

Issue: Compliance – Grievance Procedure (Resolution Steps); Ruling Date: October 28, 2016; Ruling No. 2017-4429; 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 2017-4429
October 28, 2016

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

The grievant is employed by the agency as a Superintendent. On July 22, 2016, the grievant initiated a grievance with the agency challenging her receipt of a Written Counseling Memorandum (the “Counseling Memo”). In the grievance, the grievant alleges that the Counseling Memo constitutes a misapplication and/or unfair application of policy, is arbitrary and capricious, and was issued in retaliation because of her past grievance activity and/or her appeal to a circuit court for an order to implement a hearing decision.¹

After receiving the third step response, the grievant notified the agency head on September 23, 2016 that the Chief of Corrections Operations (the “CCO”) had been improperly designated as the third step-respondent because he “was identified . . . to have implemented a realignment” that was the basis of her request for an implementation order and “is a party to the retaliation that” she alleged in the grievance. After the agency did not correct the alleged noncompliance within five workdays, the grievant requested a compliance ruling from EDR on October 7, alleging that she “was not aware” the CCO was the designated third step-respondent and “did not have a fair opportunity to have someone objective to fully evaluate all of the issues of the grievance.” In addition, the grievant claims that the first and second step-respondents were not “fair and neutral” and that the third step-respondent “failed to address her retaliation claim.” The grievant has also requested “that EDR provide facilitation to help resolve” these issues.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.² That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without

¹ The grievant previously grieved an involuntary demotion and a hearing officer ordered the agency to reinstate the grievant to her former position or a comparable position. *See* Decision of Hearing Officer, Case No. 8655, October 4, 2007. The parties have since been engaged in a series of court proceedings and appeals regarding the agency’s implementation of the hearing officer’s order in that case.

² *Grievance Procedure Manual* § 6.3.

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.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 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.⁴

Agency's Selection of the Third Step-Respondent

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 EDR's website. Each designated step-respondent shall have the authority to provide the grievant with a remedy, subject to the agency head's approval.⁵ Pursuant to its statutory responsibilities, EDR 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 EDR, 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. Absent an agreement between the parties, the agency must adhere to the designated list of step-respondents. When higher level employees file grievances, however, modifications to the standard process are necessary.⁶

In this case, the grievant's immediate supervisor is the Regional Administrator, who is designated as the ordinary third step-respondent for the agency. In such a situation, the three steps of the grievance process usually collapse into a single step,⁷ which would be handled as the second resolution step of a grievance, similar to an expedited grievance.⁸ As such, ordinarily there would be no independent first and third steps in this grievance, but only a single

³ See *id.*

⁴ 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.

⁵ See Va. Code § 2.2-3003(D).

⁶ See EDR Ruling No. 2013-3583. In addition, Number 16 of EDR's Grievance FAQs, which are available at <http://www.dhrm.virginia.gov/employmentdisputeresolution/grievancefaqs>, discusses this type of situation.

⁷ See *id.*

⁸ See *Grievance Procedure Manual* § 3.2.

management resolution step with the designated third step-respondent. This is a simple and somewhat common result and is consistent with EDR's longstanding practices.⁹

The grievance procedure further authorizes the parties to "modify . . . pre-qualification rules during the management resolution steps," so long as those modifications are mutually agreed upon.¹⁰ In this case, the grievant and the agency agreed that the grievance would proceed through a full three-step process. The agency informed the grievant that the Regional Administrator would be the first step-respondent and the Regional Operations Chief would be the second step-respondent.¹¹ The third step-respondent was not identified in the parties' initial communications about the selection of step-respondents. Thus, it appears there was no agreement between the parties on the designated third step-respondent in this grievance.

While there is some question as to whether the grievant took appropriate action to preserve her right to challenge the agency's selection of the third step-respondent,¹² EDR finds unpersuasive the grievant's assertion that the CCO is an inappropriate third step-respondent. The grievance itself challenges the issuance of a Counseling Memo. The grievance does not appear to mention or identify the CCO or allege that he retaliated against her. Indeed, the Counseling Memo was issued by the grievant's immediate supervisor. Even assuming that the grievance sufficiently alleges retaliation by the CCO, there is no mechanism under the grievance procedure that would require an agency to designate an alternate third step-respondent in cases where he or she has allegedly engaged in discrimination or retaliation against a grievant.¹³ Further, as indicated above, this grievance could have appropriately proceeded with a single management step-respondent. Given that the agency agreed to provide the grievant with a full three-step process in this case, which was more than was required, the grievant has received a sufficiently thorough opportunity to present her concerns about the Counseling Memo to upper levels of management. Accordingly, under the particular circumstances presented in this case, EDR finds that the grievant is not entitled to an alternate third step-respondent.

EDR is also not persuaded by the grievant's claims that the first and second step-respondents in this case were not "neutral and objective," or that a "neutral party should provide the grievant with a face to face meeting and response" at the third step.¹⁴ The grievance procedure does not expect step-respondents to serve as disinterested parties.¹⁵ 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 management resolution steps represent a communication process that takes place between the parties to a grievance, wherein both sides bring their perspectives,

⁹ *E.g.*, EDR Ruling No. 2009-2321 n.1.

¹⁰ *Grievance Procedure Manual* § 8.4.

¹¹ The Regional Operations Chief reports to the CCO, the eventual third step-respondent in this case, and the CCO reports to the agency head.

¹² *See Grievance Procedure Manual* § 6.3 ("By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time.").

¹³ *See id.* § 3.3. It could be inappropriate to require a grievant to confront a third step-respondent with allegations of discrimination and/or retaliation under certain circumstances, and EDR reserves the right to direct the designation of an alternate third step-respondent where it is warranted. The facts of this case do not present such a situation.

¹⁴ By proceeding beyond the first and second steps, despite her apparent concern that those step-respondents were not "neutral and objective," without raising a claim of noncompliance, the grievant has waived any right to challenge those responses. *Grievance Procedure Manual* § 6.3.

¹⁵ *See* EDR Ruling Nos. 2006-1279, 2006-1315; EDR Ruling No. 2004-916.

experiences, and understandings to that process. Although step-respondents should carry out their duties in an even-handed manner and with an open mind, they are members of management and, like the grievant, are not neutral parties.¹⁶ 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. In addition, a face-to-face meeting between the parties is required only at the second step.¹⁷ While a third step-respondent is free to meet with a grievant if he or she so chooses, such a meeting is not mandatory.¹⁸ EDR finds no basis to order a meeting with the third step-respondent or another individual in this case.¹⁹

Sufficiency of the Third Step Response

In addition, the grievant claims that the third step-respondent “failed to address her retaliation claim” in his response. Section 3.3 of the *Grievance Procedure Manual* provides that the third step response “must address the issues and the relief requested and should notify the employee of his/her procedural options.” While the step-respondent is not required to respond to each and every point or factual assertion raised by the employee, he or she must generally address each issue raised and the requested relief.²⁰

Having reviewed the third step response in the context of the particular facts surrounding this case, EDR concludes that it is adequate. It addresses the issues raised as well as the relief sought by the grievant. Indeed, the response specifically identifies the grievant’s claim that the Counseling Memo was issued as a form of retaliation and states that she has requested as relief “that all retaliation against [her] be discontinued” Though the grievant disagrees with the third step-respondent’s interpretation and characterization of the issues, the step-respondent clearly considered the grievant’s allegation of retaliation along with her other claims related to the issuance of the Counseling Memo. The third step-respondent then addressed these topics in his response, admittedly briefly, indicating that the issuance of the Counseling Memo was justified and no relief would be granted. While the third step-respondent could have provided a more detailed response by, for example, explicitly stating that retaliation against the grievant had not occurred and/or would not occur in the future, the denial of relief in upholding the Counseling Memo, with acknowledgement to the claim of retaliation, has done essentially that. Having reviewed the third step response, EDR concludes that it substantially complies with the requirements of the grievance procedure by addressing the issues and relief requested and advising the grievant of her procedural options.

Grievant’s Request for EDR Facilitation

The grievant finally asks that EDR “provide facilitation” to resolve the issues in this case. Section 8.11 of the *Grievance Procedure Manual* provides that “[p]arties having difficulty

¹⁶ See, e.g., EDR Ruling No. 2008-1991; EDR Ruling No. 2008-1870.

¹⁷ *Grievance Procedure Manual* § 3.2.

¹⁸ *Id.* § 3.3.

¹⁹ To the extent the grievant is alleging she did not receive a proper face-to-face meeting with the second step, the grievant did not challenge either the choice of the second step-respondent when informed by the agency of the designation or the meeting itself when it occurred. Thus, the grievant has waived any challenge to an allegedly improper face-to-face meeting. *Grievance Procedure Manual* § 6.3.

²⁰ E.g., EDR Ruling No. 2015-4155; EDR Ruling No. 2011-2869.

resolving a procedural compliance dispute during the management steps may request” facilitation from EDR. “This resolution process is only available if both parties agree to engage in the facilitation.”²¹ The agency has not responded to indicate whether it would be willing to engage in facilitation; however, based on the agency’s responses to the grievant’s claims of noncompliance, it appears unlikely that the agency would agree to facilitation in this case. Because the alleged matters of noncompliance cited by the grievant in her request for a ruling from EDR have been addressed in this ruling, facilitation is unnecessary. The parties are directed to proceed in the manner described below.

CONCLUSION

For the reasons discussed above, EDR concludes that the agency’s actions in the case comply with the requirements of the grievance procedure. If the grievant wishes to continue to the next step of the grievance process, she is directed to submit a request to the agency head seeking qualification of her grievance for a hearing **within five workdays of the date of this ruling**. If she does not wish to continue with her grievance, she should notify the agency’s human resources office in writing immediately.

EDR’s rulings on matters of compliance are final and nonappealable.²²



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²¹ *Grievance Procedure Manual* § 8.11.

²² See Va. Code §§ 2.2-1202.1(5); 2.2-3003(G).