

Issue: Access/to the grievance procedure; Compliance/second-step meeting; Documents;
Ruling Date: April 6, 2006; Ruling #'s 2006-1279, 2006-1315; Agency: Germanna
Community College; Outcome: grievant has access; Compliance/agency in compliance;
Documents/agency must adhere to instructions in ruling



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS AND COMPLIANCE RULING OF DIRECTOR

In the matter of Germanna Community College
Ruling Number 2006-1279 and 2006-1315
April 6, 2006

The grievant has requested a ruling in her December 15, 2005 grievance with Germanna Community College (agency) on whether the agency is out of compliance with the grievance procedure by failing to hold a second-step meeting. The grievant also requests a ruling on whether the agency improperly denied her access to the grievance procedure in conjunction with her February 20, 2006 grievance¹ and whether the agency's actions relating to that grievance constituted noncompliance.

FACTS

December 15th Grievance

The grievant was employed by the agency as an Administrative and Program Specialist III. She began work at the agency in 1993 and worked there until she was terminated with a Group III Written Notice under the Standards of Conduct on November 18, 2005 for purportedly being absent in excess of three days without proper authorization or a satisfactory reason. The grievant challenged her termination in a grievance that she initiated on December 15, 2005. In that grievance, not only did the grievant challenge her termination but she raised the issues of disability and age discrimination as well as workplace harassment and intentional infliction of emotional distress.

On January 4, 2006, the grievant was involved in an automobile accident on the way to the second-step meeting. As a result, she was taken to the hospital where she asked her husband to contact the agency to inform them that she would be unable to attend the meeting and that she would contact the agency as soon as she was able to travel again. The husband relayed this message, and the next day, the grievant sent a follow-up email to the same effect. In reply, the Second-Step Respondent requested that the grievant let her know when she was able to reschedule.

On January 19, 2006, the Second-Step Respondent, the Vice President for Academic Services, sent the grievant a correspondence captioned "Second Step Resolution to Employee Grievance." In that letter, the Second-Step Respondent rescinded the Group III Written

¹ The grievance is dated February 17, 2006, but was not received by the agency until February 20, 2006.

Notice and Termination. She further proposed that if the grievant still wanted a second step meeting to contact the agency to schedule a meeting but otherwise she suggested that the response serve as a complete second-step response.

On January 27, 2006, the grievant informed the agency head (President of the College) that the agency was non-compliant by forgoing the second-step meeting. She explained that she had “not elected to forgo the required” meeting and that she would contact the agency when she was ready to reschedule.

On January 31, 2006, the agency head responded by stating that because the Group Notice and Termination had been rescinded and the grievant had all back pay and benefits reinstated, given the limited scope of her grievance (her termination), the issue had been resolved through the reinstatement of her employment. Accordingly, he found the grievance to be moot. The grievant requested a compliance ruling from this Department on February 8, 2005.

February 20th Grievance

On February 17, 2006, the grievant attempted to return to work after a period of Short Term Disability (STD) following her traffic accident. She asserts that she was informed that she did not have a job to return to because she had moved into Long Term Disability that same day. The grievant initiated a grievance three days later asserting: (1) the agency failed to follow state policy as it relates to job protection, (2) constructive termination of employment, (3) disability discrimination, and (4) retaliation.

On March 3, 2006, the Second-Step Respondent replied to the grievance. On March 8, 2006 the grievant informed the agency head that, among other problems, the Second-Step Respondent’s response was not adequate. The grievant also made a document request in her March 8th noncompliance letter.

On March 9, 2006, the agency head responded to the grievant stating that the grievant did not have access to the grievance procedure when she initiated her February 20th grievance and that it would not take any action on the alleged noncompliance until this Department ruled on the issue of access. The agency head informed the grievant of her option to appeal the access issue to this Department, which she did on March 17, 2006.

DISCUSSION

December 15th Grievance Noncompliance

The grievant alleges that the agency was non-compliant by failing to grant her a second-step meeting. 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.² Moreover, under Va. Code § 30003(D), “[a]t least one face-to-face meeting between the employee and management shall be required.” Accordingly, a party may not unilaterally deny the other the right to a second-step meeting.

Furthermore, the President’s contention that the scope of the December 15, 2005 grievance was limited to the grievant’s termination is incorrect. The grievance asserts that the grievant’s termination “was *part of—and the culmination of*—age and disability discrimination and workplace harassment,” that began in January 2005.³ In addition, age and disability are expressly listed as issues on the Grievance Form A. These issues do not become moot simply because the grievant has been reinstated. If a discrimination grievance is unilaterally closed by the agency merely because it has elected to provide relief, substantial or otherwise, the employee is denied the opportunity to request from a hearing officer, assuming that the grievance qualified, a judicially enforceable order instructing the agency to refrain from discrimination. Accordingly, the agency is ordered to schedule a second-step meeting within 5-workdays of receipt of this ruling.

February 20th Grievance—Access

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.⁴ Under the grievance procedure, employees “must have been employed by the Commonwealth at the time the grievance is initiated (unless the action grieved is a termination or involuntary separation).”⁵ The grievance procedure further states that if this criterion is not met, an agency may deny an employee access to the grievance procedure.⁶ In this case, the grievant is challenging the agency’s termination of her employment by virtue of her purported movement into Long Term Disability (LTD).

The Department of Human Resource Management (DHRM), the agency charged with implementation and interpretation of the Commonwealth’s personnel policies, considers an employee “separated” from Commonwealth employment once she moves into LTD, unless the agency has elected to keep the employee’s position open for her. As with any separated employee, an individual on LTD may use the grievance procedure to challenge her separation from state service, i.e., her placement into LTD, so long as she is not exempt from the Virginia Personnel Act (VPA) and was “a non-probationary employee of the Commonwealth at the time of the event that formed the basis of the dispute occurred.”⁷ In this case, the grievant was a non-probationary employee at the time she was allegedly moved into LTD (separated from employment) and she was not exempt from the VPA. Accordingly, she has access to the grievance procedure.

² Va. Code §2.2-3003(D).

³ Grievance Form A, item # 10, (emphasis added).

⁴ Va. Code § 2.2-3001(A).

⁵ *Grievance Procedure Manual* § 2.3.

⁶ *Id.*

⁷ *Id.*

The February 20th grievance asserts that the grievant's termination was retaliatory and a form of disability discrimination. Because these are essentially theories as to why the grievant believes that she was terminated/involuntary separated, she may continue to advance these issues as part of her grievance.

February 20th Grievance—Noncompliance

The agency head stated that he would not address the issues of noncompliance until the issue of access was settled. Now that that issue has been resolved, this Department believes that it is appropriate to address the grievant's concerns in this ruling in order to expedite the processing of the grievance.

Inadequate Second-Step Response

First, the grievant asserts that the Second-Step Respondent did not respond to the issues set forth in her grievance. This Department finds that the agency's response does not adequately address the grieved issues. The Second-Step Respondent asserts that "while [the grievant] may believe she has issues with Unum Provident [the Commonwealth's third party administrator of VSDP], these issues are beyond the scope of my examination, and I will not make comment related to them." While the agency had no obligation to respond to the issues that the grievant may have with Unum Provident, the agency is required to address the grievant's assertion that the agency played a role in the grievant's allegedly wrongful termination. Because the grievant may have issues with another party does not permit the agency to ignore claims purportedly involving agency actions, for instance, the grievant's claim that that the *agency* colluded with Unum Provident to wrongfully terminate her employment or that the *agency* violated VSDP policy by filling her position while she was on STD.⁸ Accordingly, within 5-workdays of receipt of this ruling, the Second-Step Respondent is ordered to address those agency-related issues raised in the grievance.

Second-Step Respondent's Neutrality

In addition, the grievant asserts that the Second-Step Respondent "appears to be representing the College's interests during this meeting rather than conducting an impartial fact-finding meeting." The grievance procedure does not expect the Second-Step Respondent to serve as a disinterested party. As we explained in EDR Ruling 2004-916:

Although a step respondent should conduct the meeting in an even-handed manner and with an open mind, he is a member of management, not a neutral party. While we recognize the frustration for grievants that may result from this, allowing the disqualification of step respondents because of their managerial actions would throw the resolution step process into

⁸ See grievance issues: "B. Constructive termination of employment" and "A. Agency noncompliance with Virginia Department of Human Resources Management (DHRM) Policy 4.57, 'Virginia Sickness and Disability Program,' as it relates to Job Protection." See also grievance items #26 (Unum Provident and the agency "colluded") and #27 (agency filled the grievant's position while she was on STD).

chaos, if not render it wholly ineffectual. Further, while the resolution step process involves only the parties to a grievance, the hearing process allows grievants an opportunity to present qualifying claims to a neutral, third-party hearing officer.

Accordingly, we find no noncompliance as to this issue.

Failure to Advise as to Procedural Options

The grievant also asserts the agency did not notify her of her procedural options under the grievance procedure. The second-step response did not inform the grievant of her procedural options. The grievance procedure states that the response “should notify the employee of [her] procedural options.”⁹ Accordingly, the Second-Step Respondent is directed to so inform the grievant of her options in her forthcoming second-step response: seeking qualification for hearing from the agency head or concluding her grievance.

Agency’s Failure to Present Witnesses at the Second-Step Meeting

The grievant notes her concern that the agency presented no witnesses at the second-step meeting. Parties are allowed to bring witnesses to the second-step meeting, not required. The fact that the agency elected not to bring any witnesses to the meeting does not constitute noncompliance with the grievance process.

Request for Documents

In her March 8th letter to the agency head, the grievant also makes a document request. She asks for copies of notes taken by the Second-Step Respondent at the second step meeting and a copy of the document that was read at the second-step meeting that sets forth the agency’s position during this meeting. The grievant further requests that the Second Step Respondent identify: (1) what statements contained in her February 17th grievance the “College believes are inaccurate and unrepresentative of the true facts,” (2) the facts obtained by the Second-Step Respondent during the second step meeting, and (3) the source of the facts that support the findings set forth in the second-step response.

The grievance statute provides that “[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to actions grieved shall be made available upon request from a party to the grievance, by the opposing party.”¹⁰ This Department’s interpretation of the mandatory language “shall be made available” is that absent just cause, all relevant grievance-related information *must* be provided.

The grievance statute further states that “[d]ocuments pertaining to nonparties that are relevant to the grievance shall be produced in such a manner as to preserve the privacy of the

⁹ *Grievance Procedure Manual* § 3.2.

¹⁰ Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

individuals not personally involved in the grievance.”¹¹ Documents, as defined by the Rules of the Supreme Court of Virginia, include “writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.”¹² While a party is not required to create a document if the document does not exist,¹³ parties may mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects the privacy interests of third parties, such as a chart or table, in lieu of production of original redacted documents. To summarize, absent just cause, a party must provide the other party with all relevant *documents* (as opposed to information) upon request, in a manner that preserves the privacy of other individuals.

This Department has also long held that both parties to a grievance should have access to relevant documents during the management steps and qualification phase, prior to the hearing phase. Early access to information facilitates discussion and allows an opportunity for the parties to resolve a grievance without the need for a hearing. To assist the resolution process, a party has a duty to conduct a reasonable search to determine whether the requested documentation is available and, absent just cause, to provide the information to the other party in a timely manner.

Here the agency head stayed his response to the grievant’s document request until the issue of access was addressed. Now that this issue has been resolved, the agency has a duty to search its records to ensure that, absent just cause, all such relevant documents are provided. All such documents must be provided within 5-workdays of receipt of this ruling. If it is not possible to provide the requested documents within the 5-workday period, the party must, within 5-workdays of receiving this ruling, explain in writing why such a response is not possible, and produce the documents no later than 10-workdays from the receipt of this ruling. If responsive documents are withheld due to a claim of irrelevance and/or “just cause,” the agency must provide the grievant with a written explanation of each claim, no later than 10-workdays from the receipt of this ruling.

This Department’s rulings on matters of compliance are final and nonappealable.¹⁴

Claudia T. Farr
Director

William G. Anderson, Jr.

¹¹ *Id.*

¹² See Rules of the Supreme Court of Virginia, Rule 4:9(a)(1).

¹³ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

¹⁴ Va. Code §2.2-3003(G).

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