

Issue: Compliance – Grievance Procedure (Second Step Meeting); Ruling Date:
April 7, 2008; Ruling #2008-1991; Agency: Department of Motor Vehicles;
Outcome: Agency In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Motor Vehicles
Ruling Number 2008-1991
April 7, 2008

The grievant has requested a compliance ruling in the grievance that she initiated on February 25, 2008 with the Department of Motor Vehicles (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 February 25, 2008 grievance challenges two issues: 1) a Written Notice the grievant received on January 28, 2008, and 2) "age discrimination which has created an unfair and hostile environment." In her attachments to the grievance, the grievant has specifically identified acts by her immediate supervisor that were allegedly discriminatory. Because of this alleged discrimination, the grievant initiated her grievance with the immediate supervisor's supervisor, who also normally acts as the second step-respondent. However, the grievant later asserted that she did not wish to meet face-to-face with her immediate supervisor's supervisor for purposes of the second step meeting because she alleges that that individual (the second step-respondent) has perpetuated the discrimination against her. The agency has pointed out that the second step-respondent only recently joined the grievant's supervisory chain on the day before the grievant received the January 28, 2008 Written Notice.

The agency has declined to allow the grievant to waive the face-to-face meeting based on a number of arguments. First, the agency asserts that the grievant did not assert in her grievance that the second step-respondent discriminated or retaliated against the grievant "in any way." Second, the agency argues that because the grievant initiated the grievance with the second step-respondent, it was a "clear indication that, at the time of initiation, [the grievant] did not intend to assert that [the second step-respondent] had discriminated against [the grievant]." Lastly, the agency asserts that the grievant's argument that the second step-respondent perpetuated discrimination was not raised until after the grievant initiated the grievance and the grievance procedure provides that additional claims may not be added after initiation. After providing notice of noncompliance to the agency head, the grievant now requests a compliance ruling on the matter.

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 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.² This procedural rule was intended to effectuate a principle long recognized by the courts in discrimination and retaliation lawsuits: that requiring such a meeting could have a chilling effect on an employee's exercise of his or her rights under an employer's complaint procedure, and should be avoided.³

As an initial matter, some of the agency's arguments against permitting the grievant to waive the face-to-face meeting are not on point. While it is true that the grievant did not specifically state in her initial grievance documentation that the second step-respondent has

¹ See *Grievance Procedure Manual* § 6.3.

² *Grievance Procedure Manual* § 3.2 provides:

In the event that an employee alleges retaliation or discrimination by an individual who would otherwise serve as the agency's second-step respondent, the employee may:

- 1. Request that the agency designate another second-step respondent; or*
- 2. Waive the face-to-face meeting with the original second-step respondent and receive only a written second-step response to the grievance. 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.*

³ 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 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.*

perpetuated discrimination against her, stating as much after initiation of the grievance would not be the equivalent of adding a new “claim.” The claim the grievant has made is age discrimination. Whoever at the agency allegedly caused that discrimination, the grievant has effectively raised the issue of age discrimination in her grievance. As such, simply suggesting that there may have been more than one causal agent of the same events would not bar her claim as new.⁴

Additionally, the fact that the grievant initiated her grievance with the second step-respondent has no bearing on whether the grievant might have been alleging that the step-respondent’s actions had been discriminatory or that the grievant wished to waive any meeting with her. The grievant properly skipped her immediate supervisor and filed her grievance with the next level supervisor.⁵ The *Grievance Procedure Manual* does not address whether a grievant may skip initiating her grievance with both her immediate supervisor and the next level supervisor if she believes both perpetuated discrimination. Thus, the grievant had no choice but to initiate her grievance with her supervisor’s supervisor. The grievant initiated her grievance with the appropriate member of agency management and should not be detrimentally affected by following the grievance procedure.

However, the agency’s point about the second step-respondent’s involvement, or lack thereof, in the discrimination alleged in this grievance has some weight in this case. The grievant’s only allegation of discrimination against the second step-respondent is that she “perpetuated” the discriminatory acts of her supervisor. Based on conversations with the grievant, this allegation is based on the grievant’s dealings with the second step-respondent following the issuance of the Written Notice. According to the grievant, she attempted to discuss workplace issues with the second step-respondent at a meeting, but the second step-respondent “backed” the grievant’s supervisor and would not listen to the grievant’s side of the story. The grievant has taken from this exchange that the second step-respondent would not be “even-handed” in her review of this grievance. Such allegations, standing alone, do not appear to be allegations of unlawful discrimination. It does not appear that the grievant ever raised the issue of discrimination with the second step-respondent prior to initiating the grievance.

While a specific claim of the “perpetuation” of unlawful discrimination by a member of management could permit a grievant to waive a face-to-face meeting with that step-respondent under section 3.2 of the *Grievance Procedure Manual*, this is not such a case. Beyond her bare statement, the grievant has not specifically alleged how the second step-respondent has perpetuated discrimination. Indeed, there has been no specific allegation or evidence presented at this stage that the second step-respondent knowingly condoned or was actively involved in perpetuating the alleged discrimination by the grievant’s supervisor. The grievant’s only allegation or evidence of the perpetuation is that the second step-respondent failed to accept or listen to her side of the story with regard to events related to the Written

⁴ To the extent this portion of the ruling conflicts with past rulings such as EDR Ruling No. 2004-916, it is consistent with EDR’s current interpretation of “claims.” See, e.g., EDR Ruling No. 2007-1444.

⁵ See *Grievance Procedure Manual* § 2.4.

Notice. There is no claim or indication, at this time, that the second step-respondent has reacted to the grievant's discrimination allegation in such a way as to suggest perpetuation of discrimination. As such, it is this Department's determination that, in this case at this early stage, the grievant has not alleged sufficient grounds to waive the face-to-face meeting with the second step-respondent under section 3.2 of the *Grievance Procedure Manual*.⁶

The grievant and the agency should be mindful that the second step meeting is a meeting between parties to a grievance, and that both sides bring to that meeting their perspectives, experiences, and understandings. Although a step-respondent should conduct the meeting in an even-handed manner and with an open mind, he or she is a member of management and, like the grievant, is not a neutral party. Indeed, the management resolution phase of the grievance process was designed to allow the parties to the dispute to exchange information and attempt to resolve the issues themselves, without the assistance of a neutral third party. Absent a specific claim of unlawful discrimination, disqualifying a step-respondent because of his or her managerial actions and/or support of the underlying Written Notice would undermine that purpose. Further, while the resolution step process involves only the parties to a grievance, the hearing process, if a grievance is qualified, allows grievants an opportunity to present claims to a neutral, third-party hearing officer for resolution.

CONCLUSION

For the reasons discussed above, this Department concludes that the agency has complied with the grievance procedure by refusing to allow the grievant to waive the second step meeting. The second step-respondent is therefore directed to schedule a meeting with the grievant within five workdays of the agency's receipt of this ruling. This Department's rulings on matters of compliance are final and nonappealable.⁷

Claudia T. Farr
Director

⁶ This ruling is limited to this procedural issue only. The grievant will not be barred as a result of this ruling from arguing during the management steps or at hearing that the second step-respondent has caused or perpetuated discrimination.

⁷ Va. Code § 2.2-1001(5).