Issue: Compliance/Resolution Steps and administrative closure of grievance; Ruling date: June 10, 2003; Ruling #2003-080; Agency: Department of Corrections; Outcome: grievant out of compliance; agency closed grievance prematurely.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2003-080
June 10, 2003

The grievant has requested a compliance ruling in his April 6, 2003 grievance with the Department of Corrections (DOC). The agency administratively closed the grievance, claiming that the grievant has not provided sufficient information in his grievance for the agency to respond to his claims. For the reasons discussed below, this Department concludes that the grievant is out of compliance with the grievance procedure, but that it was premature for DOC to administratively close his grievance without first giving the grievant the opportunity to correct his noncompliance.

FACTS

The grievant is a Corrections Officer Senior with DOC. On March 18, 2003, he was issued a Group I Written Notice for "unsatisfactory attendance or excessive tardiness." Based on the accumulation of Written Notices, the agency suspended the grievant for ten days without pay.[1]

The grievant challenged the Written Notice and suspension in a grievance filed April 6, 2003.[2] On his Form A, the grievant listed only "Departmental policy and witnesses" as the facts supporting his grievance.[3] Furthermore, the grievant included a letter, advising DOC of his desire to waive the face-to-face meeting and to receive a written response instead from the Warden. To expedite the process, the Warden responded on April 9, administratively closing the grievance, citing the grievant's failure to provide any information supporting his claim that the Written Notice and suspension were unwarranted.

The grievant, through his representative, requested a compliance ruling from this Department, claiming that he is not required to provide any additional information to the agency because the burden of proof is on the agency to demonstrate why the discipline was warranted. The grievant further noted that his request to waive the meeting was not

[1] The grievant had two prior active Group II Written Notices.
[2] The grievant lists as issues on his grievance Form A: "Group I written notice and 10-day suspension (work 12 hour shift-10 days = 120)."
[3] *See* Grievance Form A, filed April 6, 2003.

an attempt to be uncooperative, but to save time. During this Department's investigation, DOC asserted that it never agreed to waive the second step meeting.[4]

DISCUSSION

Compliance - Sufficiency of Grievant's Information

In the interest of efficiency and because this is an expedited grievance, this Department will rule on the issue of the grievant's compliance at this time. The agency claims it cannot respond to the grievance because the grievant has not provided sufficient information to which it can respond. In support of its claim, the agency cites (1) the inadequacy of the grievant's Form A[5] and (2) the grievant's desire to waive the face-to-face meeting at the Second Management Resolution Step.

Under the grievance procedure, a grievance Form A "must state the claim, the facts in support of the claim, and the relief requested."[6] Moreover, the grievance procedure states that "the purpose of the second-step meeting is fact finding."[7] However, the grievance procedure is silent as to how much information a grievant must provide to the agency in the filing of his grievance and during the subsequent resolution steps.

For guidance, this Department looks to, among other sources, the principles of due process as embodied in the Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*. The Standards of Conduct describes the notice that must be given to an employee in disciplinary actions. Under the *Standards of Conduct*, an employee must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond prior to receiving formal discipline.[8] While the oral or written notification need not provide all information pertaining to the changes, it must provide the employee with *sufficient* facts to which he or she can respond.[9]

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[4] The grievant also asserted during this Department's investigation that he never received a response to his request to waive the meeting, only the written response closing his grievance.

[5] The agency complains that the grievant "did not cite the specific policy nor did [the grievant] list the names of [his]witnesses." Second Step Response, dated 4/9/03.

[6] *Grievance Procedure Manual* § 2.4, page 6.

[7] *Grievance Procedure Manual* § 3.2, page 8.

[8] DHRM Policy 1.60 (VII)(E)(2). The *Standards of Conduct* follows the United States Supreme Court's interpretation of the process due a tenured governmental employee prior to a disciplinary action. *See* Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). In Loudermill, the Supreme Court explained that the pre-termination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story. *Id.* at 546.

[9] Due process does not mandate that all evidence on a charge or even the documentary evidence be provided, only that such descriptive explanation be afforded as to permit an employee to identify the conduct giving rise to the dismissal and thereby to enable the employee to make a response. Linton v. Frederick County Board of Commissioners, 964 F.2d 1436 (4th Cir. 1992) citing Gniotek v. City of Philadelphia, 808 F.2d 241, 244 (3d Cir. 1986). The Gniotek court explains that notice is sufficient, if it

Similarly, when an employee pursues a grievance, this Department will require the same level of notice that an agency is required to provide on a Written Notice. This simply requires the employee to provide a brief explanation of facts supporting his claim. Those facts do not need to be detailed, but need to be sufficient enough for the agency to provide a reasoned response. For example, the grievant's statement that "departmental policy and witnesses" support his claim is insufficient because the agency cannot respond to his grievance without know *how* policy and witness accounts will support the grievant's claim.[10] Therefore, the grievant is out of compliance with the grievance procedure and is directed to provide a brief statement of facts to the agency so it can respond to the claim set forth in his grievance.[11]

During this Department's investigation, the agency expressed concern that the grievant, through his representative, was attempting to "bypass" the management resolution steps and take his issues directly to hearing. Under the grievance procedure, workplace disputes are grieved *first* to successive levels of agency management, at which stage many disputes are resolved.[12] This process includes a face-to-face meeting at the second management resolution step.[13] This Department has long held that *both* the employee and agency have an interest in attempting to resolve workplace disputes at the management resolution steps. Both the agency and the grievant are entitled to a meeting at the second resolution step and so far, DOC has not agreed to waive the meeting. Therefore, both parties are directed to hold a face-to-face meeting as required by the grievance procedure.[14]

Closure of the April 6 Grievance

The grievance procedure requires both parties to address procedural noncompliance through a specific process.[15] That process assures that the parties first

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apprises the vulnerable party of the nature of the charges and general evidence against him. Gniotek at 244.

[10] By analogy, Virginia courts require each party to "state the facts on which the party relies" and states that "it shall be sufficient if it clearly informs the opposite party of the true nature of the claim." *See* Virginia Rules of Court, Rule 1:4(d). *See also* Fed. R. Civ. P. 8(a)(2), which requires plaintiffs in federal court cases to provide "a short and plain statement of the claim." This rule gives "the defendant fair notice of [the claim] and the grounds upon which it rests." Garrison v. Barringer, 152 F. Supp.2d 856 (M.D.N.C. 2001) (quoting Conley v. Gibson, 355 U.S. 41 at 47 (1957)).

[11] The agency objected to the Form A, in part, because the grievant did name his witnesses. The grievant is not required to list every witness that he believes may have information pertaining to his grievance. Rather, he needs to state generally what information he believes his witnesses could provide that might convince the agency to reverse or modify its actions.

[12] *Grievance Procedure Manual* § 1.4, page 4.

[13] *Grievance Procedure Manual* § 3.2, pages 8-9.

[14] This face-to-face meeting may only be waived if both parties agree. In that case, management would provide a written response to the grievance without the benefit of a fact-finding meeting. However, even if the agency agrees to waive the meeting, this does not relieve the grievant of his responsibility to provide enough information for the agency to reasonably reply to the grievance.

[15] *Grievance Procedure Manual,* § 6, pages 16-18.

communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department'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.[16]

If the grievant is the noncompliant party and fails to correct the noncompliance, this Department has long held that the agency may administratively close the grievance by notifying the grievant in writing that (i) the grievance has been administratively closed, and (ii) the grievant may challenge the closing of his grievance by requesting a compliance ruling from this Department.[17] If the grievant requests a ruling and this Department finds that it was not proper to administratively close the grievance, this Department may order that the grievance be reopened.

In this case, administrative closure of the April 6th grievance was premature because the agency had not given the grievant five workdays to correct his noncompliance after notifying him in writing of the procedural violation, as required by the grievance procedure.[18] Accordingly, this Department concludes that the April 6th grievance must be reopened. This compliance ruling is consistent with others issued by this Department in comparable situations,[19] and is final and nonappealable.[20]

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant failed to comply with the grievance procedure. However, DOC improperly closed the grievance because it did not grant the grievant five workdays to correct his noncompliance, as required by the grievance procedure. Both parties are directed to reopen and proceed with the April 6, 2003 grievance, in accordance with this ruling. This Department's rulings on matters of compliance are final and nonappealable and have no bearing on the merits of the grievance.[21]

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Claudia T. Farr
Director

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Leigh A. Brabrand
EDR Consultant

[16] *Grievance Procedure Manual,* § 6.3, page 17.
[17] *Grievance Procedure Manual* § 6.3, page 17.
[18] The agency notified the grievant of the alleged noncompliance concurrently with the closing of the grievance.
[19] *See* Department of Employment Dispute Resolution (EDR) Ruling No. 2002-175.
[20] Va. Code § 2.2-1001(5).
[21] Va. Code § 2.2-1001(5).