

Issue: Compliance – Grievance Procedure (2<sup>nd</sup> Step Meeting); Ruling Date: October 18, 2010; Ruling #2011-2781; Agency: Virginia Community College System; Outcome: Agency in Compliance (in part), Agency Not in Compliance (in part).



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of the Virginia Community College System  
Ruling Number 2011-2781  
October 18, 2010

The grievant has requested a compliance ruling in his grievance with the Virginia Community College System (the agency) due to the agency's alleged failure to comply with the grievance procedure during the second management step.

FACTS

On or about August 18, 2010, the second step meeting occurred in this grievance. The following individuals attended this meeting: the grievant, his representative, the second step-respondent, the agency representative, and the grievant's supervisor. The grievant has now raised various issues with how the meeting was conducted. He disputes some of the second step-respondent's statements of facts and inclusion of certain items in the second step response when, as the grievant alleges, he was prevented from presenting documents about some past issues. The grievant had also requested at least one other agency employee to appear as a witness at the meeting. This individual had previously indicated he would attend, but later stated that he would not. Although this individual did not attend, the second step-respondent sent a list of questions to the individual by e-mail after the meeting to which this individual did provide a response. The grievant also argues that his supervisor should not have been permitted to attend the entire meeting.

DISCUSSION

This Department has reviewed the grievant's ruling request and distilled the issues raised into the following topics. These are taken from the requests for clarification at the end of his ruling request and are addressed separately below.

*Failure to Compel Witnesses*

The grievant alleges that the agency failed to comply with the grievance procedure by not compelling at least one witness, who was also apparently employed by the agency, to attend the grievant's second step meeting. As this Department has previously held, the grievance procedure does not require agencies to compel witnesses to participate in a second step fact-

finding meeting.<sup>1</sup> 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, 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 a hearing officer to appear as a witness.<sup>2</sup> 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.<sup>3</sup>

#### *Presence of Supervisor during Meeting*

The *Grievance Procedure Manual* clearly establishes who is permitted to be present at a second step meeting: the employee, an individual selected by the employee, the second step-respondent and an individual selected by the second step-respondent.<sup>4</sup> While either party may call witnesses, these witnesses "must not be present except while providing information."<sup>5</sup> Therefore, the agency violated this provision by allowing the grievant's supervisor, who was neither the second step-respondent nor the individual selected by the second step-respondent as a representative, to attend the entire second step meeting.

Failure to conduct an appropriate second step meeting could lead to this Department ordering the agency to hold the meeting again. However, we cannot find that the grievant was materially prejudiced by having his supervisor present at this meeting, such that a new second step meeting would be required. Therefore, while the agency has failed to comply with the grievance procedure in this respect, we will not order that a new second step meeting be held. The agency, however, should be mindful of the provisions of the *Grievance Procedure Manual* in its handling of this grievance and any future grievances by this or other employees. Continued and repeated noncompliance by an agency could lead to a finding of substantial noncompliance with the grievance procedure.

---

<sup>1</sup> See EDR Ruling No. 2010-2433; EDR Ruling No. 2006-1311.

<sup>2</sup> *Rules for Conducting Grievance Hearings* § III(E).

<sup>3</sup> *Id.* at § V(B).

<sup>4</sup> *Grievance Procedure Manual* § 3.2; see also Va. Code § 2.2-3003(D).

<sup>5</sup> *Grievance Procedure Manual* § 3.2.

*Content of the Second Step Response*

The grievant has also raised questions about the topics in the second step response.<sup>6</sup> This Department has reviewed the response and finds that it does not violate any provision of the *Grievance Procedure Manual* by including certain items such as the procedural history here. As such, in submitting a response, if the grievant chooses to do so, he may include facts about past issues that are relevant to the claims originally asserted in this grievance.<sup>7</sup>

The parties should note that a grievant may not add claims to a grievance once it is initiated.<sup>8</sup> Therefore, to the extent the grievant's response might include additional "claims" for which relief is sought, such claims would be invalid for purposes of this grievance. Importantly, too, this Department defines a "claim" raised by a grievance as the management action being challenged, not as the various supporting arguments or background evidence proffered by a grievant as to why the challenged management action is allegedly improper.<sup>9</sup> As such, a grievant may not challenge additional management acts or omissions in a grievance after that grievance has been initiated. However, a grievant may submit additional background information, arguments or theories about the management acts or omissions that were challenged in the grievance as filed.<sup>10</sup> Significantly, while a grievant is certainly permitted to proffer such information in an attempt to support his/her challenge to the management acts or omissions originally grieved, a grievant is not entitled to receive relief through his/her grievance for any additional management acts or omissions so proffered.<sup>11</sup>

While this Department finds no other noncompliance with the second step response, further comment is warranted. Under the section entitled "Agency's Position," the second step-respondent states:

It is the College's position that the Grievant experienced no adverse employment action whatsoever; therefore, the matter should be addressed through informal processes and discussions. The College asserts that the Grievant did not meet the rules for initiating a grievance and that he is using the grievance procedure to harass and/or impeded the efficient operations of government at the College.

These precise assertions were addressed in EDR Ruling No. 2010-2649.<sup>12</sup> This Department is the final arbiter of procedural compliance with the grievance procedure.<sup>13</sup> EDR

---

<sup>6</sup> The grievant also appears to raise certain factual disputes with the second step response. If the grievant chooses, he may assert such disputes in an attachment to the grievance package when submitted to the third step-respondent. Factual disputes of this nature do not rise to the level of any procedural noncompliance here.

<sup>7</sup> For example, if the grievant is alleging favoritism by his supervisor based on race, past examples of conduct by the supervisor consistent with such an intent could be relevant.

<sup>8</sup> *Grievance Procedure Manual* § 2.4.

<sup>9</sup> See, e.g., EDR Ruling No. 2010-2506; EDR Ruling No. 2007-1561 & 2007-1587.

<sup>10</sup> See, e.g., EDR Ruling No. 2009-2107; EDR Ruling No. 2008-1984.

<sup>11</sup> See, e.g., EDR Ruling No. 2008-1984; EDR Ruling No. 2003-098 & 2003-112.

<sup>12</sup> Numerous other assertions of fact on this topic included in the second step-response were also considered and addressed in the same ruling.

<sup>13</sup> Va. Code §§ 2.2-1001(5); 2.2-3003(G).

Ruling No. 2010-2649 clearly held that the grievant did indeed meet the requirements for initiating a grievance. To the extent that the agency is seeking to have this Department reconsider that holding, we find no reason to reverse our earlier ruling and the agency has provided no evidence to persuade this Department to do so. To repeat, this grievance was properly initiated under the Commonwealth's grievance procedure. The agency's continued adherence to a contrary position, in the absence of any new evidence or argument, could be viewed as demonstrating contempt<sup>14</sup> for the process in general and for the grievant's protected activity specifically in contravention of the Code of Virginia.<sup>15</sup>

These statements are not made to absolve the grievant of any wrongdoing. If in the future through his continued use of the grievance procedure or in his handling of this grievance his conduct is shown to rise to the level of harassment or impeding the efficient operations of government, it can and should be appropriately sanctioned. Absent such future conduct, however, the agency would be well-advised to accept the final holding in EDR Ruling No. 2010-2649. By submitting his grievance and proceeding reasonably through the process, the grievant has not violated the requirements of the grievance procedure. The parties shall conduct themselves consistent with this Department's rulings and the provisions of the *Grievance Procedure Manual*.

#### CONCLUSION

Based on the foregoing, this Department finds no issues of noncompliance warranting a new second step meeting or amended response by the second step-respondent. As such, **within five workdays of receipt of this ruling**, the grievant shall either submit the grievance package to the third step-respondent or notify the agency that he is concluding his grievance, while making the appropriate indication on the Grievance Form A.<sup>16</sup> This Department's rulings on matters of compliance are final and nonappealable.<sup>17</sup>

---

Claudia T. Farr  
Director

---

<sup>14</sup> In response to the grievant's current ruling request, the agency's representative states that while the agency has complied with the ruling, it continues to view EDR Ruling No. 2010-2649 as "erroneous."

<sup>15</sup> *E.g.*, Va. Code § 2.2-3000.

<sup>16</sup> *See Grievance Procedure Manual* § 3.2.

<sup>17</sup> *See* Va. Code §§ 2.2-1001(5), 2.2-3003(G).