

Issue: Compliance/second step meeting, documents; Ruling Date: 2005-1067; Ruling #2005-1067; Agency: Department of Motor Vehicles; Outcome: ruling on documents request is premature; grievant in compliance on second step meeting issue



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Motor Vehicles
Ruling Number 2005-1067
July 13, 2005

The Department of Motor Vehicles (DMV or the agency) has requested a compliance ruling in the grievant's May 6, 2005 grievance. The agency contends that the grievant has violated a substantial procedural requirement as well as the "spirit" of the grievance procedure by failing to actively participate in the required second management resolution step meeting.¹ The agency requests another second-step meeting and that the grievant be directed to participate fully in the meeting by "asking and answering questions and discussing openly the facts that have given rise to her grievance." Additionally, the grievant claims that the agency has failed to comply with the grievance procedure by not providing her with documents she has requested and to which she believes she is entitled.

FACTS

The grievant is employed in a management position with DMV. On April 12, 2005, the grievant was issued a Group III Written Notice with 10 days suspension for engaging in "[a]ctions which seriously undermines [*sic*] the effectiveness of the agency's operations." The grievant challenged the disciplinary action by initiating her May 6, 2005 grievance.

When no relief was granted at the first management resolution step, the grievant advanced her grievance to the second management resolution step. Subsequently, the agency contacted the grievant to schedule the required second-step meeting. In scheduling the second-step meeting, the grievant advised the agency that she did not intend to answer questions, call witnesses or otherwise discuss the facts that gave rise to her Group III Written Notice. Instead, the grievant stated that she would read a prepared statement at the second-step meeting.

The second-step meeting was held on June 16, 2005 and as she had indicated, the grievant read a prepared statement. According to the agency, the statement was only two to three sentences long and contained no facts related to the written notice or grievance.

¹ See *Grievance Procedure Manual* § 3.2.

As a result of the grievant's actions, the agency requested a compliance ruling from this Department on June 20, 2005.

Additionally, on May 9, 2005, the grievant requested documents related to her May 6th grievance. Specifically, the grievant's request seeks any and all investigation reports, findings, recommendations and witness statements which led to the issuance of the Group III Written Notice. In response, the agency provided the grievant with the investigation documents requested, but redacted the names of individuals interviewed during the course of the investigation. In a June 23, 2005 letter to this Department, and written in response to the agency's request for a compliance ruling regarding the grievant's behavior at the second step meeting, the grievant challenges the agency's failure to provide the names of the witnesses interviewed. Accordingly, this ruling will address both the agency's and the grievant's allegations of noncompliance.

DISCUSSION

Second Step Meeting

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 the agency believes that the grievant is about to violate the rules regarding the mandated second-step meeting, before proceeding with the meeting, the agency must notify the grievant in writing of the alleged noncompliance and allow the grievant five workdays after receipt of the written notice to correct any noncompliance.⁴ If after five workdays the agency believes that the grievant has failed to correct the alleged noncompliance, the agency may request a ruling from this Department ordering the grievant to correct the noncompliance. Further, should this Department find that the grievant violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department may resolve the grievance in the agency's favor unless

² *Grievance Procedure Manual* § 6.

³ *Grievance Procedure Manual* § 6.3.

⁴ This is consistent with our prior rulings. See EDR Ruling #2003-042 (grievant invoked his right under the grievance procedure to waive a face-to-face meeting with the second-step respondent, but then later, at the agency's insistence, attended a meeting with that individual to discuss his grievance; as such, EDR found that by proceeding with the meeting without formally contesting that meeting beforehand through the noncompliance process, the grievant effectively waived his right to challenge the meeting). See also EDR Ruling # 2004-752 (prior to the second-step meeting, the grievant knew 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 without formally contesting the agency's intended action beforehand through the noncompliance process; by proceeding with the meeting anyway, the grievant was found to have waived his right to contest any related issues later).

the grievant can establish just cause for her noncompliance.⁵ Importantly, all claims of party noncompliance must be raised immediately. For example, 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.⁶

Here, it is undisputed that prior to the second-step meeting the agency was notified that the grievant did not intend to answer questions, call witnesses or discuss the facts at the second-step meeting. However, the agency scheduled and attended a second-step meeting on June 16, 2005, without formally contesting the grievant's intended action beforehand through the noncompliance process. By proceeding with the meeting anyway, the agency effectively waived its right to contest the grievant's alleged noncompliance.

Accordingly, within 5 workdays of receipt of this ruling, the second step-respondent is directed to provide a written response on the grievance Form A or an attachment. The response must address the issues and the relief requested and should notify the grievant of her procedural options.

Because the agency has waived its right to challenge the grievant's alleged noncompliance, it is unnecessary for this ruling to address whether the grievant's actions at the second step meeting were in compliance with the grievance procedure. We are compelled to note, however, that the purpose of the second-step meeting is fact finding,⁷ and that the intent of this meeting, as with all the management resolution steps, is to resolve the issues grieved prior to hearing if possible. Accordingly, both parties are encouraged to present information relevant to the grievance at this meeting.⁸

Documents

As stated above, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.⁹ In this case, the grievant's request for a compliance ruling is premature because the grievant has not notified the agency head of the alleged procedural violation (i.e., failure to provide witness names with the investigation documents) and subsequently given the agency five workdays to correct any noncompliance, as required by the grievance procedure. Accordingly, the grievant must give the agency head the requisite notice of noncompliance and allow the agency 5 workdays to provide the requested information. If the grievant is dissatisfied with the agency's response, she may seek a compliance ruling from this Department or, if the grievance has advanced to the hearing phase of the

⁵ 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.

⁶ *Grievance Procedure Manual*, § 6.3.

⁷ *See Grievance Procedure Manual* § 3.2.

⁸ *Id.*

⁹ *Grievance Procedure Manual* § 6.3.

grievance process,¹⁰ raise the document issue again with the hearing officer during the pre-hearing conference.

This Department's rulings on compliance are final and nonappealable.¹¹

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¹⁰ Because the May 6th grievance challenges formal disciplinary action, it automatically qualifies for a hearing before an administrative hearing officer. *See Grievance Procedure Manual* § 4.1(a).

¹¹ Va. Code § 2.2-1001.