

Issue: Compliance – Grievance Procedure (other issue); Ruling Date: November 3, 2016; Ruling No. 2017-4431; Agency: Department of Veterans Services; 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 Veterans Services  
Ruling Number 2017-4431  
November 3, 2016

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) in relation to alleged noncompliance with the grievance procedure by the Department of Veterans Services (the “agency”).

FACTS

On July 29, 2016, the grievant was issued a Group I Written Notice. After the grievant raised concerns about whether she had received due process prior to the issuance of the Written Notice, the agency informed her that the Written Notice would be rescinded. The grievant informed the agency that she did not agree that the Written Notice should be rescinded because she intended to file a grievance to challenge it. The agency proceeded to rescind the July 29 Written Notice, provided the grievant with adequate notice of the charge and an opportunity to respond, and reissued the Group I Written Notice on August 3, 2016.<sup>1</sup>

The grievant filed two separate grievances—one disputing the rescinded July 29 Written Notice (“Grievance 1”) and the second disputing the August 3 Written Notice (“Grievance 2”)—on or about August 21, 2016. The two grievances are identical in disputing the July 29 and August 3 Written Notices, except that Grievance 1 alleges “[t]he correct Procedures were not followed for issuing a Group I Written Notice. Employee not given Due Process.” After advancing both grievances to the second step, a second step meeting to address both grievances was held on September 26. The grievant received a second step response to Grievance 2, but did not receive a separate response, or the Grievance Form A, for Grievance 1.

The grievant notified the agency that it was not in compliance with the grievance procedure because the second step-respondent had not provided a response to Grievance 1. In response, the agency head informed the grievant that the July 29 Written Notice, which is the subject of Grievance 1, had been rescinded. On October 11, 2016, the grievant requested a compliance ruling from EDR, alleging that the agency failed to provide a response to Grievance

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<sup>1</sup> The two Written Notices appear to be identical, other than their respective dates of issuance and expiration. The August 3 Written Notice also explicitly states that the grievant was given an opportunity to respond to the charges. The underlying conduct for which the grievant, and the description of that conduct, is the same in both Written Notices.

1, that she did not agree with the agency's decision to rescind the July 29 Written Notice, and that "there is no provision in DHRM policy that allows" agencies to rescind a Written Notice.

## DISCUSSION

### *Management Actions Challenged in Grievance 1*

While the grievant has requested a compliance ruling from EDR in relation to alleged deficiencies with the second step response, the circumstances presented in this case compel EDR to consider whether both grievances should proceed, based on the management actions that have been challenged in the two grievances. Grievance 1 disputes the issuance of the July 29 Group I Written Notice, which was rescinded before grievant initiated Grievance 1. The July 29 Written Notice ceased to exist as an act of formal discipline when it was rescinded.<sup>2</sup> In theory, a grievant could challenge the rescission of a Written Notice, but it is unclear why that would be necessary unless there is further agency action on the same subject. Here, the July 29 Written Notice was replaced by the August 3 Written Notice, which is the subject of Grievance 2. Consequently, the grievant's arguments about the rescission of the July 29 Written Notice and the impact, if any, that action had on whether the agency could reissue the Written Notice on August 3 should be incorporated into her challenge to the existing August 3 Written Notice in Grievance 2.

For these reasons, EDR sees no practical reason why both grievances should proceed through the management steps. Accordingly, it is EDR's determination that Grievance 1 merely presents alternative arguments relating to the issuance of the Written Notice that are challenged in Grievance 2. Accordingly, EDR considers the grievant's arguments raised in Grievance 1 to have been incorporated into Grievance 2, and thus Grievance 1 will not proceed further. To the extent the grievant wishes to present information to the agency about the lack of due process as it relates to the series of actions that led to the issuance of the August 3 Written Notice, she may present those arguments going forward in Grievance 2.

### *Sufficiency of the Second Step Response*

In addition, EDR finds that the second step response sufficiently addresses the issues presented in the grievance and complies with the requirements of the grievance procedure. Section 3.2 of the *Grievance Procedure Manual* provides that the second 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

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<sup>2</sup> While the grievant alleges that the agency's decision to rescind the July 29 Written Notice is not permissible under DHRM policy, EDR is unaware of any requirement under policy that would prohibit an agency from modifying or removing a Written Notice after it has been issued. Indeed, a restriction of that nature would leave agencies unable to correct procedural deficiencies or remove mistaken disciplinary actions once issued. Further, Section G of DHRM Policy 1.60, *Standards of Conduct*, provides that "[a] Written Notice must be removed from an employee's personnel file if the agency modifies or vacates its disciplinary action," implying that agencies have the authority to take such action if they choose.


assertion raised by the employee, he or she must generally address each issue raised and the requested relief.<sup>3</sup>

Having reviewed the second 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. For example, the step-respondent discussed the underlying incident that gave rise to the Written Notice, and also stated that the grievant received written notification of the offense and an opportunity to respond prior to the issuance of the August 3 Written Notice. It appears, therefore, that the step-respondent considered the grievant's claim that she was not initially provided due process, if not directly then at least by implication, in reciting that she received due process before the Written Notice was reissued. While the second step-respondent could have provided a more detailed response by, for example, explicitly addressing the grievant's claims about the initial lack of due process, the denial of relief in upholding the Written Notice has done essentially that. Having reviewed the second 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.

#### CONCLUSION

For the reasons discussed above, EDR concludes that the second step response complies with the requirements of the grievance procedure. The parties are advised that Grievance 1 will not proceed, and EDR considers any alternative claims or theories about the Written Notice raised in Grievance 1 to have been incorporated into Grievance 2 going forward. If the grievant wishes to continue to the next step of the grievance process, she is directed to advance her grievance to the third step **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.<sup>4</sup>

  
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Director  
Office of Employment Dispute Resolution

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<sup>3</sup> *E.g.*, EDR Ruling No. 2015-4155; EDR Ruling No. 2011-2869.

<sup>4</sup> *See* Va. Code §§ 2.2-1202.1(5); 2.2-3003(G).