



EMILY S. ELLIOTT
DIRECTOR

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

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2151
(TTY) 711

COMPLIANCE AND CONSOLIDATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Numbers 2020-5076, 2020-5081
April 17, 2020

The Department of Behavioral Health and Developmental Services (the “agency”) has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”)¹ on whether the grievant has failed to comply with the grievance procedure as it relates to her grievance dated March 5, 2020. The agency has also requested that EDR close and/or consolidate the March 5 grievance with the grievant’s subsequent dismissal grievance, dated March 16, 2020. In response, the grievant has requested a ruling on whether the agency’s choice of representatives is out of compliance with the grievance procedure. EDR addresses each of the parties’ respective requests below.

FACTS

On February 28, 2020, members of agency management held a meeting with the grievant at which they issued to her a notice of intent to take disciplinary action, with suspension effective immediately.² On or about March 5, 2020, the grievant filed a grievance broadly asserting a racially hostile work environment and retaliation by members of agency management, with a timeline of allegations beginning in 2016 and including the meeting on February 28, 2020. On March 11, 2020, in reference to the March 5 grievance, the agency requested from the grievant (1) “a full unedited copy of the recording (video and audio) made by you on February 28, 2020 taken after your due process meeting as you were leaving the building”; and (2) “a full and complete copy of all records in the spiral notebook and large brown envelope that you took with you on February 28, 2020.” On March 11, 2020, the agency also terminated the grievant’s employment. On March 16, 2020, the grievant filed a dismissal grievance, which is now pending with EDR for a hearing.

On March 31, 2020, contending that the grievant had neither produced the requested records nor presented a valid basis to withhold them, the agency sought a ruling from EDR that

¹ The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

² The grievant alleges that, at the conclusion of the meeting or shortly thereafter, the agency acquired the grievant’s badge and key and had her escorted from the premises by law enforcement.

the grievant's refusal to provide relevant documents was not compliant with the grievance procedure. Further, citing substantial overlap between the March 5 and March 16 grievances, the agency also requested that EDR either (1) administratively close the March 5 grievance but permit the grievant to append it to the March 16 dismissal grievance, or in the alternative (2) consolidate both grievances to proceed to a hearing.

In response, the grievant maintains that the agency is not entitled to the requested records because the information is already in the agency's possession. She also contends that, because her grievances have attributed "discrimination, retaliation, and intimidation" to the agency's employee relations manager, the continued involvement of the employee relations manager does not comply with the grievance procedure.

DISCUSSION

Parallel Grievances

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance.³ A claim of workplace conduct that is ongoing is raised timely if some agency action alleged to be part of the ongoing conduct occurred within the 30 calendar days preceding the initiation of the grievance.⁴ However, a grievance may not challenge the same management action challenged by another grievance.⁵

Whether or not requested by the parties, EDR may consolidate two or more grievances for a single hearing.⁶ EDR strongly favors consolidation and will consolidate grievances when they involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.⁷

Here, EDR finds that consolidation of the March 5 and March 16 grievances is appropriate. As explained in a previous ruling,⁸ the March 16 dismissal grievance challenged the agency's March 11 disciplinary actions, which were a subject of the February 28 meeting and which ultimately resulted in termination of the grievant's employment. Among other things, the grievant challenged those disciplinary actions on grounds that they perpetuated a pattern of racial discrimination and retaliation against her, which the agency, the grievant alleges, had failed to investigate and resolve despite the grievant's previous complaints. Likewise, the March 5 grievance challenged the agency's alleged history of racial discrimination and retaliation, to include the February 28 meeting and the disciplinary actions discussed there. The March 5 grievance was presented as a "response to the February 28, 2020 notice of intent [to] take formal

³ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.2.

⁴ See Nat'l R.R. Pass. Corp. v. Morgan, 536 U.S. 101, 115-18 (2002) (holding the same in a Title VII hostile work environment harassment case); see also *Graham v. Gonzales*, No. 03-1951, 2005 U.S. Dist. LEXIS 36014, at *23-25 (D.D.C. Sept. 30, 2005) (applying *Morgan* to claim of retaliatory hostile work environment/harassment); *Shorter v. Memphis Light, Gas & Water Co.*, 252 F. Supp. 2d 611, 629 n.4 (W.D. Tenn. 2003).

⁵ *Grievance Procedure Manual* § 2.4.

⁶ *Id.* § 8.5.

⁷ See *id.*

⁸ EDR Ruling No. 2020-5072.

disciplinary action,” and it requested reinstatement to a work environment free from racial hostility.

Thus, it appears that the allegations in both grievances involve the same parties, legal issues, policies, and factual background. In addition, as the agency has noted in its request, consolidation is not impracticable and instead appears to promote efficiency of state resources in responding to the grievant’s substantive allegations.

Further, EDR perceives no prejudice to the grievant in granting the agency’s consolidation request. As additional guidance, however, it does not appear that consolidation expands the scope of the hearing proceedings already pending for the March 16 grievance.⁹ EDR’s previous ruling recognized that, at the hearing, and “subject to the hearing officer’s authority to administer the hearing, the grievant is entitled to present relevant evidence in support of defenses that discrimination and/or retaliation improperly motivated the agency’s disciplinary action against her.”¹⁰ In the hearing officer’s discretion, such relevant evidence could include past events tending to show that severe or pervasive conduct tainted the disciplinary process. In any case, the grievant will bear the burden to prove any allegations that she experienced a hostile or retaliatory work environment.¹¹

Because the March 5 grievance will be consolidated for hearing with the March 16 dismissal grievance, EDR will defer any outstanding document discovery issues to the assigned hearing officer to be resolved according to the *Rules for Conducting Grievance Hearings*.¹² While EDR has long held that both parties to a grievance should have access to relevant documents prior to the hearing phase in order to facilitate management resolution,¹³ in this case the March 5 grievance will effectively bypass the management resolution steps and proceed to hearing. In addition, it appears that the parties’ dispute regarding the requested records raises factual and evidentiary questions best resolved by a hearing officer, such as the content and relevance of the records sought and any burden in producing them. Accordingly, and because deferring documents issues to the hearing officer does not appear to prejudice either party, EDR declines to rule definitively at this time that the grievant’s failure to produce the requested records is out of compliance with the grievance procedure.

Agency Representatives

As to the grievant’s assertion that the agency is out of compliance with the grievance procedure by responding to the pending grievances in part via its employee relations manager, EDR identifies nothing in the grievance record that would support a finding of noncompliance at this time. The grievance procedure requires that “[p]arties and party advocates shall treat all participants in the grievance process in a civil and courteous manner and with respect at all times and in all communications.”¹⁴ In addition, parties “shall not engage in conduct that . . . unfairly prejudices the opposing party.”¹⁵ However, nothing in the *Grievance Procedure Manual*

⁹ See EDR Ruling No. 2020-5072.

¹⁰ *Id.* at 3.

¹¹ See *Rules for Conducting Grievance Hearings* § VI(C)(3).

¹² See *id.* § III(E); see *Grievance Procedure Manual* §§ 5.7(3), 8.2.

¹³ See Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2; e.g., EDR Ruling No. 2020-4970.

¹⁴ *Grievance Procedure Manual* § 1.9.

¹⁵ *Id.*


discourages the involvement of the agency's upper management and/or human resources staff in responding to the grievance; to the contrary, the involvement of human resources staff is expected and, in some circumstances, required.¹⁶

Here, the grievant requests that the agency's employee relations manager not represent the agency in grievances where she is "the primary named perpetrator of racial discrimination, retaliation, and intimidation." However, the grievant's allegations are conclusory in nature, do not describe specific instances of intimidation or incivility by the employee relations manager (whether or not linked to racial considerations), and do not articulate how the grievant's rights under the grievance procedure would be prejudiced by the employee relations manager's continued involvement on behalf of the agency. EDR is not aware of any independent determination sustaining the grievant's allegations in this regard. Thus, while EDR does not tolerate retaliation, intimidation, or other incivility between parties to a grievance, there is no basis to find that the agency has failed to comply with any provision of the grievance procedure by participating via its chosen human resources staff. As explained above, to the extent that the employee relations manager is implicated in the grievant's hostile-work-environment claims, the grievant will have the opportunity to prove her allegations at the hearing.

CONCLUSION

For the reasons explained herein, the grievant's grievances filed respectively on March 5, 2020, and March 16, 2020, are hereby consolidated for a single hearing.¹⁷ Upon the appointment of a hearing officer, the parties are advised to address any outstanding concerns or issues to the assigned hearing officer for resolution.

EDR's rulings on matters of compliance are final and nonappealable.¹⁸



Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁶ See, e.g., EDR Ruling No. 2018-4733.

¹⁷ Pursuant to the fee schedule established by EDR's Hearings Program Administration policy, consolidated hearings shall be assessed a full fee for the first grievance and an additional half fee for the second grievance. See EDR Policy 2.01, *Hearings Program Administration*, Attach. B.

¹⁸ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).