

Issue: Compliance – Grievance Procedure (resolution steps); Ruling Date: March 8, 2017; Ruling No. 2017-4513; Agency: Virginia Information Technologies Agency; Outcome: Grievant in Compliance.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Employment Dispute Resolution<sup>1</sup>**

**COMPLIANCE RULING**

In the matter of the Virginia Information Technologies Agency  
Ruling Number 2017-4513  
March 8, 2017

The Virginia Information Technologies Agency (the “agency”) has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management in relation to the grievant’s February 23, 2017 grievance. The agency seeks a ruling from EDR addressing the appropriate step-respondents in this case and the handling of the grievance.

**FACTS**

The grievant is employed by the agency as an Information Technology Specialist III. On or about February 23, 2017, the grievant initiated a grievance with the agency alleging that her supervisor and her supervisor’s supervisor (the “Director”) have engaged in a series of discriminatory and/or retaliatory actions that have created a hostile work environment. In an updated version of the grievance, the grievant has marked the appropriate box on the Grievance Form A to indicate that she “decided not to present this grievance to [her] immediate supervisor” because she was alleging discrimination or retaliation by that individual, and further noted that she was alleging the same behavior by her “next level supervisor.” The grievant filed the grievance with the agency’s designated third step-respondent.

The agency requested a compliance ruling from EDR on March 3, 2017, arguing that the grievance should proceed through the normal management resolution steps because the grievant has not suffered an adverse employment action or proved that discrimination or retaliation have occurred. In addition, the agency alleges that the grievant has previously been advised of other state resources that may be used to pursue her allegations of discrimination, retaliation, and workplace harassment, and has apparently declined to pursue those methods of addressing these issues.

**DISCUSSION**

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

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<sup>1</sup> 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.

head's approval.<sup>2</sup> 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 or other special circumstances, the agency must adhere to the designated list of step-respondents.

In this case, however, the grievant is challenging alleged discrimination, retaliation, and harassment from her supervisor and the Director. These individuals have been designated by the agency as the first and second step-respondents, respectively, for grievances filed by employees at the grievant's level within the agency. The grievance procedure provides that "[a] grievance alleging discrimination or retaliation by the immediate supervisor may be initiated with the next level supervisor . . . ."<sup>3</sup> Similarly, in cases where "an employee alleges retaliation or discrimination by an individual who would otherwise serve as the agency's second-step respondent," she 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."<sup>4</sup> These procedural rules are intended to effectuate a principle long recognized by the courts in discrimination and retaliation lawsuits: that requiring such meetings could have a chilling effect on an employee's exercise of his rights under an employer's complaint procedure, and should be avoided.<sup>5</sup> Additionally, these provisions of the grievance procedure do not impose any requirement that a grievant suffer an adverse employment action or "prove" conclusively that improper or unlawful action has occurred.<sup>6</sup> It is sufficient for an employee to allege that she has experienced such behavior based on her membership in a protected class and/or her exercise of protected activity to invoke these provisions of the grievance procedure.<sup>7</sup>

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<sup>2</sup> See Va. Code § 2.2-3003(D).

<sup>3</sup> *Grievance Procedure Manual* § 2.4.

<sup>4</sup> *Id.* § 3.2.

<sup>5</sup> 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.*

<sup>6</sup> EDR's practice has not been to require such proof to utilize the exceptions discussed above. See, e.g., EDR Ruling No. 2010-2685.

<sup>7</sup> While EDR has previously found that there are some limitations to an employee's right to skip step-respondents or meet with alternate step-respondents, those limitations are not applicable in this case. See, e.g., EDR Ruling No. 2015-4116.

In this case, the grievant has directly identified her supervisor and the Director as the alleged perpetrators of her claims of discrimination and retaliation. Whether those allegations are substantiated by the facts is a matter to be considered and discussed by the parties during the management resolutions steps and, if warranted, addressed by a hearing officer. Under these circumstances, EDR finds that the grievant has adequately alleged discrimination and/or retaliation by the first and second step-respondents. Accordingly, the grievant has the right to bypass the first step-respondent, elect to have a face-to-face meeting with an alternate step-respondent instead of the Director and, if her issues are not resolved, continue to the third step. In the alternative, the grievant may waive the second step meeting with the Director and receive only a written second step response. If the grievant elects to receive a written response from the Director, a meeting with the third step-respondent must be held.

#### *Other State Processes*

In addition to its assertion that the grievance does not sufficiently allege discrimination, retaliation, and/or harassment that would permit the grievant to bypass her supervisor and the Director, the agency further argues that the grievant has been advised of another state process for pursuing these complaints on several occasions and has not availed herself of that process. EDR is uncertain as to the relevance of this information. There is no requirement under the grievance procedure that an employee attempt to file a formal complaint prior to initiating a grievance; indeed, the *Grievance Procedure Manual* specifically states that an employee may not initiate a grievance to challenge management action(s) that have been “pursued through another state process.”<sup>8</sup> The grievant’s choice to file a grievance rather than pursue a formal complaint with another state process has no bearing on whether this grievance may be initiated or whether there is merit to any of the allegations contained therein.

#### CONCLUSION

For the reasons set forth above, EDR finds that the grievant is entitled to bypass the first step-respondent and meet with an alternate second step-respondent designated by the agency, or receive a written response from the Director and meet with the third step-respondent. The grievant is directed to notify the agency whether she wishes to meet with an alternate second step-respondent, which the agency would designate, or waive the meeting and receive a written second step response from the Director **within five workdays of the date of this ruling**. The parties must then proceed through the management resolution steps in a manner that is consistent with the grievant’s choice and as discussed in this ruling.

EDR’s rulings on matters of compliance are final and nonappealable.<sup>9</sup>



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Director  
Office of Employment Dispute Resolution

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

<sup>9</sup> See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).