

Issue: Compliance/Second-step meeting; Written-Notice issues/damaging state property, obscene/abusive language, safety rule violations, termination; Ruling Date: February 22, 2005; Ruling #2005-951; Agency: Department of Game and Inland Fisheries; Outcome: Agency out of compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Game and Inland Fisheries
Ruling No. 2005-951
February 22, 2005

On January 11, 2005, the grievant, through his attorney, requested a compliance ruling in his December 7, 2004 grievance with the Department of Game and Inland Fisheries (DGIF or the agency). The grievant alleges that the agency has failed to comply with its established designation of step respondents and that he is therefore entitled to a ruling in his favor on the merits of his grievance.

FACTS

The grievant was employed by the agency as a Game Warden. On November 17, 2004, the agency issued the grievant a Group III Written Notice and terminated his employment. The grievant submitted a grievance challenging the agency's action to the agency's designated first-step respondent, his immediate supervisor (Captain P), on December 7, 2004. The agency substituted Colonel S (Captain P's supervisor) as the first-step respondent and advised the grievant that the agency director would serve as second-step respondent.

On December 29, 2004, the grievant, through his attorney, gave written notice of noncompliance to the agency head. In his notice, the grievant identified two areas of alleged noncompliance: (1) the agency's substitutions for the first and second-step respondents and (2) the agency's failure to provide requested documents. The agency did not respond to the notice of noncompliance.

On January 11, 2005, the grievant's counsel requested a compliance ruling from this Department (or EDR) with respect to both issues raised in the notice of noncompliance. The parties subsequently settled their dispute regarding the grievant's previous document request, but they were unable to resolve their conflict with respect to the step respondents.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹ That process assures that the parties first communicate with each other about the purported noncompliance, and resolve any compliance problems voluntarily without EDR'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

¹ See *Grievance Procedure Manual* § 6.3.

noncompliance. If the party fails to correct the alleged noncompliance, the other party may request a ruling from EDR. Should EDR find that the agency violated a substantial procedural requirement, EDR may render a decision against the noncomplying party on any qualifiable issue, unless the noncomplying party can establish just cause for its noncompliance; rendering such a decision is reserved for the most egregious of circumstances. For instance, if a party ignores a previous compliance order from EDR, 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.² Each designated step respondent shall have the authority to provide the grievant with a remedy, subject to the agency head's approval.³ Pursuant to its statutory responsibilities, EDR has long collected and maintained each agency's designated step respondents. This assures that each agency's management resolution step respondents are appropriate, are known to employees and to EDR, and that this phase of the grievance process is administered consistently and fairly.

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, the agency substituted an incorrect first-step respondent after the grievant had submitted his grievance to his immediate supervisor, the designated first-step respondent. Because the individual substituted by the agency was himself the designated second-step respondent, the agency advised the grievant that it would substitute the agency head—the designated third-step respondent—at the second-step level, in effect collapsing the three-step management resolution process into a two-step process. The agency states that it made these changes because the designated first-step respondent, the grievant's immediate supervisor, "was himself involved in the very incident for which the grievant was issued a written notice" and was being disciplined for that conduct.

We acknowledge that, under the circumstances, the immediate supervisor's involvement in the grievance process may be awkward. However, just as a supervisor is not disqualified from acting as a step respondent for a grievance challenging discipline he issued, even though the grievant in such a situation may feel the supervisor's involvement renders him unable to act impartially,⁴ the mere fact that the designated first-step respondent is himself involved in the underlying conduct neither disqualifies him from acting as the first-step respondent nor permits

² See *Grievance Procedure Manual* § 8.9.

³ See Va. Code § 2.2-3003(D).

⁴ See generally Ruling No. 2004-916 (rejecting request to disqualify second-step respondent; noting that "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.")

the agency to make a unilateral substitution.⁵ Moreover, we emphatically reject the agency's contention that because the grievant had the option to initiate the grievance with the individual issuing the discipline (here, the second-step respondent) or to pursue an expedited process, the agency itself has the discretion either to change the first-step respondent or to reduce the management resolution process to two steps. These rights belong to the grievant alone and cannot be imposed on a grievant against his wishes.

This Department does not condone the agency's conduct; however, we do not find that it was so egregious in nature as to justify an award on the merits on the grievant's behalf. This is not a situation in which the agency has ignored repeated compliance orders of this Department. Although we recognize the grievant's apparent frustration over the agency's noncompliance, there is no evidence that the agency acted in bad faith. Accordingly, we deny the grievant's request that he be awarded the full relief sought in his grievance as a remedy for the agency's noncompliance.

CONCLUSION

For the reasons discussed above, this Department concludes that the agency failed to comply with the grievance procedure by unilaterally substituting step respondents for the first and second management resolution steps. The agency is directed to have the designated first-step respondent or a mutually-agreed-upon substitute provide the grievant with a written response to the grievance within five workdays of receipt of this ruling. If the grievance remains unresolved after the first resolution step and the grievant elects to move the grievance to the second step, the agency is advised that it may not substitute another agency employee for the designated second-step respondent unless the grievant agrees in writing to such substitution.

This Department's rulings on matters of compliance are final and nonappealable and have no bearing on the merits of the grievance.⁶

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Director

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⁵ To the extent the agency's concern is that the first-step respondent would grant relief inconsistent with the agency's intent, we note that while a respondent must have the authority to grant relief, any such relief would be subject to the agency head's approval. *See* Va. Code § 2.2-3003(D).

⁶ Va. Code § 2.2-1001(5).