

Issue: Compliance/grievance procedure/Second-step meeting; Performance Evaluation/notice of improvement needed; Ruling Date: October 14, 2005; Ruling #2006-1132; Agency: Department of Social Services; Outcome: agency not in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling Number 2006-1132
October 14, 2005

The grievant has requested a compliance ruling in the grievance that she initiated on June 3, 2005 with the Department of Social Services (DSS or the agency). The grievant contends that the agency has violated the grievance procedure by refusing to allow her to waive the second-step meeting.

FACTS

The grievant is employed by the agency as a Fiscal Technician Senior. On June 3, 2005, the grievant initiated a grievance challenging a Notice of Improvement Needed. In her Grievance Form A, she alleges that she received the Notice as part of a continuing pattern of harassment by her supervisor, Ms. C, and her supervisor's supervisor, Mr. S. The grievant charges that the harassment "is not on a Professional Level, rather this Harassment stems from some type of Personal Vendetta against [her] by a portion of the Senior Management, which includes [Mr. S]."

The grievant had previously initiated two other grievances against the agency. The first of these grievances, initiated on March 10, 2005, alleged workplace harassment, "job bullying" and sexual and religious discrimination; as part of her requested relief, the grievant sought the termination of Mr. S, as well as two other managers.¹ The second grievance, initiated April 25, 2005, alleges retaliation by another member of management.

After the parties failed to resolve the June 3, 2005 grievance at the first management resolution step, the grievant advanced that grievance to the second resolution step. As Mr. S is the designated second-step respondent, however, she asked to waive the second-step meeting pursuant to § 3.2 of the *Grievance Procedure Manual*, which provides that where a grievant "alleges retaliation or discrimination by an individual who would otherwise serve as the agency's second-step respondent," the grievant may waive the second-step meeting. On June 21, 2005, the agency denied the grievant's request on the basis that the grievant did not indicate discrimination or retaliation in the Grievance Form A.

¹The grievant also made an internal EEO complaint about the alleged harassment and discrimination. Mr. S was identified as a subject of this complaint.

On June 30, 2005, the agency advised the grievant that it considered her to be out of compliance with the grievance procedure because she had not scheduled the second-step meeting with Mr. S. By letter dated July 8, 2005, the grievant advised the agency head that she considered the agency to be out of compliance with the grievance procedure for, among other reasons, refusing to allow her to waive the second-step meeting. On July 18, 2005, the agency head responded by letter to the grievant's complaint. In his letter, the agency head neither denied nor admitted non-compliance with respect to the second-step meeting, but instead advised the grievant that it would be asking this Department to make a compliance ruling on this issue. On August 29, 2005, the grievant requested a compliance ruling from this Department on the agency's failure to allow her to waive the second-step meeting.

DISCUSSION

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 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 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.

Under the grievance procedure, management and employees generally have an equal interest in and entitlement to at least one face-to-face meeting during the management resolution steps. But in grievances alleging retaliation or discrimination, the grievance procedure specifically allows a grievant to decline such meetings with the claimed perpetrator of retaliation or discrimination, in an effort to avoid discouraging alleged victims of discrimination or retaliation from coming forward with their complaints.³ This procedural rule was intended to effectuate a principle long recognized by the courts in discrimination and retaliation law suits: that requiring such a meeting could have a chilling effect on an employee's exercise of his rights under an employer's complaint procedure, and should be avoided.⁴

² See *Grievance Procedure Manual* § 6.3.

³ *Grievance Procedure Manual* § 3.2.

⁴ See, e.g., *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). In *Meritor*, the United States Supreme Court held that an employer could be held liable for a supervisor's discriminatory harassment of an employee, notwithstanding the existence of a grievance procedure and the employee's failure to use it. As the Court noted, it was "not altogether surprising that respondent failed to invoke the [bank's grievance] procedure and report her grievance to [her supervisor, the alleged perpetrator.]" *Meritor* at 73. The Court also concluded that the

Here, there is little question that the grievant claims that the designated second-step respondent, Mr. S, played a critical role in alleged discrimination and retaliation. In her June 3, 2005 grievance, the grievant specifically identified Mr. S and charged that the conduct being grieved was a continuation of the harassment that had “resulted in [her] filing [t]wo [p]revious [g]rievances.” In the materials submitted by the grievant with her March 10, 2005 grievance, she alleges that Mr. S engaged in religious harassment; that after she complained about the alleged religious harassment, Mr. S engaged in retaliatory conduct; and that Mr. S improperly ordered her to change records without providing documentation and participated in retaliatory conduct when she refused to obey his directive in the absence of documentation. Under these circumstances, we find that the grievant adequately alleged discrimination and/or retaliation by the second-step respondent and therefore had the right under the grievance procedure to waive the second-step meeting.⁵

CONCLUSION

For the reasons discussed above, this Department concludes that the agency failed to comply with the grievance procedure by refusing to allow the grievant to waive the second-step meeting. The second-step respondent is therefore directed to provide the grievant with a written response to her grievance within five workdays of the agency’s receipt of this ruling. The agency is advised that, in accordance with the grievance procedure, if the grievant subsequently elects to advance her grievance to the third resolution step, the grievant must be allowed to meet with the third-step respondent.⁶

This Department’s rulings on matters of compliance are final and nonappealable.⁷

Claudia T. Farr
Director

Gretchen M. White

employer's defense in the case would have been "substantially stronger" if its procedures had been "better calculated to encourage victims of harassment to come forward." *Id.*

⁵ While the agency is correct that the grievant did not check the box on the Grievance Form A indicating discrimination or retaliation, the express language of the Form A provides that this box is only to be checked where discrimination or retaliation is alleged by the “immediate supervisor.” As Mr. S was not the grievant’s immediate supervisor, the grievant’s failure to check this box is immaterial to her right to waive the second-step meeting. We note that in lieu of a meeting with the second-step respondent, the agency could have offered the grievant a meeting with a substitute second-step respondent. *See Grievance Procedure Manual* § 3.2. However, the agency could not have required the grievant to participate a second-step meeting with the individual substituted.

⁶ *Grievance Procedure Manual* § 3.2

⁷ Va. Code § 2.2-1001(5).

EDR Consultant