

Issue: Compliance – Grievance Procedure (other issue); Ruling Date: November 26, 2014; Ruling No. 2015-4032, 2015-4033; Agency: University of Virginia Medical Center; Outcome: Grievant in Compliance (in part); Grievant Not in Compliance (in part).



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

COMPLIANCE RULING

In the matter of the University of Virginia Health System
Ruling Number 2015-4032, 2015-4033
November 26, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management on whether his two October 21, 2014 grievances with the University of Virginia Health System (the “agency”) are in compliance with the grievance procedure.

FACTS

On or about August 14, 2014, the grievant filed a grievance alleging that he “was called to a Predetermination meeting” on that date and alleging that he is “treated differently than [his] colleagues under the same or similar circumstances.” He further claimed that the meeting was a form of retaliation because of previous grievance activity.

The grievant received his annual performance appraisal for 2013-2014 on or about September 1, 2014, with an overall rating of “Does Not Fully Meet Expectations.” He filed a grievance to challenge the performance evaluation on or about September 15, 2014.

Based on the information provided to EDR, the grievant has filed two additional grievances that are also currently proceeding through the management resolution steps. The first, initiated on September 11, 2014, claims that his work assignments are unfair because he is “the senior engineer” but is “assigned to junior engineer roles” as a result of bias and resolution. The second, initiated on September 15, challenges a Step 1 – Informal Counseling Memo issued for unsatisfactory job performance.

On or about October 21, 2014, the grievant initiated two further grievances. In the first grievance (“Grievance 1”), he alleges that he has been subjected to “[m]ultiple predetermination meetings that are targeting only [him].” It appears that these predetermination meetings have been held to advise the grievant of the agency’s possible intent to issue disciplinary action. The grievant claims that the agency is misapplying and/or unfairly applying agency policy relating to pre-disciplinary due process meetings, and that these meetings “negatively impact[]” the grievant’s ability to do his job.

In the second grievance (“Grievance 2”), the grievant asserts that he has been “[u]nfairly” placed on a performance improvement program and that the “program requirements [are] being

used as the source of below expectations of work.” The grievant argues that the agency has misapplied and/or unfairly applied policy in placing him on the performance improvement program and in applying the program to him.

Upon receiving the October 21 grievances, the agency closed them both for failure to comply with Section 2.4 of the *Grievance Procedure Manual*. The agency argues that some of the grievant’s claims duplicate those made in earlier grievances and that they have otherwise been initiated to harass and/or impede agency operations. The grievant disputes the agency’s assertions and appeals to EDR for a ruling on whether his grievances may proceed.

DISCUSSION

Duplication

The grievance procedure provides that a grievance must not challenge the same management action challenged by another grievance.¹ The agency asserts that Grievance 1 challenges the same management actions as the grievant’s August 14 grievance, and that Grievance 2 is duplicative of his September 15 grievance challenging his performance appraisal. Having reviewed the information provided by the parties, it does not appear that the October 21 grievances are duplicative. Grievance 1 challenges additional predetermination meetings that have occurred since the meeting that was the subject of the August 14 grievance.² Similarly, while the performance improvement plan is related to the grievant’s overall performance appraisal rating of “Does Not Fully Meet Expectations,” the September 15 grievance does not list the performance improvement plan as an issue, nor does it appear that the agency has addressed the performance improvement plan in relation to the September 15 grievance. Indeed, the performance improvement plan was not issued to the grievant until September 29, after the September 15 grievance was initiated. As such, the performance improvement plan could not have been grieved in the September 15 grievance. While the October 21 grievances raise claims that clearly relate to some previously-grieved issues surrounding the grievant’s performance appraisal and surrounding issues, the particular management actions at issue in the current grievances have not been challenged in other grievances. The October 21 grievances are not duplicative of other grievances.³

Harassing or Impeding Agency Operations

Section 2.4 of the *Grievance Procedure Manual* provides that a grievance cannot “be used to harass or otherwise impede the efficient operations of government.”⁴ This prohibition is primarily intended to allow an agency to challenge issues such as the number, timing, or

¹ *Grievance Procedure Manual* § 2.4.

² The grievant claims that he has an average of one predetermination meeting month. For example, he has received at least one counseling memo that may have been preceded by such a meeting. That counseling memo is currently the subject of an additional grievance.

³ Management actions that have been addressed in previous grievances may, however, be discussed as background information, to the extent they may be relevant to the currently grieved management actions.

⁴ *Grievance Procedure Manual* § 2.4.

frivolous nature of grievances, and the related burden to the agency.⁵ To find that a grievant has failed to comply with this provision of the *Grievance Procedure Manual*, there must be evidence establishing that the grievant knew with substantial certainty that his/her actions would impede the operations of an agency.⁶ It may be inferred that a grievant intends the natural and probable consequences of his/her acts.⁷ While neither the number, timing, or frivolous nature of the grievances, nor the related burden to an agency, are controlling factors in themselves, those factors could, in some cases, support an inference of harassment cumulatively or in combination with other factors. Such determinations are made on a case-by-case basis, and because closing a grievance on these grounds is an extreme sanction, the analysis of such a claim carries a commensurately high burden.⁸

Grievance 1

Grievance 1 challenges the agency's decision to hold "[m]ultiple predetermination meetings" with the grievant, at which he was advised of the agency's possible intent to issue disciplinary action. The grievant appears to argue that he is being unfairly targeted for these meetings as compared with other employees in his work group. However, the grievant's argument that these meetings have had an objectively adverse impact on his employment is not supported by the facts. It appears the agency has simply directed the grievant to attend pre-disciplinary due process meetings to address potential misconduct or other performance issues that may warrant discipline or other action.

Even accepting all of the grievant's allegations as true, the relief he has requested in Grievance 1 is not appropriate. On the Grievance Form A, the grievant requests "[c]ompensation for legal fees" and "[s]anctions against [the agency] for continued harassment." In cases relating to misapplication and/or unfair application of policy, a hearing officer "may order the agency to reapply the policy from the point at which it became tainted."⁹ Neither sanctions nor attorneys' fees would be available in this case.¹⁰

In addressing this matter, we are also cognizant of the grievant's past grievance activity. Based on the information provided to EDR, it appears that the grievant has four active grievances, all filed between August 14 and September 15, that are proceeding through the management resolution steps. These grievances all appear to relate to similar issues. EDR must be vigilant not to allow the grievance procedure to become a tool for an employee to challenge each and every action taken by his/her superiors, however minor. The facts and circumstances surrounding Grievance 1, when considered with knowledge of the grievant's prior grievance activity, could support an inference of harassment or otherwise impede the efficient operations of government. Based on the grievant's representations, he has been required to attend several pre-disciplinary due process meetings and his coworkers have not. These are not the type of issues

⁵ See EDR Ruling No. 2010-2374; EDR Ruling No. 2002-224.

⁶ See EDR Ruling No. 99-138.

⁷ See *id.*

⁸ See *id.*

⁹ *Rules for Conducting Grievance Hearings* § VI(C)(1).

¹⁰ *Grievance Procedure Manual* § 5.9(b); *Rules for Conducting Grievance Hearings* § VI(E)

normally seen challenged in a grievance because pre-disciplinary due process meetings, by themselves, carry no consequence and are reasonable response to management concerns regarding possible misconduct.¹¹

Taking all of these factors into account, it is EDR's determination that Grievance 1 will remain closed. Use of the grievance procedure in this case would not advance the interests of any party or the Commonwealth, as there are no issues of substance to address. Accordingly, EDR concludes that Grievance 1 does not comply with Section 2.4 of the *Grievance Procedure Manual* because it supports an inference of harassment and impedes the efficient operations of government.

Grievance 2

The grievant filed Grievance 2 on October 21, 2014 to challenge the agency's administration of the performance improvement plan he has been placed on as a result of his annual performance appraisal rating of "Does Not Fully Meet Expectations." While the overall timing and number of the grievances are factors to be considered, and the filing of six grievances within approximately two months could, in some cases, indicate abuse of the grievance process, it seems in this case that the grievant is attempting to raise ongoing concerns with his performance appraisal and the agency's response to that performance appraisal, all of which have occurred within a relatively short period of time. While the performance improvement plan issues presented in Grievance 2 are closely connected with the actions challenged in the grievant's earlier grievances, Grievance 2 raises claims about more tangible management actions and/or omissions, i.e., the performance improvement plan, that have occurred since the prior grievances were initiated or that were not challenged in the prior grievances.

The number, timing, and nature of the grievances here do not rise to the level of harassment that EDR has required in the past to justify the closure of Grievance 2 on these grounds. A grievant's decision to dispute management actions with which he disagrees will inevitably create work for an agency. However, the grievance record does not support the conclusion that the grievant has raised completely baseless or unreasonable claims. With regard to Grievance 2, the agency has not met the high burden required to close a grievance for harassing or impeding agency operations.

CONCLUSION

Based on the foregoing, Grievance 1 will remain closed. The parties are advised that Grievance 1 should be marked as concluded due to noncompliance and no further action is required. Grievance 2 is re-opened and shall be permitted to proceed. Grievance 2 should be

¹¹ Should the agency issue disciplinary action in relation to any of the predetermination meetings referenced in Grievance 1, or any future predetermination meeting that may occur, the grievant would not be prevented from contesting the merits of his allegations relating to pre-disciplinary due process through a subsequent grievance challenging the discipline. Indeed, these issues would be appropriately discussed in that context.

returned to the appropriate step-respondent to be addressed on the merits of its claims. Once received, the step-respondent must issue a written response within five workdays.¹²

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



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¹² See *Grievance Procedure Manual* § 3.1.

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