



JANET L. LAWSON  
DIRECTOR

**COMMONWEALTH OF VIRGINIA**  
*Department Of Human Resource Management*  
*Office of Employment Dispute Resolution*

James Monroe Building  
101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, Virginia 23219

Tel: (804) 225-2131  
(TTY) 711

**COMPLIANCE RULING**

In the matter of the Department of Corrections  
Ruling Numbers 2023-5492, 2023-5499  
January 13, 2023

The grievant has requested two compliance rulings from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management in relation to alleged noncompliance with the grievance procedure by the Department of Corrections (the “agency”) occurring at the second step of his grievances.

FACTS

On or about July 11, 2022, the grievant initiated a grievance challenging a selection process for a Major position at Facility A in which the grievant was not offered the position. The grievant claims that the agency has engaged in retaliation for his reporting of issues to management and prior grievance activity. The grievant was also not selected as the top candidate in other selection processes: 1) a Major position at Facility B, 2) a Captain position at Facility B, and 3) a Captain position at Facility C. The grievant submitted a new grievance on or about August 22, 2022, which, in addition to other matters, challenges not being selected for these positions. The grievant also reiterated his claims of retaliation and asserted that he is being discriminated against on the basis of race.

A second-step meeting for both grievances occurred on December 2, 2022. During the meeting, the grievant states he attempted to present additional evidence he believes is relevant to his grievances. The second-step respondent apparently told the grievant that he would not consider any issue or evidence that “was not contained in the written grievances.” The grievant indicates that he wanted to present evidence regarding the following issues: 1) a dispute about a Freedom of Information Act (FOIA) request the grievant submitted for certain 2022 emails about himself and the agency’s response thereto;<sup>1</sup> 2) an alleged failure to follow FOIA pursuant to a request that the grievant submitted for certain 2017 emails; 3) “inconsistencies” that allegedly occurred in a previous grievance the grievant submitted, which, the grievant asserts, shows the agency’s attempts to retaliate against him;<sup>2</sup> and 4) a case report issued by the Office of the State Inspector General (OSIG) concerning alleged misconduct the grievant states he reported in October 2020.

---

<sup>1</sup> The grievant indicates that he pursued a dispute over this FOIA request to circuit court.

<sup>2</sup> As far as EDR is aware, the previous grievance is on active appeal at the Court of Appeals. The grievant states he attempted to give the second-step respondent a copy of the brief he filed in the matter in court.

The grievant asserts that the second-step respondent's failure to receive and consider evidence on these issues is noncompliant with the grievance procedure.

In addition, the grievant asserts that the second-step respondent's written responses to his grievances do not comply with the grievance procedure. The grievant states that the second-step respondent failed to address issues concerning the selection processes challenged in his grievances. The second-step respondent has provided an amended response, dated December 27, 2022 and sent to the grievant on January 6, 2023, further addressing the issues of the grievances. Having provided notice of noncompliance to the agency head, the grievant has sought rulings to address the alleged issues of noncompliance with the grievance procedure.

### DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>3</sup> That process assures that the parties first communicate with each other about the noncompliance, and resolve any 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.<sup>4</sup> If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from EDR, 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 EDR finds that either party to a grievance is in noncompliance, its 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.<sup>5</sup>

#### *Limiting issues at second-step meeting*

Section 3.2 of the *Grievance Procedure Manual* describes the meeting that normally occurs at the second resolution step:

*The purpose of the second-step meeting is fact-finding and should include open discussion of the grievance issues to promote understanding of the other party's position and possible resolution of the workplace issues. Accordingly, the parties are encouraged to present information relevant to the grievance at this meeting. While the parties may question one another regarding disputed facts and issues, the meeting should not be adversarial or treated as a hearing. The second-step respondent is charged with presiding over the meeting and must do so in an even-handed manner. Thus, for example, while the second-step respondent could*

---

<sup>3</sup> *Grievance Procedure Manual* § 6.3.

<sup>4</sup> *See id.*

<sup>5</sup> Although the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party in cases of substantial noncompliance with procedural rules, EDR favors having grievances decided on the merits rather than procedural violations. Thus, EDR 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, EDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

*limit the introduction of repetitive information, they should not prohibit an employee from disclosing relevant information not previously provided.*

The grievant states that the second-step respondent refused to consider any issue that “was not contained in the written grievances.” The grievance procedure contemplates that in presiding over the meeting, a second-step respondent may limit the introduction of evidence, so long as the employee is not prohibited from presenting relevant information. A pronouncement of limiting discussion to the issues “contained in the written grievances” would appear to be generally consistent with determining the relevant subject matter of a grievance by the management actions or omissions grieved.<sup>6</sup> That being said, a factual issue need not be specifically stated on the grievance form or an attachment prior to the meeting to be appropriate for discussion. However, it follows that the factual matter must be relevant to the actions grieved.

The matters identified by the grievant that he states he was prevented from presenting evidence about are two FOIA requests, “inconsistencies” from a previous grievance, and an OSIG Report from 2020. EDR cannot find the second-step respondent’s apparent determination that such topics are not directly relevant to the management actions challenged (four selection processes) to be inconsistent with their authority as the step respondent presiding over the meeting pursuant to the grievance procedure. Based on the information made available in the compliance ruling request, EDR cannot find that these matters are of such clear relevance that the grievance procedure required the second-step respondent to include discussion of those issues during the meeting. Indeed, some of the topics are not proper considerations for the current grievance. For example, to the extent the grievant believes that the agency has failed to comply with the requirements of FOIA, EDR has no authority to address or enforce those requirements under the grievance process.<sup>7</sup> Further, the alleged “inconsistencies” occurred in a previous grievance that appears to still be active on appeal with the Court of Appeals. Accordingly, we cannot find that limiting discussion at the meeting from these topics would be considered noncompliance with the grievance procedure under these facts. If there is any other evidence the grievant believes he was prevented from presenting, he has not provided a description of the evidence in support of his ruling request.

EDR will additionally note that if these grievances proceed to either a qualification ruling by EDR or a grievance hearing, the second-step respondent’s determination does not limit either EDR or a hearing officer from considering information deemed relevant to the grieved issues. Thus, for example, the grievant should feel free to submit any information he believes relevant to his grievances to EDR at the time a qualification ruling is requested, if the grievances reach that stage. Similarly, if the grievances proceed to a grievance hearing, the grievant will be able to present evidence determined to be relevant to the actions grieved by the hearing officer.

#### *Adequacy of resolution step response*

Following the second-step meeting, “the second-step respondent must provide a written response . . . [that] must address the issues and the relief requested and should notify the employee of their procedural options.”<sup>8</sup> While the management respondent is not required to take up each

---

<sup>6</sup> See *Grievance Procedure Manual* § 2.4; § 3.2

<sup>7</sup> EDR has already addressed certain related issues concerning documentation requests in a compliance ruling in these grievances. See EDR Ruling Nos. 2023-5448, 2023-5453.

<sup>8</sup> *Grievance Procedure Manual* § 3.2.

and every point or factual assertion raised by the grievant, he must generally address each issue raised and the requested relief.<sup>9</sup> The grievant was correct to identify that at least as to his August 22, 2022 grievance, the initial second-step response was not adequate under the requirements of the grievance procedure. The selection processes challenged should have been addressed by the second-step respondent as these appear to be the management actions that gave rise to the initiation of the grievances.

On January 6, 2022, the grievant was sent an amended second-step response. Having reviewed the amended response in the context of the particular facts surrounding this case, EDR concludes that it is adequate for purposes of compliance with the grievance procedure. The response addresses the topics of the selection processes and the surrounding issues of the grievances, even if the response does not expressly respond to every allegation and argument the grievant has set forth in support of his claims. Accordingly, EDR finds that the amended response substantially complies with the requirements of the grievance procedure.

#### CONCLUSION

Based on the foregoing, EDR finds that the agency has substantially complied with the requirements of the grievance procedure in conducting the second-step meeting and by adequately addressing the issues and relief requested in a written response. To proceed with the grievances, the grievant must either advance the grievances or notify the agency's human resources office in writing that he wishes to conclude his grievances **within five workdays of receipt of this ruling.**

*Christopher M. Grab*  
Director  
Office of Employment Dispute Resolution

---

<sup>9</sup> E.g., EDR Ruling No. 2018-4718; EDR Ruling No. 2016-4195.