

Issue: Compliance – Grievance Procedure (other issue); Ruling Date: December 19, 2013; Ruling No. 2014-3781; Agency: Virginia Department of Transportation; Outcome: Grievant Not 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 Number 2014-3781  
December 19, 2013

The Virginia Department of Transportation (the “agency”) has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management on whether two grievances initiated by the grievant on or about November 27, 2013 are in compliance with the grievance procedure. For the reasons set forth below, both grievances do not comply with the grievance procedure and may be administratively closed.<sup>1</sup>

FACTS

The grievant filed a grievance on July 8, 2013 claiming that the agency, by not adjusting his salary pursuant to its most recent compensation study, had misapplied policy and discriminated based on his gender and age with respect to his salary.<sup>2</sup> That grievance is currently proceeding through the management resolution steps. After receiving the second step response from the agency, the grievant initiated two additional grievances on or about November 27, 2013, based on information contained in the second step response. The first November 27 grievance (“Grievance 607”) alleges that the agency has failed to comply with the grievance process. The second November 27 grievance (“Grievance 608”) alleges “[i]nconsistent application of [the] agency’s compensation program.”

Upon receiving Grievance 607 and Grievance 608, the agency requested a compliance ruling from EDR, claiming that the grievances were duplicative of the July 8, 2013 grievance and/or otherwise noncompliant with the grievance procedure. The agency seeks review of the grievances as not complying with the grievance procedure.

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<sup>1</sup> After the agency requested this ruling, the grievant submitted two separate notices of noncompliance to the agency head. These notices were forwarded to EDR by the agency so that the issues could be addressed as part of the overall compliance questions at issue in this ruling. To the extent the grievant’s assertions in his notices of noncompliance are not specifically addressed below, the claims are moot because the grievances will not proceed through the grievance process for the reasons stated herein.

<sup>2</sup> For further factual background and discussion of the July 8, 2013 grievance, see EDR Ruling Number 2014-3679.

## DISCUSSION

### *Agency's Request for Ruling*

In response to the agency's ruling request, the grievant asserts the grievance procedure does not permit the agency to seek a ruling from EDR on the issue of whether a grievance may be administratively closed in this instance. In cases where the agency believes that a grievance has not been properly initiated, "management may notify the employee . . . that the grievance will be administratively closed due to noncompliance" and the grievant "has the right to request a compliance ruling from EDR to overturn the closing of the grievance" within five workdays of the notice of closure.<sup>3</sup> The grievant is correct, therefore, that a grievance would ordinarily first be administratively closed by the agency, and the grievant could then request a compliance ruling from EDR. We do not agree, however, that EDR cannot rule on the agency's request.

There would be little purpose in ordering the agency to administratively close the grievances and force the grievant to appeal that decision to EDR before addressing the questions presented here. Indeed, we can find no way, and the grievant has identified none, in which the grievant has been prejudiced by proceeding in this manner. From whatever posture the issue is raised, EDR's decision is the final review as to whether Grievances 607 and 608 were initiated in compliance with the grievance procedure. The grievant has been given the opportunity to address the agency's position during the pendency of this ruling, as he would have in requesting a ruling following an agency's closure. Declining to rule at this juncture would only seem to postpone the time when EDR rules on these compliance issues. It is simply more efficient to address the allegations of initiation noncompliance regarding Grievances 607 and 608 now in the interest of allowing the parties to proceed more quickly to addressing the grievant's other pending grievances on their merits.

### *Grievance 607*

Grievance 607 challenges the agency's conduct in responding to the issues raised in the July 8, 2013 grievance. Specifically, the grievant alleges that "the agency's conduct has been in bad faith with respect to participation in and administration of" the grievance procedure and that the agency has violated Section 1.9 of the *Grievance Procedure Manual*. The grievant claims that the agency has "abused" the grievance process "by knowingly making misrepresentations, . . . providing misleading information, and making commitments that [it] did not intend to honor in order to achieve a favorable outcome for the agency. . . ."

The grievance procedure provides that, in general, "*any* management actions or omissions may be grieved," but that an employee may not file a grievance "seeking relief from alleged agency noncompliance with the grievance procedure."<sup>4</sup> Issues of this type should be raised using the noncompliance process established in Section 6 of the *Grievance Procedure Manual*.<sup>5</sup> Thus, grievances filed for the purpose of obtaining relief from agency noncompliance

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<sup>3</sup> *Grievance Procedure Manual* § 2.4; see also *Grievance Procedure Manual* § 6.2.

<sup>4</sup> *Id.* at § 2.4 (emphasis in original).

<sup>5</sup> *Id.* at §§ 2.4, 6.3.

may be administratively closed.<sup>6</sup> These allegations, to the extent they would be timely raised, may be addressed through the noncompliance process and are not properly the subject of a separate grievance. Accordingly, Grievance 607 may be administratively closed.

### *Grievance 608*

The agency asserts that Grievance 608 challenges the same management action as the July 8, 2013 grievance, namely the agency's failure to award the grievant a salary adjustment. The *Grievance Procedure Manual* states that a grievance may not "challeng[e] the same management action or omission challenged by another grievance."<sup>7</sup>

Grievance 608 challenges the agency's failure to consistently apply its compensation program to all employees. The grievant specifically argues that the agency misapplied and/or unfairly applied compensation policies and discriminated against him based on his race. The July 8, 2013 grievance challenges the agency's decision not to adjust the grievant's salary pursuant to its most recent compensation study. In the July 8 grievance, the grievant argues that the agency misapplied and/or unfairly applied policies relating to compensation and has discriminated against him on the basis of his gender and age.

Having reviewed both Grievance 608 and the July 8 grievance, these grievances do not challenge separate and distinct management actions. Rather, it would appear that the issue in both grievances is the same: the agency's decision that the grievant was not eligible for a salary increase pursuant to a compensation study. In both grievances, the grievant seeks an adjustment to his salary retroactive to May 25, 2013, the apparent date other agency employees received salary adjustments under the compensation study. The grievant initiated Grievance 608 based on information he received in the agency's second step response to the July 8 grievance. Grievance 608 does not challenge a new management action or omission that occurred after he initiated the July 8 grievance. Grievance 608 seems to merely incorporate information from the response in support of new theories as to why the agency improperly denied him the salary increase.<sup>8</sup>

While a grievance cannot be amended to include "challenges to additional management actions or omissions" after it has been initiated,<sup>9</sup> a grievant may argue alternative theories as to why the challenged management actions or omissions were improper. Grievance 608 contains an additional theory as to why the agency's action was improper, namely a claim that the agency has engaged in discrimination based on the grievant's race. Grievance 608 also presents new information in support of the grievant's theory that the agency misapplied and/or unfairly applied compensation policies to the grievant. The grievant may present these arguments going forward

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<sup>6</sup> *Id.* at § 2.4.

<sup>7</sup> *Id.*

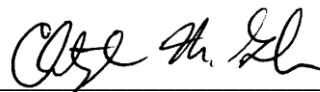
<sup>8</sup> "The purpose of the second-step meeting is fact finding and should include open discussion of the grievance issues to promote understanding of the other party's position and possible resolution of the workplace issues." *Grievance Procedure Manual* § 3.2. The grievance process expressly contemplates that a grievant may discover new information about the challenged issues during the management resolution steps. While receiving such information could amount to a separate management action that could be grieved, this will rarely, if ever, be the case.

<sup>9</sup> *Grievance Procedure Manual* § 2.4.

in the July 8 grievance if he so desires. Grievance 608 does not, however, challenge a new management action or omission, but merely presents new arguments relating to issues that have already been challenged in the July 8 grievance. Accordingly, Grievance 608 is duplicative of another grievance and may be administratively closed.

#### CONCLUSION

For the reasons set forth above, Grievance 607 and Grievance 608 may be administratively closed for initiation noncompliance under Section 2.4 of the *Grievance Procedure Manual*. EDR's rulings on matters of compliance are final and nonappealable.<sup>10</sup>



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<sup>10</sup> See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).