

Issue: Compliance/Second step meeting, documents; Ruling Date: February 17, 2005;
Ruling #2005-943; Agency: Department of Corrections; Outcome: Agency in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2005-943
February 17, 2005

The grievant has requested a ruling in his December 13, 2004 grievance with the Department of Corrections (DOC or 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 provide requested information, by conducting the second-step meeting in a “hostile manner,” and by refusing to allow the grievant’s union representative to participate in the second-step meeting.

FACTS

The grievant was employed by the agency as a HVAC Supervisor at Facility H. On December 2, 2004, the agency issued the grievant a Group III Written Notice for leaving his tools unattended. The grievant’s employment was terminated effective December 3, 2004.

The grievant initiated a grievance challenging his termination on December 13, 2004. That same day, the grievant’s union representative presented the facility’s Human Resources Officer (HRO) with a request for documents. The representative states that he did not expect for the documents to be produced immediately, although the HRO states that she understood that to be his request. The HRO advised the representative that she was uncomfortable producing personnel documents to the representative without first talking to the grievant. The representative asked to make copies of documents in his possession regarding the grievant, including the document request, but the HRO denied his request because she was concerned about allowing the representative to copy the grievant’s personnel materials. After the HRO denied his request to make copies at the facility, the representative left the facility, taking with him the request for documents. The representative states that he then made copies of the documents he had with him and returned to the facility, where he gave them to an officer for delivery to the warden. The facility denies that it received the request.

Because his grievance involves his termination from employment, the grievant elected to use the expedited grievance process. The second-step meeting was held on December 29, 2004. The grievant’s union representative claims that the grievant “waited as long as possible” to receive the information he had requested prior to the meeting, but that he had not received the requested information at the time the second-step meeting occurred. The

grievant did not request a compliance ruling from this Department prior to the second-step meeting regarding the agency's alleged failure to produce documents.

The parties agree that the second-step meeting was somewhat antagonistic, but they disagree on which party was responsible for the conflict. The grievant's representative alleges that the second-step respondent conducted the meeting in a hostile manner, although the grievant himself characterizes the respondent's demeanor as "pretty stern" rather than antagonistic. The agency denies that the second-step respondent's conduct was inappropriate and asserts that the union representative acted in a "boisterous" manner.

The grievant alleges that the second-step respondent refused to allow his union representative to participate in the second-step meeting, although the HRO was allowed to participate. The parties agree that, at the second-step respondent's direction, the HRO began the meeting by reading the rules for the meeting.¹ The parties also agree that the grievant's union representative interrupted the HRO and asserted that as a result of her participation, he, too, had the right to participate in the meeting; that the exchange between the representative and the second-step respondent with respect to his participation was terse; and that the second-step respondent denied the representative's request. In addition, the parties agree that the HRO did not ask questions of the grievant or otherwise participate substantively in the meeting. The HRO states that her only other participation was to assure the grievant after the meeting had ended that he would be accorded his rights under the grievance procedure; the grievant alleges that, in addition, the HRO responded to a question posed by the grievant during the meeting about the failure to provide the requested information.²

Following the December 29, 2004 meeting, the grievant, through his union representative, gave written notice to the agency head that the agency had failed to comply with the grievance procedure by failing to produce requested information, by conducting the second-step meeting in a hostile manner, and by refusing to allow him to participate in the meeting. By two letters dated January 4, 2004, the agency responded to the grievant's letter of non-compliance and denied that its actions were out of compliance. On January 6, 2004, the grievant, through his representative, requested a compliance ruling from this Department.³

DISCUSSION

Failure to Produce Requested Information

¹ The grievant and his representative characterize the content of the text read by the HRO as the "rules" for the meeting; the HRO states that she read the applicable policy and procedures from the Grievance Procedure Manual.

² The grievant believes that the HRO may have said other things as well, but he has no specific recollection of any such statements. The grievant's union representative has indicated that the HRO spoke only three times—to read the meeting rules, in response to a question about documents, and after the meeting had ended.

³ At the time the grievant made his request, he had not yet received the agency's response to his letter of non-compliance.

The grievance statute provides that “[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to actions grieved shall be made available upon request from a party to the grievance, by the opposing party.”⁴ This Department’s interpretation of the mandatory language “shall be made available” is that absent just cause, all relevant grievance-related information *must* be provided.

The grievance statute further states that “[d]ocuments pertaining to nonparties that are relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance.”⁵ Documents, as defined by the Rules of the Supreme Court of Virginia, include “writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.”⁶ While a party is not required to create a document if the document does not exist,⁷ parties may mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects that the privacy interests of third parties, such as a chart or table, in lieu of production of original redacted documents. To summarize, absent just cause, a party must provide the other party with all relevant documents upon request, in a manner that preserves the privacy of other individuals.

This Department has also long held that both parties to a grievance should have access to relevant documents during the management steps and qualification phase, prior to the hearing phase. Early access to information facilitates discussion and allows an opportunity for the parties to resolve a grievance without the need for a hearing. To assist the resolution process, a party has a duty to conduct a reasonable search to determine whether the requested documentation is available and, absent just cause, to provide the information to the other party in a timely manner.

In this case, the grievant’s ruling request challenges the agency’s alleged failure to provide the following information: (1) copies of photographs taken by the agency of the tools allegedly left out by the grievant; (2) a copy of the grievant’s last evaluation; (3) a copy of the grievant’s “job description/duties”; and (4) “copy of any similar [sic] incident and any other related material [the agency] plan[s] to offer as reason for termination.” The grievant asserts that his request for this information was submitted in writing to the agency on December 13, 2004. The agency admits that the grievant’s union representative met with the facility’s HRO on that date and showed her the information request, but denies that the agency received a copy of that request.

The grievant acknowledges that since his request for a compliance ruling, he has been provided with copies of his most recent evaluation and his employee work profile (EWP). The agency has advised the grievant that there are no records responsive to his fourth request, and the grievant’s representative has advised this Department that they do not challenge this

⁴ Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

⁵ *Id.*

⁶ See Rules of the Supreme Court of Virginia, Rule 4:9(a)(1).

⁷ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

representation by the agency. Thus, the only request which remains outstanding for this Department's resolution is the grievant's request for copies of the photographs of the tools at issue.

In its written response to the grievant's letter of non-compliance, the agency stated that the photographs had been "presented" at the grievant's "first meeting" with the facility warden on December 2, 2004. The agency did not claim at that time that it had already provided copies of the photographs to the grievant. During the course of this Department's investigation, however, the agency asserted that copies of the photographs had been sent to the grievant with his written notice and presented evidence to support this contention. The grievant admits that he received a copy of his written notice in the mail, but he denies that he received copies of the photographs.

In light of the dispute between the parties regarding the submission and receipt of the grievant's document request, as well as the evidence presented by the agency regarding its production of the copies at issue, we do not find that the agency's actions were out of compliance with the grievance procedure. However, in the interests of fairness and efficiency, we direct the agency to provide a second set of copies of the photographs to the grievant. We note that the agency does not apparently dispute the grievant's entitlement to the documents, having already provided them to him once before. Moreover, as the documents total only four pages, this directive will not impose an unduly onerous burden on the agency.

Second-Step Meeting

The grievant, through his union representative, also alleges that the agency failed to comply with the grievance procedure by conducting the second-step meeting in a hostile manner and by refusing to allow the grievant's union representative to participate in the meeting, when the second-step respondent allowed the HRO to participate. The grievant's representative further alleges that the agency's alleged failure to provide documents prior to the second-step meeting hindered the grievant's ability to participate in that meeting. As a remedy for the agency's alleged non-compliance, the grievant's representative has requested that the grievant be granted another second-step meeting.⁸ We will address each of these issues below.

Alleged Hostility of Second-Step Respondent

With respect to the allegations regarding the manner in which the meeting was conducted, we conclude there is a lack of evidence to substantiate the grievant's claim. Although the grievant's union representative asserts that the second-step respondent's behavior toward him and the grievant was hostile, the agency maintains that it was the union

⁸ The grievant apparently does not join in this request. In the course of our investigation, the grievant indicated that he did not seek another second-step meeting and that he did not believe another meeting was the relief being sought on his behalf by his union representative.

representative, not the second-step respondent, who acted inappropriately during the meeting. More importantly, during the course of this investigation, the grievant himself conceded that the second-step respondent's demeanor was "pretty stern," rather than antagonistic.

Even if we were to assume, however, that the second-step respondent had conducted the meeting in a hostile manner, there is insufficient evidence that this alleged conduct resulted in prejudice to the grievant. The grievant's union representative has claimed that as a result of the warden's alleged conduct, the grievant became disconcerted and was unable to raise concerns regarding having been disciplined in a manner inconsistent with other employees.⁹ These assertions are contradicted by the grievant himself, however, who advised this Department that he feels the second-step respondent gave him the opportunity to say everything he wanted to say during the meeting and denied that there were any issues he was unable to raise. Moreover, while the representative has requested that the agency be ordered to conduct another second-step meeting to redress the prejudice caused by the alleged hostility, the grievant himself has stated that he does not seek this relief. As it is the grievant's claim at issue here, we find his statements regarding any potential prejudice to be particularly persuasive. We also note that because the grievant is challenging a formal disciplinary action, if he chooses to proceed with his grievance, it will automatically qualify for a hearing.

Participation of the Grievant's Union Representative

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.¹⁰ In this case, the parties agree that the grievant had a right to have an individual of his 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. Specifically, the grievant alleges that the agency failed to comply with the grievance procedure by denying his selected individual, his union representative, the opportunity to actively participate in the meeting when the second-step respondent's selected individual, the facility's HRO, was allowed to participate.

This Department has taken the position that the selected individual is generally 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. However, if the second-step respondent permits her selected individual to participate, the grievant's selected individual must also be allowed to participate in the meeting to the same extent.

⁹ During the course of this Department's investigation, the HRO agreed that the grievant appeared disconcerted at times during the meeting, but she characterized the grievant's demeanor as a response to the union representative's "boisterous" conduct.

¹⁰ *Grievance Procedure Manual* § 3.2.

In this case it is undisputed that the HRO began the meeting by reading the meeting “rules,” and that after the meeting had concluded, she again spoke to the grievant. In addition, the grievant alleges that the HRO responded to an inquiry regarding the agency’s failure to produce documents during the meeting, although the HRO denies that this occurred. The parties agree, however, that the HRO did not play any substantive role in the conduct of the meeting and that she did not question the grievant, who was the only witness present.

While the grievant is correct that the second-step respondent failed to allow an equal level of participation by his selected individual as she allowed for her own selected individual, in light of the HRO’s limited participation in the second-step meeting, we find that the second-step respondent’s actions do not constitute non-compliance with the grievance procedure. Certainly, had the HRO been allowed to play a substantive role in the meeting (for example, by being able to question the grievant), denial of a like opportunity to the grievant’s selected individual would have constituted non-compliance. Here, however, it is undisputed that the HRO’s participation was exceedingly limited, and allowing the grievant’s selected individual to participate in a similarly circumscribed fashion would have provided little, if any, benefit to the grievant.

We note, however, that by allowing the HRO to participate in the second-step meeting, even in a limited fashion, without according a similar right to the grievant’s selected individual, the agency created unnecessary and avoidable confusion. Moreover, regardless of the agency’s intent in allowing the HRO’s participation, the agency may have fostered an impression that the meeting was not being conducted in an even-handed manner. While we are 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, an agency should strive, where possible, to avoid even the appearance of allowing itself an advantage regarding its individual of choice while not allowing that same advantage to the grievant.

Failure to Provide Documents

Lastly, the grievant’s union representative alleges that the grievant was in effect denied a meaningful fact-finding opportunity at the second-step meeting because the agency had failed to provide him with requested information. As an initial matter, we note that this claim is contradicted by the grievant’s own assertion that he was able to say everything he wanted to say at the second-step meeting and that another meeting was unnecessary. Even absent this contradictory evidence, however, this claim would fail as untimely. The grievance procedure requires that any claims of party noncompliance be raised immediately, or the claim may be considered waived.¹¹ While the grievant’s union representative suggests that he and the grievant delayed the meeting for as long as possible in order to receive the requested information, it is undisputed that prior to the second-step meeting, the grievant did not provide the agency head with written notice of the alleged non-compliance in providing documents and did not seek a compliance ruling on this issue from this Department. As the

¹¹ *Grievance Procedure Manual* § 6.3.

February 17, 2005

Ruling #2005-943

Page 8

grievant and his representative failed, prior to the second-step meeting, to pursue the available avenues for redress of the agency's alleged non-compliance, the grievant has waived this claim.¹²

This Department's rulings on matters of compliance are final and nonappealable.¹³

Claudia T. Farr
Director

Gretchen M. White
EDR Consultant

¹² We note that while the grievant did not have the documents available to him during the second-step meeting, because the requested documents either have been provided to the grievant or will be provided as a result of this ruling, he will have the benefits of those documents at hearing, should he elect to proceed to hearing.

¹³ Va. Code §2.2-3003(G).