

Issue: Compliance – Grievance Procedure (Second Step Meeting); Ruling Date: March 18, 2015; Ruling No. 2015-4116; Agency: Department of Corrections; Outcome: Agency in Compliance.



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

COMPLIANCE RULING

In the matter of the Department of Corrections
Ruling Number 2015-4116
March 18, 2015

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 Corrections (the “agency”).

FACTS

On February 24, 2015, the grievant initiated an expedited grievance with the agency to challenge the issuance of a Group III Written Notice with a five-workday suspension. In her grievance, the grievant alleged that the Written Notice was “retaliatory in nature” because she was “informed by the Lead Warden” at her facility that she should “accept [her] discipline and move on.” The agency has designated the Chief Deputy Warden at the grievant’s facility as the single management step-respondent for expedited grievances. On or about March 16, 2015, before scheduling the single management step meeting, the grievant requested a compliance ruling from EDR, alleging that she “should have been given the opportunity” to meet with an alternate step-respondent instead of the Chief Deputy Warden. The grievant asserts that the Chief Deputy Warden issued the Written Notice and is “in the chain of command of the [Lead] Warden” who made the allegedly retaliatory statement to the grievant and argues that, as a result, the agency should be required to select an alternate step-respondent for the meeting.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹ 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.² 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

¹ *Grievance Procedure Manual* § 6.3.

² *See id.*

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.³

In this case, the grievant's request for a compliance ruling appears to be premature because she has not shown that she first notified the agency in writing of the alleged procedural violation. There is no indication that the grievant has provided the agency with a notice of noncompliance alleging that the agency's designation of the Chief Deputy Warden as her single management step-respondent does not comply with the grievance procedure. In the interest of expeditiously resolving the issues raised in this grievance, however, we will address the grievant's claims regarding the selection of the step-respondent.

Under the grievance procedure, an expedited grievance consists of a single management step that is analogous to the second step meeting in an ordinary grievance.⁴ The single management step-respondent is the same individual that would typically serve as the second step-respondent.⁵ In the event that an employee alleges retaliation or discrimination by an individual who would otherwise serve as the agency's single management step-respondent in an expedited grievance, the employee may either: (1) request that the agency select another step-respondent; or (2) waive the face-to-face meeting with the original step-respondent and meet instead with the person designated as the agency's third step-respondent or another alternate step-respondent.⁶

Here, the Chief Deputy Warden is the agency's designated single management step-respondent for expedited grievances. The grievant has not alleged that the Chief Deputy Warden discriminated or retaliated against her. Accordingly, there is no basis for EDR to conclude that the agency should be required to select an alternate step-respondent or permit the grievant to meet with its designated third step-respondent instead of the Chief Deputy Warden. While the grievance procedure authorizes the parties to "modify . . . pre-qualification rules during the management resolution steps," including "substituting a step-respondent," so long as those modifications are mutually agreed upon,⁷ this is not a case where the grievant is entitled to meet with an alternate step-respondent.

Furthermore, this is not a case where the Lead Warden's allegedly retaliatory conduct would trigger the grievant's right to request an alternate step-respondent. The Lead Warden's alleged statement does not constitute retaliation under the grievance procedure, which is defined as an action "taken by management or condoned by management because an employee participated in" protected activity.⁸ The grievant has not alleged that she engaged in any

³ 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.

⁴ *Grievance Procedure Manual* §§ 3.2, 3.4.

⁵ *Id.* § 3.4.

⁶ *Id.*

⁷ *Id.* § 8.4.

⁸ *Id.* § 9. Protected activity consists of "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General

protected activity prior to the issuance of the Written Notice at issue in this case. It appears instead that the grievant's concerns stem from the Lead Warden's allegedly dismissive attitude toward the grievant's decision to challenge the Written Notice, which she has characterized as "retaliatory."⁹ A grievance alleging retaliation from a step-respondent must contain some indication that the grievant engaged in protected activity and believes the management actions challenged in the grievance resulted from that exercise of protected activity to trigger any applicable right to receive a response from an alternate step-respondent.

Likewise, that the Chief Deputy Warden issued the discipline and reports to the individual who was allegedly dismissive of the grievant's concerns with the Written Notice do not, on their own, entitle the grievant to a meeting with an alternate step-respondent. While we understand the grievant's concerns, the grievance procedure does not expect step-respondents to serve as disinterested parties.¹⁰ While we recognize the frustration for grievants that may result from this, 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 grievant and the agency should be mindful that the single management step meeting takes place between the parties to a grievance, and that both sides bring to that meeting their perspectives, experiences, and understandings. Although the single management step-respondent should conduct the meeting in an even-handed manner and with an open mind, he or she is a member of management and, like the grievant, is not a neutral party.¹¹ 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.¹²

For the reasons discussed above, we conclude that the agency's selection of the Chief Deputy Warden as the single management step-respondent in this case complies with the grievance procedure. If the parties agree to substitute someone other than the Chief Deputy Warden to serve as the single management step-respondent, they are free to do so. In the absence of such an agreement, the parties are directed to schedule a date for the single management step meeting **within five workdays of the date of this ruling.**

EDR's rulings on matters of compliance are final and nonappealable.¹³



Christopher M. Grab
Director
Office of Employment Dispute Resolution

Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercise any right otherwise protected by law" *Id.* § 4.1(b)(4).

⁹ This analysis would apply even if the grievant had alleged that the Chief Deputy Warden made the allegedly retaliatory comment, as the grievant's assertions about the comment do not constitute a claim of retaliation under the grievance procedure.

¹⁰ See EDR Ruling Nos. 2006-1279, 2006-1315; EDR Ruling No. 2004-916.

¹¹ See, e.g., EDR Ruling No. 2008-1991; EDR Ruling No. 2008-1870.

¹² Should the grievant wish to continue with her grievance beyond the management resolution steps, this grievance will automatically qualify for a hearing, wherein her grievance will be decided by an impartial hearing officer appointed by EDR. See *Grievance Procedure Manual* § 4.1(a).

¹³ See Va. Code §§ 2.2-1202.1(5); 2.2-3003(G).