

Issue: Compliance – Grievance Procedure (Second Step Meeting); Ruling Date: December 8, 2009; Ruling #2010-2433; 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 2010-2433
December 8, 2009

The grievant 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 not compelling co-workers to appear as witnesses at the second-step meeting.

FACTS

On July 30, 2009 and August 10, 2009, the grievant initiated grievances challenging two Group II Written Notices with suspension. The second-step meeting on these two grievances was apparently scheduled for August 21, 2009. The grievant states that the agency led her to believe that it would contact her witnesses, a claim the agency disputes. The grievant further states that when she arrived at the second-step meeting and discovered that there were no witnesses in attendance, she started to leave but was asked to stay by the second-step respondent. She claims that she agreed to stay because of the second-step respondent's management authority over her.

By letter dated August 30, 2009, the grievant advised the agency head in writing of the alleged non-compliance regarding the second-step meeting.¹ In response, the agency denied that they requested the grievant's list of witnesses or made any statements that would have led the grievant to believe that they would compel the attendance of her witnesses at the second-step meeting. The agency also stated that, contrary to the grievant's assertions, it had advised her that it had no duty to call her witnesses.

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

¹ Although the grievant raised a number of other issues of alleged non-compliance in her letter to the agency head, she has advised this Department that she is only seeking a ruling on the second-step meeting issue.

² *Grievance Procedure Manual* § 6.

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.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 not compelling her witnesses, who are also apparently employed by the agency, to attend the grievant's second-step meeting. As this Department has previously held, in EDR Ruling No. 2006-1311, 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, while an agency is not required to compel employees to appear as witnesses on a grievant's behalf, it should make clear to any employees asked by a grievant to appear that they are permitted to do so and that their time will be counted as work time. Further, although this is not such a case, to the extent an agency requires its own witnesses to appear at a second-step meeting, basic fairness would appear to impose an equal requirement on any agency employee reasonably asked by a grievant to be a witness.

In addition, we note 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

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 2004-680.

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

⁶ *Id.* at § V(B).

⁷ *See* Va. Code §§2.2-1002(5), 2.2-3003(G).