

Issues: Compliance – Grievance Procedure (documents, resolution steps, second step meeting); Ruling Date: March 2, 2018; Ruling No. 2018-4685; Agency: Department of State Police; Outcome: Agency in Compliance.



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

COMPLIANCE RULING

In the matter of the Department of State Police
Ruling Number 2018-4685
March 2, 2018

The grievant has requested a compliance ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) in relation to alleged noncompliance with the grievance procedure by the Department of State Police (the “agency”).

FACTS

The grievant initiated a grievance with the agency on or about February 6, 2018. The grievant originally submitted the grievance to his immediate supervisor. On February 11, a different member of agency management provided the grievant with the first step response. The grievant apparently advanced the grievance to the second step, the second step meeting took place on February 14, and the second step response was issued on the same day. The grievant indicates that he received the second step response on February 20.

The grievant submitted a notice of noncompliance to the agency head on or about February 14, 2018, arguing that the agency improperly substituted an alternate first step-respondent without his approval. On February 22, the grievant submitted a second notice of noncompliance, contending that (1) the agency failed to advise him of his right to challenge the allegedly improper substitution at the second step, and (2) the agency did not properly respond to a January 26, 2018 request for documents under the Virginia Freedom of Information Act (“FOIA”). The grievant submitted a third notice of noncompliance on February 25, claiming that the agency did not allow him sufficient time to prepare for the second step meeting. When these alleged matters of noncompliance were not corrected by the agency, the grievant requested a ruling from EEDR. In his ruling request, the grievant argues that the agency has engaged in substantial noncompliance with the grievance procedure and asks EEDR to render a decision against the agency on the issues raised in his grievance.¹

¹ As a general rule, a party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance. See *Grievance Procedure Manual* § 6.3. If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from EEDR, 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. While the grievant has provided a full five work days for the agency to correct some of the compliance issues discussed above, his request for a ruling appears to be premature for other matters. Ordinarily, EEDR would direct the grievant to give written notice of the alleged noncompliance and allow the agency five work days to correct any noncompliance

DISCUSSION

Agency's Selection of First Step-Respondent

In his February 14, 2018 notice of noncompliance, the grievant argues that the agency improperly substituted an alternate first step-respondent without his approval. 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 EEDR's website. Each designated step-respondent shall have the authority to provide the grievant with a remedy, subject to the agency head's approval.² Pursuant to its statutory responsibilities, EEDR 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 EEDR, 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.³ Absent an agreement between the parties, the agency must adhere to the designated list of step-respondents.

In this case, the agency's designated first-step respondent is the grievant's immediate supervisor. However, the grievant alleges that a different manager provided the first step response. In this situation, it appears that the substitution of an alternate first step-respondent without the grievant's approval did not comply with the grievance procedure.

However, the grievance procedure further provides that a party who "proceed[s] with the grievance after becoming aware of a procedural violation . . . generally forfeits the right to challenge the noncompliance at a later time."⁴ The grievant apparently advanced his grievance to the second step after receiving the first step response. While the grievant argues that agency management did not specifically inform him of his right to challenge this alleged issue of noncompliance before proceeding, EEDR has long held that it is incumbent upon each employee to know his or her responsibilities under the grievance procedure.⁵ A grievant's lack of knowledge about the grievance procedure and its requirements does not necessarily excuse his or her failure to raise a matter of noncompliance in a timely manner. Accordingly, EEDR finds that, in this case, the grievant waived his right to dispute the agency's substitution of an alternate first

before seeking a compliance ruling. In the interest of expeditiously resolving the issues raised in this grievance, however, EEDR will address of the grievant's claims so the parties may proceed to address the substance of the grievance.

² See Va. Code § 2.2-3003(D).

³ See *Grievance Procedure Manual* § 8.4.

⁴ *Id.* § 6.3.

⁵ See, e.g., EDR Ruling Nos. 2006-1349, 2006-1350; EDR Ruling No. 2002-159; EDR Ruling No. 2002-057.

step-respondent by advancing the grievance to the second step. Additionally, it appears that at this point in the process, returning the grievance to the first step would only serve to waste time, duplicate effort, and needlessly delay the grievance procedure, and thus, it is more efficient in this case for the grievance to advance to the next step.⁶

Grievant's FOIA Request

In his February 22, 2018 notice of noncompliance, the grievant further asserts that the agency did not properly respond to a request for documents under FOIA. The grievant submitted a FOIA request to the agency on January 26, 2018, before he initiated the grievance at issue in this ruling. The second step-respondent included with his response to the grievant a copy of a letter to agency management requesting disclosure of the documents sought by the grievant. It is unclear whether the agency has actually provided the grievant with the requested documents. In his February 22 notice of noncompliance to the agency, the grievant argues that agency management has not complied with the grievance procedure because it has not provided him with the documents sought in his FOIA request.

The grievance statutes provide that “[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved, shall be made available upon request from a party to the grievance, by the opposing party.”⁷ Section 8.2 of the *Grievance Procedure Manual* states that, “[o]nce a grievance has been initiated, an employee’s request for documents relating to his/her grievance, pursuant to [FOIA], shall also be treated by the agency as a request for documents under the grievance procedure.” In this case, the grievant’s FOIA request predates the initiation of the grievance, and thus the document disclosure provisions of the grievance procedure do not apply. To the extent there is any dispute as to whether the agency’s production of documents in response to the grievant’s January 26, 2018 request was consistent with FOIA, EEDR has no authority to enforce the provisions of FOIA. A person denied the rights and privileges conferred by FOIA must seek enforcement of FOIA’s provisions in a court of appropriate jurisdiction.⁸

In the alternative, the grievant may either elect to submit a new request for documents to the agency pursuant to Section 8.2 of the *Grievance Procedure Manual* or affirmatively notify the agency that he wishes for his outstanding FOIA request to be considered as a request for documents under the grievance procedure going forward. If the grievant chooses to do so, the agency must comply with the requirements of the grievance procedure regarding the production of documents that are relevant to a pending grievance.

Second Step Meeting

In his February 25, 2018 notice of noncompliance, the grievant appears to claim that the second step-respondent did not give him advance notice of when the second step meeting would

⁶ For instance, the second step respondent noted that “the first sergeant would be in a better position to provide relief, if it was appropriate” than the grievant’s immediate supervisor.

⁷ Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

⁸ See Va. Code § 2.2-3713(B).

take place, with the result he did not have sufficient time to prepare in advance of the meeting. Even assuming, for purposes of this ruling only, that the grievant's allegations are accurate, EEDR finds that the second step-respondent substantially complied with the requirements of the grievance procedure. The second step response itself is approximately five pages in length and discusses the management actions challenged by the grievant in detail. The grievant has not explained what additional information he would have presented to the second step-respondent had he received greater notice of the meeting or further opportunity to prepare. Moreover, EEDR has reviewed nothing to indicate that returning the grievance to the second step-respondent for an additional meeting would result in a reissued response that materially differs in any way from the response that has already been provided. To the contrary, returning the grievance to the second step would only serve to waste time, duplicate effort, and needlessly delay the grievance process in this case. Under these circumstances, it is simply more efficient in this case for the grievance to advance to the next step, if the grievant is not satisfied with the second step response.

Alleged Substantial Noncompliance

Finally, the grievant argues that the alleged issues of noncompliance discussed above should be considered substantial noncompliance with the grievance procedure and, as relief, he requests that the matters grieved "be dismissed in [their] entirety." Although the grievance statutes grant EEDR the authority to render a decision on a qualifiable issue against a noncompliant party in cases of substantial noncompliance with the grievance procedure,⁹ EEDR favors having grievances decided on the merits rather than procedural violations. Thus, EEDR will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. The agency's actions in this case, if they can be considered noncompliance, do not rise to the level that would justify a finding of substantial noncompliance or the extreme sanction sought by the grievant in case. Accordingly, the relief requested by the grievant is denied.

CONCLUSION

Based on the foregoing, EEDR finds that the agency has substantially complied with the requirements of the grievance procedure. To proceed with the grievance, the grievant must either advance the grievance to the next step or notify the agency's human resources office in writing that he wishes to conclude his grievance **within five workdays of receipt of this ruling.**

EEDR's rulings on matters of compliance are final and nonappealable.¹⁰



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⁹ *Id.* § 2.2-3003(G).

¹⁰ *See id.* §§ 2.2-1202.1(5), 2.2-3003(G).