

Issue: Compliance/second step respondent meeting; Ruling Date: December 20, 2004; Ruling #2004-915; Agency: College of William and Mary; Outcome: agency out of compliance; parties directed to conduct another second-step meeting in accordance with principles set forth in this ruling



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the College of William and Mary
Ruling Number 2004-915
December 20, 2004

The grievant has requested a ruling in her October 28, 2004 grievance with the College of William and Mary (the agency) on whether the agency is out of compliance with the grievance procedure. The grievant contends that the agency has violated the grievance procedure by refusing to allow her to question witnesses during the second-step meeting and to communicate with the individual she selected to accompany her to that meeting.

FACTS

The grievant is employed as a Housekeeper. On October 28, 2004, she initiated a grievance alleging that the agency had failed to provide a safe working environment and had retaliated against her. The grievant alleges that the agency's failure to provide a safe working environment led to such stress that she was forced to take leave from work, and she seeks reimbursement for her financial losses, as well as other relief.

Because the grievant alleged retaliation and lost wages, she elected not to present her grievance to her immediate supervisor but to proceed instead to the second resolution step. On November 10, 2004, the parties met for the second-step meeting. That meeting ended when the parties were unable to resolve conflicts between them regarding the proper conduct of the meeting, including the grievant's right to question witnesses and the role of the individual selected by the grievant to accompany her to the meeting, in this case her union representative. The same day, the grievant gave written notice to the agency head that the agency had failed to comply with the grievance procedure by denying the grievant the right to speak with her union representative during the meeting, instead requiring the grievant and the union representative to leave the room to confer.

The agency subsequently attempted to reschedule the meeting for November 12, 2004, but the grievant, through her union representative, informed the agency that they were unable to attend the meeting due to a lack of advance notice. The grievant also challenged the propriety of the agency's moving forward with the second-step meeting in light of her pending letter of noncompliance.

The agency responded to the grievant's letter of noncompliance by letter dated November 15, 2004. In this letter, the agency acknowledged that the second-step respondent

had asked that the grievant and her union representative excuse themselves from the room in order to speak, but denied that it had failed to comply with the grievance procedure.

By memorandum dated November 23, 2004, the grievant, through her union representative, requested a ruling on the agency's alleged noncompliance with the grievance procedure. Despite this pending request, a second second-step meeting was held on December 1, 2004. The grievant alleges that during this meeting, she was not allowed to question witnesses directly, but was instead required to ask questions of the second-step respondent. The grievant claims the second-step respondent would then repeat some of her questions to the witness, but refused to repeat several other questions on the grounds that she was attempting to "badger" the witness. The grievant states that the union representative's role did not arise during this second second-step meeting because the grievant considered it pointless to confer with the representative when she and the representative were being denied the right to participate directly in the meeting. After the conclusion of the second-step meeting, the second-step respondent provided the grievant with a written response to her grievance.

DISCUSSION

As an initial matter, we note that the completion of the second-step meeting does not render the grievant's request for a compliance ruling moot. Moreover, the grievant's participation in the December 1st meeting does not constitute a waiver of her claim of noncompliance. Prior to participating in the December 1st meeting, the grievant attempted to postpone the meeting until the compliance issue was resolved. In making this request, the grievant, through her union representative, specifically noted that the "grievance policy" provides that no meeting should be held until after this Department has issued its ruling on the pending compliance request.¹ Despite the grievant's request, however, the agency proceeded with the meeting. Although the grievant participated in this meeting, she continues to object to the agency's refusal to allow her to confer with her union representative and to question witnesses directly. Under these circumstances, we cannot find that the grievant voluntarily waived her claim of noncompliance, or that the issues she has raised are moot.

Participation in the Second-Step Meeting by the Grievant's Selected Individual

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 If after five workdays the grievant believes that the agency has failed to

¹ See *Grievance Procedure Manual* § 6.1 ("A challenge to EDR will normally stop the grievance process temporarily. The grievance process will resume when EDR issues its ruling on the challenge.")

² *Grievance Procedure Manual* § 6.

³ *Grievance Procedure Manual* § 6.3.

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

Both the grievant and the agency have met these procedural requirements with respect to the issue of participation by the grievant's union representative. The grievant gave written notice to the agency of its alleged noncompliance on November 10, 2004. In response, by letter dated November 15, 2004, the agency advised the grievant that it considered its actions to have been in accordance with the grievance procedure.⁵ The grievant, through her union representative, subsequently made a written request to this Department for a compliance ruling on this issue.

Under the grievance procedure, the following individuals may be present at a second-step meeting: the grievant, a person selected by grievant, the second-step respondent, and a person selected by the second-step respondent.⁶ In this case, both parties agree that the grievant had a right to have an individual of her choice attend the second-step meeting, and, in fact, there is no dispute that the grievant has been permitted to do so. At issue, however, is the extent to which the individual selected by the grievant may participate in the meeting.

The grievant alleges that the agency failed to comply with the grievance procedure by denying her the opportunity to speak with her selected individual during the second-step meeting. In his cover letter to this Department requesting a compliance ruling, the grievant's union representative explained that he and the grievant do not seek for the selected individual "to engage in the actual discussion" but only to "have the right to quietly counsel the grievant in the moment when a question arises."

This Department has taken the position that the selected individual is not entitled to be an active participant in the second-step meeting, although an agency is certainly free to allow such participation if it chooses. Unless permitted by the agency, the selected individual may not directly ask questions of the witnesses, make opening or closing arguments, answer questions on behalf of a grievant, or in any other way *directly* participate in the meeting.⁷

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 The grievant's ruling request suggests that the agency head acted inappropriately by having a designee respond to the grievant's letter of noncompliance. Under the grievance policy, the agency head was not required to make a written response to the grievant: his only obligation was to cure the noncompliance, if he agreed the alleged noncompliance occurred. Having elected to respond to the grievant's allegations in writing, the agency head was free to respond directly or to respond through his designee.

⁶ *Grievance Procedure Manual* § 3.2.

⁷ If the second-step respondent allows the grievant's selected individual to participate, the second-step respondent's selected individual may also participate in the meeting to the same extent allowed for the grievant's selected individual.

On the other hand, however, for a grievant's right to be accompanied by a person of their choice to be meaningful, the selected individual cannot be required to act merely as a silent observer. Rather, the individual selected by a grievant must be allowed the opportunity to interact with the grievant during the second-step meeting, provided the interaction is not unduly disruptive or disrespectful of others present. Examples of appropriate interaction include conferring quietly or exchanging notes. Unless a grievant and her selected individual have refused to interact in an appropriate manner, they may not be forced to leave the meeting in order to engage in these interactions, but rather must be allowed to conduct these interactions throughout the course of the meeting and in the room in which the meeting is being held.

There appears to be no dispute that the agency did not allow the grievant to confer with her union representative during the initial second-step meeting, but instead required them to leave the room. Although the grievant states that she did not seek to confer with her union representative during the rescheduled second-step meeting, her failure to do so appears to have resulted from a belief that such efforts would have been futile. In light of these circumstances, we conclude that the agency failed to comply with the grievance procedure and direct that the parties conduct another second-step meeting in accordance with the principles set forth above.

Questioning of Witnesses by the Grievant

In the course of our investigation, the grievant indicated that she also objected to the second-step respondent's refusal to allow her to question witnesses directly. The grievant failed to identify this issue in her letter of noncompliance, however, and her union representative similarly failed to identify this issue in his request for a compliance ruling.⁸ This Department would generally consider the grievant's verbal request that we address this issue to be premature, as she has failed to give written notice of noncompliance to the agency head. However, because we are directing that another second-step meeting be held, we will address the issue in this ruling.

The grievant alleges that at the November 10, 2004 second-step meeting, she was advised by the second-step respondent that she could not ask questions of the witnesses. She further alleges that she was not allowed to question witnesses directly at the rescheduled second-step meeting on December 1, 2004, and that although the second-step respondent permitted her to ask him to ask witnesses certain questions, he refused to relay a number of questions to the witnesses on the ground the questions were badgering.

The Grievance Procedure Manual provides that while the second-step meeting is not to be adversarial or treated as a hearing, "the parties may question one another regarding disputed facts and issues."⁹ In the majority of cases, the second-step respondent should allow

⁸ We note, however, that the grievant's union representative did raise this issue in a letter to the second-step respondent dated two days after the grievant's letter of non-compliance to the agency head.

⁹ *Grievance Procedure Manual* 3.2.

the grievant to question witnesses directly, limiting questioning only where the grievant's questioning is clearly irrelevant to the underlying grievance, repetitive, or unduly hostile. In those limited situations where direct questioning is inappropriate—for example, where the grievant has shown a repeated unwillingness or inability to ask questions in a non-adversarial manner—the second-step respondent may act as an intermediary between the grievant and the witness. In such situations, the second-step respondent may take questions from the grievant and then repeat them to the witnesses, modifying or refusing to repeat the grievant's questions only where the questions are clearly irrelevant or repetitive. In *no* circumstance may the grievant be denied the opportunity to question witnesses.

As the grievant failed to give the agency written notice of her claim regarding her inability to question witnesses directly, we will not render a determination regarding the agency's compliance on this matter. In the event the agency fails to comply with the principles set forth in the ruling at the subsequent second-step meeting in this matter, the grievant may initiate a claim of noncompliance in accordance with the grievance procedure.

This Department's rulings on matters of compliance are final and nonappealable.¹⁰

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¹⁰ Va. Code § 2.2-1001(5).