

Issue: Compliance/Second-step meeting in resolution steps; Ruling Date: January 18, 2005;
Ruling #2004-916; Agency: College of William and Mary; Outcome: agency out of
compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the College of William and Mary
Ruling Number 2004-916
January 18, 2005

The grievant has requested a ruling in her October 7, 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 communicate with the individual she selected to accompany her to the second-step meeting, by limiting questioning at her second-step meeting, by failing to provide her with an interpreter for that meeting, and by failing to pay her for the time spent in the second-step meeting. She also alleges that the second-step respondent has a conflict of interest requiring disqualification.

FACTS

The grievant is employed as a Housekeeper. On October 7, 2004, she initiated a grievance alleging that the agency had retaliated against her for filing a previous grievance on August 18, 2004. Specifically, the grievant claims that her supervisor retaliated against her by wrongly issuing the grievant a Group I Written Notice for her behavior during a counseling meeting, and by insulting and engaging in condescending behavior toward the grievant during that meeting.

After the first-step respondent denied the grievant's request for relief, the grievant advanced her grievance to the second resolution step. The agency scheduled a second-step meeting for October 21, 2004.¹ This meeting was adjourned after the grievant indicated that she had difficulty understanding English and the parties were unable to resolve other conflicts between them regarding the proper conduct of the meeting, specifically the role of the individual selected by the grievant to accompany her to the meeting (in this case her union

¹ The grievant filed two additional grievances against the agency on August 18, 2004 and October 4, 2004. The first of these grievances has moved through the management resolution steps and has been denied qualification by the agency and this Department. The other grievance remains in the management resolution process. The grievant's union representative has stated that he and the grievant believe that the October 21, 2004 second-step meeting involved the grievant's October 7, 2004 grievance. In contrast, the agency's documents indicate that the October 21st meeting involved the grievant's October 4, 2004 grievance. As the specific grievance at issue during the October 21st meeting is not ultimately relevant to the compliance matters at issue here, we will assume, for purposes of this ruling only, that the second-step meeting involved the grievant's October 7th grievance.

representative). The second-step meeting was subsequently rescheduled for November 10, 2004. Although the parties apparently reconvened on November 10th, they were unable to complete the meeting because of the grievant's language difficulties and the continuing dispute over the role of the grievant's union representative.

Following the November 10, 2004 meeting, 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, and by refusing to provide the grievant with an interpreter for the meeting. The grievant also claimed that the second-step respondent should be disqualified, because he had allegedly previously retaliated against the grievant in relation to an earlier grievance. Finally, the grievant asked that the agency pay her overtime for the time she spent in the November 10th meeting, as that meeting was scheduled to occur after the end of her shift.

The agency responded to the grievant's letter of noncompliance on November 15, 2004. The agency denied that it had violated the grievance procedure by not allowing the grievant's union representative to participate in the second-step meeting, but the agency admitted that the second-step respondent had required the grievant and her union representative to interact outside the meeting room. The agency also denied the grievant's allegation that the second-step respondent should be disqualified because of a conflict of interest. In response to the grievant's request for an interpreter, the agency explained that it had attempted to locate a Korean interpreter but had been unable to do so, and that it would continue to look for an interpreter to assist the grievant. The agency also agreed to pay the grievant for the time spent in the second-step meeting, including overtime if warranted by the total number of hours worked by the grievant during the work week in question.

The agency subsequently rescheduled the grievant's second-step meeting to take place the week of December 5, 2004 and arranged for an interpreter to be present at that meeting. The meeting has now been postponed pending this Department's ruling on the grievant's claims of noncompliance.

DISCUSSION

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 correct the alleged noncompliance, the grievant may request a ruling from this Department

² *Grievance Procedure Manual* § 6.

³ *Grievance Procedure Manual* § 6.3.

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 with respect to this issue 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."⁷

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.⁸

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 We note that in his response to the grievant following the October 21st meeting, the second-step respondent indicated that the grievant did not want to proceed with the meeting unless her union representative was permitted to "represent" her.

⁸ 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.

In this case, the grievant and the agency have previously agreed to reschedule the second-step meeting. Although the second-step respondent is free to allow the grievant's selected individual to participate directly in the rescheduled meeting, he may choose to bar such participation. The second-step respondent may not, however, prohibit the grievant and her selected individual from conferring quietly and/or exchanging notes during the meeting, and he may not require that such interactions take place outside the meeting room.

Disqualification of the Second-Step Respondent

The grievant has also alleged that the second-step respondent has a conflict of interest and should be disqualified from acting as the respondent during the rescheduled second-step meeting.⁹ In response to a previous grievance filed by the grievant, the second-step respondent directed that the grievant and her immediate supervisor be counseled. The present grievance arises from the resulting counseling session between the grievant and the first-step respondent—specifically, the present grievance challenges (i) the written discipline issued to the grievant as a consequence of her alleged conduct during this counseling session, as well as (ii) the alleged behavior of the first-step respondent toward the grievant during that session. The grievant argues that the second-step respondent should be disqualified because in directing that the counseling session take place, he retaliated against the grievant for filing her prior grievance.

Under the grievance procedure, a grievant may request that another second-step respondent be designated when the grievance alleges retaliation or discrimination by that respondent.¹⁰ The provision is intended to prevent the chilling effect that might result from

⁹ As noted previously, the grievant specifically identified this issue in her letter of noncompliance to the agency head. In its response to the grievant, the agency denied that a disqualifying conflict of interest exists.

¹⁰ See *Grievance Procedure Manual* § 3.2 (“In the event that an employee alleges retaliation or discrimination by an individual who would otherwise serve as the agency’s second-step respondent, the employee may: 1. Request that the agency designate another second-step respondent; or 2. Waive the face-to-face meeting with the original second-step respondent and receive only a written second-step response to the grievance. If the employee elects to waive the face-to-face meeting with the original second-step respondent, the employee must be allowed to meet with the third-step respondent.”)

grievants having to appear before the very supervisors whom they allege have taken the discriminatory or retaliatory action challenged by the grievance.

In this case, the grievance does not contain such a claim against the second-step respondent. Instead, the grievance only challenges the purported conduct of the first-step respondent. Although the grievant has subsequently alleged that the second-step respondent retaliated against her with respect to her previous grievance, because this allegation was not raised in the Grievance Form A, it cannot be a basis for disqualification under the grievance procedure.

The grievant and the agency should be mindful that the second-step meeting is a meeting between parties to a grievance, and that both sides bring to that meeting their perspectives, experiences and understandings. Although a step respondent should conduct the meeting in an even-handed manner and with an open mind, he is a member of management, not a neutral party. While we recognize the frustration for grievants that may result from this, allowing the disqualification of step respondents because of their managerial actions would throw the resolution step process into chaos, if not render it wholly ineffectual. Further, while the resolution step process involves only the parties to a grievance, the hearing process allows grievants an opportunity to present qualifying claims to a neutral, third-party hearing officer.

Questioning of Witnesses

In the course of our investigation, the grievant indicated that she also objected to the second-step respondent's requirement that he "pre-approve" her questions to her witnesses. The grievant failed to specifically 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. This Department would generally consider the grievant's 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 the agency has previously agreed to hold another second-step meeting, we will address the issue in this ruling.

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."¹¹ While the grievant's right to question witnesses is extensive, however, it is not without limitation. The second-step respondent may refuse to allow a grievant to ask witnesses clearly irrelevant or repetitive questions. The second-step respondent may also restrict unduly hostile questioning by a grievant. 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.

¹¹ *Grievance Procedure Manual* 3.2.

As the grievant failed to give the agency written notice of her claim regarding the questioning of witnesses, 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.

Remaining Issues

In her letter of noncompliance, the grievant also challenged the agency's failure to provide an interpreter for her second-step meeting and to pay her for the time spent in that meeting. Neither issue was raised in the grievant's request for a compliance ruling.

As the agency had previously stated that it would be willing to provide an interpreter and has now indicated that it has located an appropriate interpreter, this issue would appear to be moot. Similarly, as the agency has stated its willingness to pay the grievant for her time at the second-step meeting and the grievant does not raise this issue in her compliance ruling request, we find this issue to be moot as well. In the event the agency fails to provide an interpreter or to appropriately compensate the grievant for the time spent in the second-step meeting, the grievant may request a compliance ruling on these issues.

This Department's rulings on matters of compliance are final and nonappealable.¹²

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¹² Va. Code §2.2-3003(6).