

Issue: Compliance/grievance procedure/resolution steps; retaliation/other protected right;  
Ruling Date: May 10, 2006; Ruling #2006-1299; Agency: Department of Motor Vehicles;  
Outcome: agency not in compliance



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Motor Vehicles  
Ruling Number 2006-1299  
May 10, 2006

The grievant has requested a ruling in his February 21, 2006 grievance with the Department of Motor Vehicles (DMV or agency) on whether the agency is out of compliance with the grievance procedure. The grievant essentially contends that the agency has violated a procedural requirement of the grievance procedure by forcing him to initiate his grievance with his immediate supervisor despite his claim that his immediate supervisor has retaliated against him.

**FACTS**

The grievant is a Manager at a Customer Service Center. The grievant has initiated a grievance in which he asserts that as a result of his having raised staffing shortage concerns with his supervisor's supervisor, he was transferred to another facility. The agency asserts that the facts, as alleged, do not qualify as retaliation as defined by the grievance procedure.

**DISCUSSION**

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>1</sup> 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.<sup>2</sup> If the grievant believes that an agency is out of compliance, he must notify the agency head of the alleged noncompliance. If after five workdays the grievant believes that the agency has failed to correct the alleged noncompliance, the grievant may request a ruling from this Department.

*Step Respondents*

Under the grievance procedure, "a grievance alleging discrimination or retaliation by the immediate supervisor may be initiated with the next level supervisor."<sup>3</sup> Here, the

---

<sup>1</sup> See *Grievance Procedure Manual* § 6.

<sup>2</sup> *Grievance Procedure Manual* § 6.3.

<sup>3</sup> *Grievance Procedure Manual* § 2.4(1).

grievant claims that the agency has violated a procedural requirement of the grievance procedure by requiring him to initiate his grievance with his immediate supervisor, who he alleges retaliated against him. As stated above, the agency appears to have concluded that the alleged conduct does not qualify as "retaliation" as defined by the grievance procedure: "actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. "whistleblowing")."

The agency is correct that generally, without more, a transfer or shift change is not an adverse employment action.<sup>4</sup> However, we recently recognized that such reassignments can, in rare cases, constitute actionable retaliation if the schedule change *materially* affected the grievant in an adverse way and was taken in order to dissuade the employee from engaging in the protected activity.<sup>5</sup> Furthermore, where the disputed event forms the basis of the grievance, this Department avoids, where possible, engaging in fact-finding on the merits of the grievance when called upon to address a matter of compliance.<sup>6</sup> For the above reasons, and because allowing the grievant to initiate his grievance with his supervisor's supervisor would appear to pose no risk of prejudice to the agency, it is reasonable to allow the grievant to skip his immediate supervisor in this case.

#### CONCLUSION

For the reasons discussed above, the grievant may initiate his grievance with his immediate supervisor's supervisor. Accordingly, the immediate supervisor's supervisor is ordered to respond to the grievance within five workdays of receipt of this ruling. Because this grievance will have been initiated beyond the second-step, the third-step respondent will preside over the fact-finding meeting that typically occurs at the second-step.<sup>7</sup> This Department's rulings on matters of compliance are final and nonappealable.<sup>8</sup>

---

Claudia T. Farr  
Director

---

William G. Anderson, Jr.

---

<sup>4</sup> See EDR Ruling 2004-768 (Despite the grievant's unhappiness with having to make new child care arrangements and reschedule her daughter's counseling sessions, where reassignment did not result in a demotion, loss of promotional opportunities, or a cut in pay or benefits, the reassignment cannot be viewed as "job-related" and was therefore not an adverse employment action.)

<sup>5</sup> See EDR Ruling 2006-1241.

<sup>6</sup> C.f. EDR Ruling 2001-189.

<sup>7</sup> C.f. *Grievance Procedure Manual* § 3.2, which provides that if the employee elects to waive the face-to-face meeting with the original second-step respondent, the employee must be allowed to meet with the third-step respondent.

<sup>8</sup> Va. Code § 2.2-1001(5).

May 10, 2006  
Ruling #2006-1299  
Page 4

EDR Consultant, Sr.