

Issue: Qualification – Grievance Procedure (Other Issue); Ruling Date: April 17, 2013; Ruling No. 2013-3569; Agency: Department of Motor Vehicles; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of the Department of Motor Vehicles
Ruling Number 2013-3569
April 17, 2013

The grievant has requested a ruling on whether his April 21, 2012 grievance with the Department of Motor Vehicles (the “agency”) qualifies for a hearing. In EDR Ruling Number 2013-3559, the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management declined to qualify the grievance for a hearing. The grievant has requested that EDR reconsider that ruling. For the following reasons, EDR will not change its original determination.

DISCUSSION

The facts underlying the grievance are set forth in EDR Ruling No. 2013-3559 and will not be repeated here.¹ In his request for reconsideration, the grievant argues that EDR erred in applying the “adverse employment action” standard in determining qualification. He further asserts that EDR should grant relief on the merits of his grievance on the basis that the agency conduct challenged in the April 21, 2012 grievance constitutes noncompliance with the grievance procedure. These arguments are addressed below.

Materially Adverse Standard

In its previous ruling in this matter, EDR concluded that the grievant had failed to meet his burden of showing that he had been subjected to an “adverse employment action.” In his request for reconsideration, the grievant argues that EDR should only have required the grievant to show a “materially adverse” action instead, because the grievance was initiated during a period when EDR used that standard.

¹ In conjunction with his request for reconsideration, the grievant has provided additional evidence of the involvement of Human Resources in the grievance process, as well as information regarding events taking place after the initiation of the grievance (in particular, a performance evaluation and suspension). As the issue is whether the conduct *grieved on April 21, 2012* constitutes a sufficiently adverse issue to qualify for hearing, the post-grievance conduct cited by grievant is not relevant. However, the grievant was free to challenge both of these actions through separate grievances, and he has apparently done so with respect to his suspension.

Assuming, for purposes of this ruling only, that the materially adverse standard were to apply, the result would not change. In its decisions assessing whether an agency's actions rose to the materially adverse action level, EDR would consider the totality of the circumstances and assess whether the agency's actions were harmful to the point that they could well dissuade a reasonable employee from participating in the protected conduct.² As noted by the Supreme Court, "normally petty slights, minor annoyances, and simple lack of good manners" do not establish "materially adverse actions" that are necessary to establish a retaliation claim.³ The conduct alleged by the grievant does not rise to the level of establishing a materially adverse action, nor is it enough to dissuade a reasonable employee from still participating in the grievance process. Accordingly, even under the materially adverse standard sought by the grievant, his grievance does not qualify for hearing.⁴

Noncompliance

The grievant also argues that the agency's alleged conduct constitutes noncompliance with the grievance procedure, and that this noncompliance warrants a determination in his favor on the merits of his grievance. The grievance procedure requires both parties to address procedural noncompliance through a specific process.⁵ 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 first notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.⁶ If the party fails to correct the alleged noncompliance, the complaining party may request a ruling from EDR.⁷

In this case, the grievant has not shown that he first notified the agency head in writing of the alleged violation and that he has given the agency five workdays to correct the purported noncompliance, as required by the grievance procedure.⁸ Further, the grievance for which the grievant was acting as first step-respondent has completed the agency resolution steps, and EDR will not now direct the agency to correct any alleged inappropriate conduct during the first step of that grievance. Finally, with respect to the grievant's request that EDR grant the relief sought in his grievance because of the conduct during that first step, there is no evidence that the agency's actions constituted substantial noncompliance or were motivated by bad faith or a gross disregard of the grievance procedure. As such, there is no basis to award the substantive relief sought by the grievant.⁹

² See EDR Ruling No. 2011-2839; See also *Rizzo v. Niagara Mohawk Power Corp.*, 2006 U.S. Dist. LEXIS 41987, at *18-20 (N.D.N.Y. June 22, 2006) (applying the materially adverse standard and noting that "a jury could consider the evidence in its totality and conclude that Defendants were engaged in a pattern of retaliation against Plaintiff").

³ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

⁴ See EDR Ruling Nos. 2011-2714, 2011-2753 (finding that supervisor's "questioning in an allegedly intimidating manner" and a due process letter did not constitute materially adverse actions, even if considered together); see also EDR Ruling No. 2011-2839.

⁵ See *Grievance Procedure Manual* § 6.

⁶ *Grievance Procedure Manual* § 6.3.

⁷ *Id.*

⁸ *Id.*

⁹ See EDR Ruling No. 2013-3511.

Retaliation Investigation

The grievant asks that, in the event his grievance is not qualified for hearing, EDR exercise its authority to conduct a retaliation investigation of his claims. Under Section 1.5 of the *Grievance Procedure Manual*, “[a]n employee may not pursue both a retaliation investigation and a grievance on the same management action or omission alleged to be retaliatory.” Accordingly, EDR cannot conduct a retaliation investigation on the grievant’s allegations, as he initially chose to pursue those claims through the grievance process.

CONCLUSION

For the reasons set forth above, EDR declines to reconsider its previous ruling in this case.¹⁰ EDR’s qualification and compliance rulings are final and nonappealable.¹¹



Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁰As this grievance has not been qualified for hearing, it is unnecessary to address the grievant’s request for consolidation.

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