

Issue: Compliance – Grievance Procedure (resolution steps); Ruling Date: June 29, 2016; Ruling No. 2016-4377; Agency: Department of State Police; 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 State Police
Ruling Number 2016-4377
June 29, 2016

The grievant has requested a compliance ruling regarding his March 29, 2016 grievance with the Department of State Police (the “agency”). The grievant claims that the agency failed to comply with the grievance procedure in handling responses to the grievance at both the first and second management resolution steps.

FACTS

On or about March 28, 2016, the grievant initiated a grievance with the agency, challenging disciplinary action issued by a member of management who is not the grievant’s immediate supervisor, utilizing a Grievance Form A. The grievance was submitted to the manager who issued the discipline. However, this manager appears to have directed the grievant’s immediate supervisor to respond to the grievance as the first step-respondent. On March 30, 2016, the first resolution step response was issued to the grievant, stating that while the respondent had carefully reviewed the grievance, he “cannot offer any resolution to this grievance.” The grievant, using the Grievance Form A, chose to advance his grievance to the second resolution step. After coordination with the grievant and his attorney, the agency held the second resolution step meeting between the grievant and the manager who issued the disciplinary action on May 12, 2016. On or about May 18, 2016, the agency issued the second resolution step response to the grievant, declining to provide the requested relief. The grievant, again using the Grievance Form A, chose to advance his grievance to the third resolution step. On or about May 31, 2016, the third step-respondent issued his response to the grievance, and reduced the Group III Written Notice to a Group II Written Notice. On or about June 10, 2016 the grievant chose to advance his grievance to be qualified for a hearing.

However, on June 8, 2016, the grievant, through his attorney, notified the agency head of alleged noncompliance based upon the position that, in a grievance challenging discipline issued by the second step-respondent, the second step meeting should have been with the agency’s designated third step-respondent. In response, the agency asserts that that the grievant’s meeting with the second step-respondent was proper under the grievance procedure, and it refused to allow the grievant to meet with the third step-respondent. Accordingly, the grievant now seeks a compliance ruling from this office.

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 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

Here, the grievant asserts that the second resolution step meeting and response did not satisfy the requirements of the grievance procedure because the wrong person served as the second step-respondent. The grievant argues that the third step-respondent should have served as the second step-respondent in this instance. Under the grievance procedure, grievances challenging formal discipline issued by someone other than the grievant's immediate supervisor may be initiated with the person who issued the discipline.⁴ However, in a case where the member of management who issued the Written Notice is the second step-respondent under the agency's designated step-respondents, the first step is generally skipped and the grievance begins at the second step with the requisite second step meeting.⁵ Thus, in this instance, the first and second steps should have "collapsed" into a single step, with the agency's designated second step-respondent serving as such. Because the grievant did have the second step meeting with the agency's designated second step-respondent, EDR cannot find noncompliance in this case.⁶ While it may be good practice for an agency to afford the grievant a meeting with the third step-respondent, depending on the circumstances of the case, no requirement to do so exists under the grievance procedure.⁷

¹ *Grievance Procedure Manual* § 6.3.

² *See id.*

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* § 2.4.

⁵ *See* Grievance FAQs, No. 16, at <http://www.dhrm.virginia.gov/employmentdisputeresolution/grievancefaqs>. Alternatively, the parties could agree to a modification of the step-respondents with substitutions, for example.


⁶ Although EDR has not addressed it here, there is also a strong indication that the grievant waived his opportunity to challenge the agency's alleged noncompliance at the first and second steps by advancing the grievance beyond those steps. *See Grievance Procedure Manual* § 6.3.

⁷ *See Grievance Procedure Manual* § 3.3.

Further, the agency appears to claim that the grievant failed to comply with the grievance procedure by requesting qualification for hearing on June 10, 2016, two days beyond the five working days in which he should have responded. Such a claim, raised after the fact of receiving the grievant's request for qualification, is moot, as any noncompliance has been cured by the grievant's submission of the response. Thus, EDR declines to find noncompliance on that basis.

CONCLUSION

For the reasons discussed above, there is no basis for EDR to conclude that the agency or the grievant has failed to comply with the grievance procedure at this time. As the agency head has now qualified in full this grievance for a hearing, within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B. EDR's rulings on matters of compliance are final and nonappealable.⁸



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