

Issue: Compliance/witnesses at second-step meeting; Ruling Date: April 27, 2006; Ruling #2006-1311; Agency: Virginia Department of Health; Outcome: agency in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Virginia Department of Health
Ruling Number 2006-1311
April 27, 2006

The grievant, through his counsel, has requested a ruling on whether the Virginia Department of Health (VDH or the agency) has failed to comply with the grievance procedure. The grievant contends that the agency has violated the grievance procedure by refusing to compel witnesses to appear at the second-step meeting.

FACTS

The grievant was employed by the agency as a Psychologist Supervisor until his termination on or about January 14, 2006. On February 10, 2006, the grievant initiated a grievance challenging his termination and other alleged agency actions.

In preparation for the second-step meeting, the grievant apparently contacted several fact witnesses who are employed by the agency. The agency states that those witnesses indicated that they did not wish to participate in the second-step meeting. On March 8, 2006, the grievant, through his attorney, advised the agency by letter that its failure "to make available relevant fact witnesses employed by the agency" constitutes noncompliance with the grievance procedure. By letter dated March 9, 2006, the agency head responded to the grievant's claim of noncompliance. He indicated that the requested witnesses did not wish to participate in the meeting, and noted that under the grievance procedure, there is no authorization "for either party to compel the involuntary attendance of witnesses." He further advised the grievant that he would ask the witnesses either to attend the meeting or advise the second-step respondent that they would not be attending.¹ The grievant subsequently requested a compliance ruling from this Department.

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 noncompliance, and resolve any compliance problems voluntarily, without this Department's involvement. Specifically, the party claiming noncompliance must notify

¹ A copy of the agency head's letter was apparently provided to the witnesses.

² *Grievance Procedure Manual* § 6.

the other party in writing and allow five workdays for the opposing party to correct any noncompliance.³ 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 ordering the agency to correct the noncompliance. Further, should this Department find that the agency violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department may resolve the grievance in the grievant's favor unless the agency can establish just cause for its noncompliance.⁴

The grievant alleges that the agency failed to comply with the grievance procedure by refusing to compel several witnesses, who are also employed by the agency, to attend the grievant's second-step meeting. The grievant asserts that the agency's refusal will deprive him of his right under the grievance procedure to any meaningful fact-finding by the second-step respondent. The agency argues that the witnesses in question do not wish to testify, and that it is their right under the grievance procedure to make that election without reprisal. The agency further asserts that it lacks authorization under the grievance procedure to compel employee-witnesses to appear.

Although we understand and appreciate the grievant's concerns, the grievance procedure does not require agencies to compel witnesses to participate in a second-step fact-finding meeting. For this reason, we cannot conclude that the agency has failed to comply with the grievance procedure.

We note, however, that agencies are required to make available for hearing any employee ordered by the hearing officer to appear as a witness.⁵ In the event that the present grievance proceeds to hearing and the employee-witnesses in question fail to comply with an order directing their appearance, the hearing officer would be free to consider the agency's failure to compel its employees to attend and to draw any appropriate inferences from that failure.⁶

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

Claudia T. Farr
Director

Gretchen M. White

³ *Grievance Procedure Manual* § 6.3.

⁴ 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.

⁵ *Rules for Conducting Grievance Hearings* § III (E).

⁶ *Id.* at § V(B).

⁷ Va. Code §2.2-3003(G).

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