

Issue: Compliance/misapplied grievance procedure by refusing to compensate witnesses for participation in a second step meeting; Ruling Date: July 30, 2004; Ruling #2004-752;
Agency: Department of Corrections; Outcome: grievance out of compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2004-752
July 30, 2004

On behalf of the grievant, the agency has requested a compliance ruling in a grievance initiated on April 28, 2004. In his grievance, the grievant alleges that the agency misapplied the grievance procedure by refusing to compensate his witnesses for participation in a second-step meeting.

The agency asserts that the grievant is out of compliance with the grievance procedure for initiating a grievance to challenge a compliance issue. For the reasons discussed below, this grievance is out of compliance with the grievance procedure and may be administratively closed.

FACTS

The grievant is employed as a Corrections Officer. He initiated his original grievance on March 15, 2004, asserting that the shift commander was spreading rumors and making false statements about his health. The grievance proceeded through the first resolution step without resolution. On April 7, in preparation for his scheduled second-step meeting, the grievant forwarded letters to employees he desired to appear as witnesses. In his letter, the grievant advised the employees that their appearance was protected¹ and that they would be compensated for their participation, to include administrative leave and reimbursement for travel expenses.

On April 12, the human resource manager called the grievant to notify him that his letter contained erroneous information regarding the authorized compensation for witnesses to attend a resolution step meeting. Although the facts are in dispute as to the exact comments made by the human resources manager, the grievant's interpretation was that the agency would provide no compensation for employees to attend his second-step meeting. He claims further that he was ordered to contact all his witnesses and inform them that their participation would not be compensated. The grievant continued to advance his grievance of March 15 by attending a second-step meeting on April 13, 2004.

On April 28, 2004, the grievant initiated the present grievance to challenge the agency's alleged noncompliance with the grievance procedure. This grievance also proceeded

¹ Va. Code § 2.2-3004. A. (v); *See Grievance Procedure Manual*, § 4.1 (b).

through the first resolution step without resolution. On May 10, 2004, the grievant was notified by the second-step respondent that he was out of compliance with the grievance procedure for initiating a new grievance for purposes of challenging a compliance issue.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.² 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.³

For example, if a grievant believes that an agency has violated the rules regarding compensation for witnesses who appear at 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 ordering the agency to correct the noncompliance. Further, 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.⁴ Importantly, all claims of party noncompliance must be raised immediately. 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.⁵

Challenging the Agency's Alleged Noncompliance

The April 28, 2004 grievance is essentially a challenge to the agency's alleged statement of intent not to provide administrative leave and reimbursement for the reasonable costs for transportation, meals, and lodging for employees who were to appear as witnesses at the grievant's second-step meeting.⁶ In this case, the agency's failure to provide compensation to prospective witnesses would not be a separate management action that may be grieved independently of the March 15, 2004 grievance.⁷ As such, the proper avenue for the grievant was to follow the rules for party noncompliance as previously described above.

² *Grievance Procedure Manual* § 6.

³ *Grievance Procedure Manual* § 6.3.

⁴ 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 noncompliance. *See, e.g.*, EDR Ruling 2003-026.

⁵ *Grievance Procedure Manual*, § 6.3.

⁶ *Grievance Procedure Manual*, § 8.6.

⁷ The agency's denial of compensation to witnesses would constitute a misapplication of both DHRM and DOC policy and state travel regulations, which could be grieved separately by the individual employee.

Waiver of Right to Challenge Noncompliance

In this case, on April 12, 2004, the grievant became aware, based upon a telephone conversation with the human resource manager, that the agency did not interpret Leave policies and the Grievance Procedure Manual to require that the witnesses he requested to appear at his second-step meeting be granted administrative leave and travel reimbursement. However, he later attended a second-step meeting on April 13 without formally contesting the agency's intended action beforehand through the noncompliance process. By proceeding with the meeting anyway, the grievant effectively waived his right to contest any related issues later.⁸

The parties are advised that the agency may mark the April 28, 2004 grievance as concluded due to noncompliance, and no further action is required on that grievance. This Department's rulings on compliance are final and nonappealable.⁹

We are compelled to advise the agency, however, that DHRM policy states that employees who are witnesses in a grievance *will* be granted reasonable amounts of administrative leave, to include travel time, to participate in grievance proceedings.¹⁰ Grievance proceedings are further defined as management step meetings, hearings, and related court appearances. Likewise, the Grievance Procedure Manual states that employees *are* to be granted administrative leave to appear as a witness in a grievance matter and to participate in the steps of the grievance process. Additionally, "[r]easonable costs for transportation, meals, and lodging are to be reimbursed in accordance with state travel regulations."¹¹ Finally, DOC's own policy authorizes administrative leave for employees who appear as witnesses in a grievance matter and reimbursement for travel, meals, and lodging in accordance with state travel regulations.¹² Although a compliance ruling was not timely requested by the grievant here, to ensure compliance with these policies in future grievances, the agency is strongly encouraged to instruct management and human resources personnel regarding these provisions.¹³

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Director

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⁸ This is consistent with our prior rulings. See, e.g., EDR Rulings Nos. 2002-036 and 2003-042.

⁹ Va. Code § 2.2-1001.

¹⁰ See DHRM Policy 4.05 V (A).

¹¹ See Grievance Procedure Manual, § 8.6.

¹² See DOC Procedure Number 5-17, Employee Grievances, 5-17.19 and 5-17.20.

¹³ See Va. Code § 2.2-3000(B)(1)(requiring each executive branch agency to require supervisory personnel to be trained in the grievance procedure, personnel policies, and conflict resolution).

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