

Issue: Compliance – Grievance Procedure (Second Step Meeting); Ruling Date: October 15, 2010; Ruling #2011-2803; Agency: State Board of Elections; Outcome: Grievant Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the State Board of Elections
Ruling Number 2011-2803
October 15, 2010

The State Board of Elections (the agency) has requested a compliance ruling in two grievances that the grievant initiated on or about September 10, 2010. The parties have been unable to agree on the appropriate process for the second step meeting.

FACTS

Both of the grievant's September 10, 2010 grievances were submitted as expedited because they challenge his termination. In his grievances, he has alleged that the agency head has engaged in discrimination and/or retaliation that led to his termination. Because of the small size of this agency and the grievant's former position, in this grievance, the agency head would normally serve as the only step-respondent. Consequently, the face-to-face second step meeting in the expedited process was to occur with the agency head. On the basis of his discrimination and retaliation allegations, however, the grievant wishes to waive this face-to-face meeting and receive only a written response. The agency has offered to have the grievant meet with a deputy of the agency head rather than the agency head. The grievant has declined this offer. The agency has also offered to have the grievant answer written questions the agency head has, so that a written response at the second step can be made, with no face-to-face meeting required. The grievant has not agreed to this approach either and appears to want to proceed directly to hearing. The parties are essentially at an impasse.

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 noncompliance, and resolve any compliance problems voluntarily, without this Department's (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

¹ *Grievance Procedure Manual* § 6.3.

noncompliance.² If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from the EDR Director, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for the delay in conforming to EDR's order.³

This Department has ruled in the past that under the grievance procedure, both management and employees generally have an equal interest in and entitlement to at least one face-to-face meeting during the management resolution steps. Absent an agreement between the parties to waive the face-to-face meeting entirely, the grievance procedure requires that such a meeting be held.⁴ However, in grievances alleging retaliation or discrimination, the grievance procedure also 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.⁵ 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.⁶

The application of these rules to the facts of this case present an unusual situation. The grievant generally has the right to waive the face-to-face meeting with the agency head here, as the alleged perpetrator of discrimination and/or retaliation. However, this Department has ruled that in expedited grievances, like this one, when the grievant waives the face-to-face meeting with the second step-respondent, the meeting shall be held with the person who would otherwise

² *Id.* Given the exchanges that have already occurred between the parties about the second step meeting issue, this notification requirement has been effectively met in this case.

³ While in cases of substantial noncompliance with procedural rules the grievance statutes grant the EDR Director the authority to render a decision on a qualifiable issue against a noncompliant party, this Department favors having grievances decided on the merits rather than procedural violations. Thus, the EDR Director will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, this Department will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

⁴ *E.g.*, EDR Ruling No. 2010-2576; EDR Ruling No. 2008-1991. Further, Number 13 of the Frequently Asked Grievance Questions on EDR's website provides that "any party to a grievance has a right to insist on the second-step meeting, and if either party demands it, then the second-step meeting generally must take place." Frequently Asked Grievance Questions, No. 13, <http://www.edr.virginia.gov/faqs.htm>.

⁵ *Grievance Procedure Manual* § 3.2.

⁶ *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.*

serve as the third step-respondent (were the grievances not expedited).⁷ In these two grievances, however, the agency head is the only step-respondent. As such, this Department must determine a suitable case-specific outcome that fulfills all these requirements as much as is possible.

In this Department's view, the agency provided the grievant two reasonable options: 1) attend a face-to-face meeting with a deputy agency head and receive a written response by that individual, OR 2) respond to written questions with no face-to-face meeting and receive a written response by the agency head.⁸ Either one of these options generally satisfies the above rules by not requiring the grievant to confront face-to-face the alleged perpetrator of discrimination and/or retaliation, and by also fulfilling the general fact-finding purpose of the meeting. Because either option appears acceptable to the agency, the grievant is directed to choose one of them to proceed with his grievances. **Within five workdays of receipt of this ruling**, the grievant shall elect his choice. Once this information is provided, the grievances shall commence at this second step stage based on the choice of the grievant.

The grievant and the agency should be mindful that the second step meeting stage is a means for the parties to a grievance to communicate and fact find, and that both sides bring their own perspectives, experiences, and understandings. Although with either option above a step-respondent should preside over the second step phase 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 grievants and agency management to exchange information and attempt to resolve the issues themselves, without the assistance of a neutral third party. Each party has a right to such a meeting, absent an agreement between the parties to waive it. Further, while the resolution step process involves only the parties to a grievance, if a grievance is qualified, the hearing process allows grievants an opportunity to present claims to a neutral, third-party hearing officer for resolution.

This Department's rulings on matters of compliance are final and nonappealable.⁹

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Director

⁷ EDR Ruling Nos. 2009-2106, 2009-2125. The parties could also agree on another substitute for the meeting. *Id.*

⁸ The grievant would also have the right to submit questions to the agency head and receive answers. Further, the grievant could submit any documents and/or witness statements for consideration by the agency head, and vice versa. *See Grievance Procedure Manual* § 3.2.

⁹ *See* Va. Code §§ 2.2-1001(5), 2.2-3003(G).