

Issue: Compliance – Grievance Procedure (Resolution Steps); Ruling Date: January 27, 2017; Ruling No. 2017-4475; Agency: Department of Game and Inland Fisheries; Outcome: Agency in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution¹

COMPLIANCE RULING

In the matter of the Department of Game and Inland Fisheries
Ruling Number 2017-4475
January 27, 2017

The grievant has requested a ruling 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 Game and Inland Fisheries (the “agency”).

FACTS

The grievant is employed by the agency as a Conservation Police Sergeant. On December 8, 2016, the grievant initiated a grievance with the agency challenging the agency’s selection process for two positions in which he competed unsuccessfully. The second step-respondent issued a written response to the grievant, without conducting a face-to-face meeting, on or about December 28. The grievant notified the agency head on December 30 that the agency had not complied with the grievance procedure because no second step meeting was held prior to the issuance of the second step response. In his notice of noncompliance, the grievant further alleged that the second step-respondent was “not the proper respondent” and had “an inescapable conflict of interest” because he was involved in the recruitment process for one of the positions challenged in the grievance.

In response, the agency informed the grievant that it intended to hold the required face-to-face meeting with the third step-respondent, who would be “more impartial” because he was not involved in the selection process or, in the alternative, offered to schedule the meeting with the designated second step-respondent. The agency further noted that “the appropriate personnel” had responded to the grievance. The grievant requested a compliance ruling from EDR on January 6, 2016, alleging that (1) the agency’s selection of the second step-respondent was not consistent with its list of designated step-respondents, and (2) both the first and second step-respondents had “conflict[s] of interest” due to their involvement in the selection process, and (3) the agency did not hold the second step meeting before issuing the second step response. The grievant further asserts that the agency has “violated a substantial procedural requirement of the Grievance Procedure” and requests that EDR “render a decision in favor of the Grievant.”

¹ Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as “EDR” in this ruling to alleviate any confusion. EDR’s role with regard to the grievance procedure remains the same post-merger.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.² That process assures that the parties first communicate with each other about the 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.³ 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 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.⁴

Selection of Step-Respondents

Under the grievance procedure, each agency must designate individuals to serve as respondents in the resolution steps. A list of these individuals shall be maintained by the agency's Human Resources Office and is also available on EDR's website. Each designated step-respondent shall have the authority to provide the grievant with a remedy, subject to the agency head's approval.⁵ Pursuant to its statutory responsibilities, EDR has long collected and maintained each agency's designated step-respondents. This assures that each agency's management resolution step-respondents are appropriate, known to employees and to EDR, and that this phase of the grievance process is administered consistently and fairly.

An agency's careful designation of step-respondents, and consistent adherence to those designations, is crucial to an effective grievance process. Step-respondents have an important statutory responsibility to fulfill and should decline to serve only in extenuating circumstances, such as extended illness or serious injury. Further, if a step-respondent cannot serve in that capacity pending a particular grievance, management should seek an agreement with the grievant on a substituted step-respondent and should put any agreement in writing. Absent an agreement between the parties, the agency must adhere to the designated list of step-respondents. In this case, the agency's designated first step-respondent is the grievant's immediate supervisor, and the second step-respondent is the Division Director. The agency has informed the grievant that the appropriate individuals have been selected to serve as step-respondents, and EDR has reviewed nothing to suggest that the agency's designation of step-respondents in this case is improper.

² *Grievance Procedure Manual* § 6.3.

³ *See id.*

⁴ While in cases of substantial noncompliance with procedural rules the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party, 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.

⁵ *See* Va. Code § 2.2-3003(D).

Furthermore, EDR is not persuaded by the grievant's claims that the first and second step-respondents in this case had a "conflict of interest" that would disallow either or both of them from acting as a step-respondents. The grievance procedure does not expect step-respondents to serve as disinterested parties.⁶ Allowing the disqualification of step-respondents solely because of their managerial actions or position in the agency's chain of command would throw the resolution step process into chaos, if not render it wholly ineffectual. The management resolution steps represent a communication process that takes place between the parties to a grievance, wherein both sides bring their perspectives, experiences, and understandings to that process. Although step-respondents should carry out their duties in an even-handed manner and with an open mind, they are members of management and, like the grievant, are not neutral parties.⁷ Indeed, the management resolution phase of the grievance process was designed to allow the parties to the dispute to exchange information and attempt to resolve the issues themselves, without the assistance of a neutral third party. Accordingly, EDR finds that the agency's selection of step-respondents in this grievance complies with requirements of the grievance procedure.

Second Step Meeting

The *Grievance Procedure Manual* provides that, "[w]ithin 5 workdays of the second-step respondent's receipt of the grievance, the second-step meeting must be held."⁸ In this case, the second step-respondent issued a written response without holding a meeting, which does not comply with grievance procedure. After receiving the grievant's notice of noncompliance, however, the agency explained to the grievant that, due to his concern that the second step-respondent had a "conflict of interest," a meeting would be held with the third step-respondent instead. This approach is comparable to what would occur in cases where "an employee alleges retaliation or discrimination by an individual who would otherwise serve as the agency's second-step respondent."⁹ While the agency could have notified the grievant of this arrangement at an earlier stage in the grievance process, EDR has no basis to conclude that the agency intended to prevent the grievant from meeting with a representative of agency management.

Under the specific circumstances of this case, EDR finds that the parties should proceed to the third step, where a face-to-face meeting must be held with the third step-respondent. The agency has agreed to provide the grievant an additional opportunity to present his concerns about the selection processes to upper levels of management that is not required by the grievance process, as a means of addressing his assertions that the first and second step-respondents were not impartial. In addition, EDR is not convinced that the second step should be repeated, and the grievant has provided no information to show why this would be necessary. There is nothing to indicate that a meeting with the second step-respondent would result in a second step response that materially differs in any way from the response that has already been provided. To the contrary, requiring the second step-respondent to hold a meeting and reissue a response would

⁶ See EDR Ruling Nos. 2006-1279, 2006-1315; EDR Ruling No. 2004-916.

⁷ See, e.g., EDR Ruling No. 2008-1991; EDR Ruling No. 2008-1870.

⁸ *Grievance Procedure Manual* § 3.2.

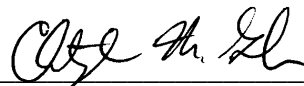
⁹ *Id.* In that situation, the grievant may either "[r]equest that the agency designate another second-step respondent" or "[w]aive the face-to-face meeting with the original second-step respondent and receive only a written second-step response to the grievance. If the employee elects to waive the face-to-face meeting with the original second-step respondent, the employee must be allowed to meet with the third-step respondent." *Id.*

only serve to waste time, duplicate effort, and needlessly delay the grievance process. In short, it is more efficient in this case to advance the grievance to the third step.

CONCLUSION

While 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 the grievance procedure,¹⁰ EDR favors having grievances decided on the merits rather than procedural violations. The agency's noncompliance in this case, if any, does not rise to the level that would justify such extreme action. To proceed with this grievance, the grievant must either advance his grievance to the third step or conclude his grievance **within five workdays of the date of this ruling**. If the grievant advances to third step, a face-to-face meeting must be held with the third step-respondent.

EDR's rulings on matters of compliance are final and nonappealable.¹¹



Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁰ Va. Code § 2.2-3003(G).

¹¹ See Va. Code §§ 2.2-1202.1(5); 2.2-3003(G).