

Issue: Compliance/second-step meeting; Ruling Date: August 25, 2005; Ruling #2006-1105; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: request premature



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Mental Health,
Mental Retardation, and Substance Abuse Services
Ruling No. 2006-1105
August 25, 2005

The grievant has asked for a compliance ruling from this Department. He alleges that the Department of Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS or the agency) failed to comply with the grievance procedure by refusing to allow him to question witnesses during the second-step meeting.

FACTS

The grievant was employed by the agency as a Rehab Tech. On July 19, 2005, the agency advised the grievant of its intent to issue him a Group I Written Notice for disruptive behavior and a Group II Written Notice for failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy. The grievant received the two written notices on July 21, 2005, at which time his employment with the agency was terminated.

On July 20, 2005, the grievant initiated a grievance challenging the agency's announced intent to take disciplinary action. Using the expedited process, the grievant subsequently initiated a second grievance on August 3, 2005 challenging the issuance of the written notices and his resulting termination.

The parties met for the second-step meeting on the grievances on August 10, 2005. The meeting began with a debate regarding the role of the grievant's union representative, who attended the meeting with the grievant. The second-step respondent then began to question the grievant's first witness. At the conclusion of his own questions, the second-step respondent took questions from the grievant, which he then relayed to the witness.

After the questioning of the first witness had been completed, the second witness was asked into the meeting room. According to the second-step respondent, the grievant objected to where the witness was sitting, on the ground that he would not be able to hear the witness. The second-step respondent states that after the witness, who uses a wheelchair, refused to move, he suggested the grievant move instead. When the placement issue had been resolved, the second-step respondent asked the witness a series

of questions regarding the grievant's claims. After the second-step respondent completed his own questioning, he excused the witness without giving the grievant an opportunity to question the witness either directly or indirectly through the second-step respondent. The grievant then asked the second-step respondent if he was going to be allowed to ask the witness questions, to which the second-step respondent replied that he would not. The second-step respondent states that he denied the grievant the opportunity to question the witness because of a history of antagonism between the grievant and the witness and the hostility exhibited by the grievant toward the witness during the second-step meeting. The grievant and his union representative advised the second-step respondent that they saw no point in continuing the meeting and would seek redress through other means.

Two days later, on August 12, 2005, the grievant, through his union representative, requested a compliance ruling from this Department. Prior to making this request, the grievant did not give the agency head written notice of noncompliance.

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 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 or the opposing party to correct any noncompliance.² If the party fails to correct the alleged noncompliance, the complaining party may request a ruling from this Department.

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 violations and subsequently given the agency five workdays to correct any noncompliance, as required by the grievance procedure. However, while we find that a compliance ruling in this matter would be premature, we would like to address an apparent misunderstanding by the agency.

As the second-step respondent agrees that he did not allow the grievant to question the second witness either directly or indirectly, it appears to be undisputed that the grievant was denied the opportunity to question that witness. In Ruling No. 2004-915 (a copy of which was given to the grievant by the agency during the second-step meeting) we explained that during a second-step meeting, a grievant has the right under the grievance procedure to question witnesses regarding disputed facts and issues.³ In the

¹ *Grievance Procedure Manual* § 6.1.

² *Grievance Procedure Manual* § 6.3.

³ *See also Grievance Procedure Manual* §3.2 (noting 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.") *See also* EDR Ruling No. 2004-916 (reiterating the principle set forth in Ruling No. 2004-915 that a grievant may question witnesses regarding disputed facts and issues).

majority of cases, the second-step respondent should allow 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—specifically, where the grievant has already exhibited during the meeting 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. As this Department advised in Ruling Number 2004-915, however, in *no* circumstance may the grievant be denied the opportunity to question witnesses.

The grievant may renew his request for a compliance ruling if these issues remain unresolved after giving the agency head notice and the opportunity to correct the challenged noncompliance.

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