs; outcome: agency out of compliance.



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of the Department of Military Affairs  
Nos. 2003-056 and 2003-060  
March 25, 2003

On March 12, 2003, the grievant requested a compliance ruling in her September 9, 2002 grievance with the Department of Military Affairs (DMA or the agency). The grievant claims that the second-step respondent for her September 9, 2002 grievance was incorrect and as such, she is entitled to her requested relief. On March 19, 2003, the grievant requested an additional compliance ruling regarding the agency's alleged failure to adequately train its supervisory personnel on the grievance process, personnel policies and conflict resolution.

**FACTS**

Until her March 6, 2003 termination, the grievant has been employed as a Law Enforcement Officer I with DMA. On September 9, 2002, the grievant initiated a grievance alleging that the agency retaliated against her after she made complaints regarding a co-worker's behavior, which she claimed was intimidating and physically threatening. In October 2000, the agency designated a senior management position to serve as the agency's second-step respondent for all grievances initiated within the agency. The second-step respondent for the grievant's September 9<sup>th</sup> grievance was not employed in the designated position. On February 5, 2003, the September 9<sup>th</sup> grievance proceeded to a hearing. Subsequently, the grievant became aware that the designated second-step respondent had not participated in the grievant's September 9<sup>th</sup> grievance. Immediately thereafter the grievant sought a compliance ruling from this Department.<sup>1</sup>

The grievant filed six additional grievances after her September 9, 2002 grievance. Several of these grievances allege retaliation for reporting her co-worker's

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<sup>1</sup> The agency asserts that the grievant has failed to raise her compliance challenge in a timely manner. A grievant may forfeit her right to challenge a procedural violation if she proceeds with the grievance process after becoming aware of the violation. *Grievance Procedure Manual* § 6.3, page 17. In the present case, however, evidence indicates that the grievant did not know that there was a potential procedural violation with respect to the individual serving as the second-step in her September 9, 2002 grievance until she advanced through the grievance process on subsequent grievances. As such, this Department concludes that the grievant raised her compliance challenge in a timely manner after she became aware of the potential violation.

alleged misconduct. On March 6, 2003, the grievant had a second-step meeting in two of her grievances with the agency's designated second-step respondent. On Friday, March 14, 2003, the grievant had a second-step meeting in the remaining three grievances with the agency's designated second-step respondent.<sup>2</sup>

## DISCUSSION

### *Incorrect Second-step Respondent*

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>3</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 party 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 this Department may render a decision against the noncomplying party on any qualifiable issue unless the noncomplying party can establish just cause for its noncompliance. Resolution in a party's favor is reserved for the most egregious of circumstances. For instance, if a party repeatedly ignores previous compliance orders from this Department, a ruling in favor of the opposing party may be granted.

Under the grievance procedure, each agency should maintain a list of step respondents with its Human Resources Office.<sup>4</sup> Each designated step-respondent shall have the authority to provide the grievant with a remedy.<sup>5</sup> While not specifically addressed in the grievance procedure, it is common practice for an agency to notify this Department of its designated step-respondents and any necessary changes thereafter. 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 or injury. Further, if a designated 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.

In the present case, an incorrect second-step respondent replied at the second management resolution step of the grievant's September 9, 2002 grievance. Further, it does not appear that special circumstances prevented the designated second-step respondent from serving in that capacity. This Department does not condone unilateral

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<sup>2</sup> Pursuant to this Department's compliance ruling dated March 4, 2003, one of the grievances was administratively closed as duplicative of an earlier grievance. See Ruling # 2003-024.

<sup>3</sup> See *Grievance Procedure Manual* § 6, pages 16-18.

<sup>4</sup> See *Grievance Procedure Manual* § 8.9, page 22.

<sup>5</sup> See Va. Code § 2.2-3003(D).

substitutions; however, in this case, any harm that accrued to the grievant as a result of the agency's deviation from the designated step-respondent has been cured by the grievant's meetings with the designated second-step respondent on March 6 and March 14, 2003. At these meetings, the grievant was afforded the opportunity to present to the designated second-step respondent evidence on and to ask questions about the same issues contained in her September 9, 2002 grievance, i.e., retaliation for reporting her co-worker's alleged misconduct. As such, this Department concludes that the issue of noncompliance asserted by the grievant was subsequently resolved, and the grievant is not entitled to relief on the merits.

#### *Failure to Train DMA Supervisors*

The grievant further asserts that her supervisor and the second-step respondent in her September 9, 2002 grievance have not been trained in the grievance process, personnel policies and conflict resolution as required by Virginia law.<sup>6</sup> Additionally, the grievant correctly asserts that this Department is required to monitor the agency's activities with regard to training in these areas.<sup>7</sup> This Department has a duty to ensure that a grievant's due process rights are protected. In the present case, the grievant has presented no evidence that the alleged inadequate training of members of DMA management has impacted the grievant's due process or grievance rights. Therefore, while this Department encourages the training of agency supervisory personnel in the grievance process and is charged with the responsibility of monitoring such activity, failure to train is not a violation of the procedural rules of the Grievance Procedure Manual, but rather an issue to be addressed through this Department's monitoring role, outside the context of an individual grievance.

#### CONCLUSION

For the reasons discussed above, this Department concludes that the agency failed to comply with the grievance procedure by unilaterally substituting a second step respondent. However, by meeting with the designated second-step respondent in subsequent grievances that allege the same issue as the September 9, 2002 grievance, any violation of the grievance process has been remedied. This Department further concludes that a failure to train supervisory personnel is not a violation of the procedural rules of the Grievance Procedure Manual. This Department's rulings on matters of compliance are final and nonappealable and have no bearing on the merits of the grievance.<sup>8</sup>

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<sup>6</sup> Va. Code § 2.2-3000(B)(1) states that each agency shall "[r]equire supervisory personnel to be trained in the grievance procedure, personnel policies, and conflict resolution."

<sup>7</sup> See Va. Code § 2.2-3000(C).

<sup>8</sup> Va. Code § 2.2-1001(5).

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