

Issue: Compliance – Grievance Procedure (Resolution Steps); Ruling Date: August 26, 2010; Ruling #2010-2685; Agency: Department of Corrections; Outcome: Agency Not in Compliance.



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Corrections  
Ruling Number 2010-2685  
August 26, 2010

The grievant has requested a compliance ruling regarding three grievances currently pending with the Department of Corrections (DOC or the agency). The grievant contends that the agency has violated the grievance procedure by refusing to allow her to waive the meeting with the customary second step respondent.

FACTS

The grievant initiated a grievance on March 24, 2010 challenging a leave issue (Grievance 1). She initiated a second grievance on March 30, 2010 alleging retaliatory acts by the Assistant Warden (Grievance 2). On April, 29, 2010, the grievant initiated a third grievance, this one also alleging retaliatory acts for having reported verbal abuse (Grievance 3). The grievant requested that the agency allow her to meet with the Regional Director at the second step meeting rather than the usual second step respondent, the Warden. The grievant asserts that the Warden has discriminated/retaliated against her. Essentially, she asserts that he has done nothing to prevent the discrimination/retaliation by the Assistant Warden.

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 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

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<sup>1</sup> See *Grievance Procedure Manual* § 6.3.

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.<sup>2</sup> 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.<sup>3</sup>

In this case, the grievant asserts that the Warden has essentially “perpetuated” the discriminatory/retaliatory acts of the Assistant Warden by not intervening. We have previously recognized that a specific claim of the “perpetuation” of unlawful discrimination/retaliation 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*.<sup>4</sup> The grievant asserts that:

I have been experiencing retaliation to include workplace harassment at the hands of my supervisor, Assistant Warden [] since September 2009. Every time that it happened, I brought it to [the Warden’s] attention and he did nothing about it. He did not uphold the department’s policy of zero tolerance concerning retaliation, harassment as well as workplace violence. It was [the Wardens] job to protect me from the continued harassment of [the Assistant Warden]. He allowed this harassment to continue to the point of violent threats from [the Assistant Warden]. Had [the Warden] dealt with this

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<sup>2</sup> *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.

<sup>3</sup> 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.*

<sup>4</sup> See EDR Ruling No. 2008-1991.

issue when it was first brought to his attention, he could have defused the situation and it would not have progressed to the point that it did.

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According to the general provision of the policy for workplace harassment, it is the responsibility of all managers and supervisors to maintain a non-hostile, bias-free working environment and to ensure that employees are free from harassment of any kind. Employees and third parties should report incidents of workplace harassment (including sexual harassment) as soon as possible after the incident occurs. A written complaint should be filed in accordance with the procedures set forth in Section IX of this operating procedure. Managers and supervisors have a duty to promptly investigate allegations of workplace harassment that come to their attention. Complaints should be reported by the manager or supervisor to the Human Resource Office, the DOC Office of Equal Employment Opportunity (EEO), or the Deputy Director for Human Resources for monitoring, advice, or assistance. If the investigation determines the complaint has merit, immediate, appropriate corrective action is to be taken. Even though policy specifically states what [the Warden's] responsibilities are, he allowed me to remain under the supervision of [the Assistant Warden] for six months enduring his maltreatment without reporting this to his supervisors.

Even though I adhered to policy and reported the incidents as required, I still was harassed and threatened by [the Assistant Warden]. After I was finally removed from the direct supervision of [the Assistant Warden], he passed me in the hallway and I said "Good morning." and he said, "I'm going to get your black ass." I wrote an incident report about that threat and at no time did [the Warden] speak with me about that incident.

It was not until six months after the first reported incident that I requested permission from him to go over and speak with [the Regional Director] about the continued retaliation and workplace violence that he finally removed me from under the direct supervision of [the Assistant Warden]. I was then put under the supervision of the Treatment Supervisor, who is also supervised by [the Assistant Warden]. Anyway you look at it I was still under [the Assistant Warden's] supervision and he had resorted to violent racial threats by this time.

Here, the grievant has provided a fairly specific description of how the Warden has allegedly perpetuated the harassment. If one were to assume, for purposes of this ruling only, that the above allegations had merit, such inaction and omissions could potentially rise to the level of "perpetuation." It makes little sense to require the grievant to essentially establish the merits of her grievances at this stage in order to avoid having to meet with the Warden. Thus,

under the particular facts of this case, the grievant will not be required to meet with the Warden, who will nonetheless provide a written response within 5 work days of the agency's receipt of this ruling. The grievant must be allowed to have the face-to-face meeting with the third step respondent. This Department's rulings on matters of compliance are final and nonappealable.<sup>5</sup>

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Claudia T. Farr  
Director

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<sup>5</sup> See Va. Code §§ 2.2-1001(5), 2.2-3003(G).