

Issues: Compliance – Grievance Procedure (Resolution Steps and Other Issue);
Ruling Date: January 7, 2014; Ruling No. 2014-3783, 2014-3790; Agency: Virginia
Department of Transportation; Outcome: Agency in Compliance.



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

COMPLIANCE RULING

In the matter of the Virginia Department of Transportation
Ruling Numbers 2014-3783, 2014-3790
January 7, 2014

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) rule on various aspects of alleged noncompliance with the grievance procedure in his July 8, 2013 grievance by the Virginia Department of Transportation (the agency). The grievant asserts that the third step response has not complied with the grievance procedure. The grievant also disputes the validity of the agency's referral of his discrimination claims in the grievance for third party review by DHRM's Office of Equal Employment Services (OEES).

On November 25, 2013, the grievant provided the agency head a notice of noncompliance regarding the agency's response to his July 8, 2013 grievance at the third step. The grievant raises two main issues. First, he alleges that the agency has not returned to him the original Grievance Form A with a response in the appropriate box from the third step-respondent. Instead, the agency has sent him a copy of the Grievance Form A with the applicable third step section completed by both e-mail and hand-delivery.¹ Second, he alleges that the third step response is inadequate in that it does not address the issues and relief requested in his grievance or advise him of his procedural options. The agency has since amended the third step response following the notice of noncompliance.

After the grievant's original request for a ruling regarding the third step response, the agency submitted the grievance paperwork to DHRM's OEES for a third party review of the grievant's discrimination claims. This referral was directed to OEES by the third step-respondent. The grievant asserts that such a referral does not comply with the grievance procedure and seeks a compliance ruling from EDR after having provided the agency with notice of noncompliance.

Original Grievance Form A

The grievant asserts that the grievance procedure requires that the agency return the original Grievance Form A with each management step response. The grievant is not correct. No provision of the *Grievance Procedure Manual* requires that the *original* Form be transmitted

¹ The paperwork appears to have also been sent by mail.

each time a response is provided.² Indeed, Section 8.10 specifically allows for the use of electronic transmission of grievance materials (such as e-mail and scanned documents). As long as the appropriate section of the Grievance Form A is completed and provided, there is no requirement of an exchange of original documentation. The agency's original transmission by e-mail and subsequent hand-delivered copy of the third step response substantially complied with the grievance procedure.

Adequacy of Third Step Response

Section 3.3 of the *Grievance Procedure Manual* provides that the third step response "must address the issues and the relief requested and should notify the employee of his/her procedural options." While the step-respondent is not required to respond to each and every point or factual assertion raised by the employee, the respondent must address each issue raised and the requested relief.³ Although the original third step response is very brief, it largely addressed in minimalist fashion the issues raised by this grievance, especially in light of the detail provided at the previous step. However, the grievant did raise a new theory directly to the third step-respondent regarding a claim of race discrimination.⁴ This claim was not addressed at all in the original third step response and it should have been addressed in some way. Since the grievant's ruling request, the third step-respondent has issued an updated response that does address this new theory. Thus, whereas the original request may not have complied with the requirements of the grievance procedure, the agency has now come into compliance and this issue is moot.

The grievant also asserts that the third step response did not "notify the employee of his/her procedural options."⁵ While his procedural options were not listed in the original third step response attachment, they were included in a subsequent e-mail from the agency's human resources department with a signed copy of the Grievance Form A. Technically speaking, the grievance procedure does not mandate the inclusion of this notification. Rather, it merely states that a step-respondent "*should* notify the employee of his/her procedural options."⁶ To the extent this language could be read as a mandate, the failure, if any, to include it does not invalidate the step response or require the matter to be sent back to the step-respondent for a re-issued response with the notice of procedural options. Any error here is harmless as the grievant should be well aware of his procedural options at this stage and the subsequent communication from human resources. The grievant's next steps will also be described below.

Referral to OEES

The grievant disputes the agency's referral of his discrimination claims to OEES as noncompliant with the grievance procedure. There is no provision of the grievance procedure that allows an agency to unilaterally refer a grievance or a portion thereof for outside review by

² See, e.g., *Grievance Procedure Manual* § 3.3.

³ E.g., EDR Ruling No. 2011-2869.

⁴ See also EDR Ruling No. 2014-3781.

⁵ *Grievance Procedure Manual* § 3.3.

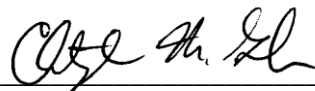
⁶ *Id.* (emphasis added).

OEES and have the grievance held pending completion of the review. However, if the parties agreed to place the grievance on hold to allow the review to take place, nothing in the grievance procedure prohibits the referral. It is apparent in this case that the grievant has not consented to the agency's referral.

Notwithstanding the foregoing, nothing prevents the agency from seeking OEES review of discrimination claims such as these and EDR cannot prevent OEES from conducting the review. However, this grievance will not be placed on hold without the agreement of the parties for the time it may take to complete such a review. Thus, if the agency does not withdraw its request from OEES, any forthcoming review may have little practical effect on the grievance as it will continue to proceed through the process regardless of when the review is completed. Further, given that this ruling has found the updated third step response to have substantially complied with the grievance procedure, this case is now ready to proceed to a determination of whether it should qualify for a hearing. Therefore, the basis for the OEES request, apparently for potential incorporation into a third step response, could be moot.

CONCLUSION

Based on the foregoing, EDR finds that the third step response as updated substantially complies with the minimum requirements of the grievance procedure. To proceed with the grievance, within five workdays of receipt of this ruling, the grievant must forward the grievance package to the agency head (or designee), with the appropriate box checked on the Grievance Form A, to request qualification of the grievance for hearing.⁷ If the grievant wishes to conclude his grievance, he must notify the agency's human resource office in writing within five workdays of receipt of this ruling. EDR's rulings on matters of compliance are final and nonappealable.⁸



Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁷ *Grievance Procedure Manual* § 3.3.

⁸ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).