

Issue: Compliance/grievance administratively closed due to claim of duplication; grievant claims second step meeting was non-compliant/Qualification/agency requests; Ruling Date: December 7, 2004; Ruling #2004-882, 2004-883; Agency: State Board of Elections; Outcome: Compliance: grievance is in compliance – may proceed through management steps; Qualification: request by agency is premature.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the State Board of Elections
Ruling Numbers 2004-882 and 2004-883
December 7, 2004

The grievant has requested a ruling on whether her June 18, 2004 grievance with the State Board of Elections (SBE or the agency) is in compliance with the grievance procedure. The agency administratively closed the grievance, claiming that it duplicated a grievance initiated on March 29, 2004. Further, the agency has requested a qualification ruling on the June 18, 2004 grievance and seeks consolidation of the grievance with the grievant's March 29, 2004 and September 2, 2004 grievances. In addition, the grievant alleges that the second step respondent has failed to comply with the requirements of the second management resolution step.

FACTS

In her March 29, 2004 grievance, the grievant alleges that (1) she has been denied training that would have assisted her in performing her job duties in a more timely and efficient manner; (2) she was denied a requested raise in salary, while other employees received pay increases; (3) she was falsely accused of being unable to complete her job duties; (4) the agency is attempting to displace her from her position as well as reclassify her job duties in an effort to hire someone new; and (5) she has been excluded from the decision-making process on matters for which she should have been consulted given her position within the agency. The grievant claims these management actions have been taken as a result of her informing the agency that she intends to relocate to another state and that such actions are discriminatory and have made for a hostile work environment. The March 29th grievance has proceeded through the management resolution steps and is currently with this Department for a determination on qualification.

On April 2, 2004, the grievant was allegedly called into a meeting with agency management. In this meeting, the grievant was allegedly questioned about her job performance. In her June 18, 2004 grievance, the grievant claims that the April 2nd meeting was "adversarial and antagonistic," held in retaliation for her participation in the grievance process, and constitutes further discrimination and harassment. Additionally, the grievant claims that since the meeting, she has been

“blacklisted” and kept from doing her job. The June 18th grievance was administratively closed by the agency at the second management resolution step as duplicative of the March 29th grievance.

On September 1, 2004, the grievant was issued a Group I Written Notice for “[u]nauthorized time away from the work area” and “disruptive behavior.” On the same day, the grievant was also issued a Group II Written Notice for “[f]ailure to follow a supervisor’s instructions” and “[f]ailure to perform assigned work.” The grievant challenged both Written Notices by initiating a grievance on September 2, 2004 grievance. The September 2nd grievance alleges discrimination, harassment and retaliation and is currently at the second management resolution step of the grievance process.¹

DISCUSSION

Alleged Noncompliance of Grievant

An employee’s grievance must not duplicate another grievance challenging the same action or arising out of the same facts.² If there is duplication, management may notify the employee that the grievance will be administratively closed due to noncompliance.³

While the March 29, 2004 and June 18, 2004 grievances both allege discrimination, workplace harassment and/or hostile work environment, and that the grievant has been prevented from performing her job, they challenge different management actions. Specifically, the March 29, 2004 grievance was initiated in response to the agency’s actions after learning of the grievant’s intentions to relocate to another state. Conversely, the June 18, 2004 grievance was initiated in response to an April 2, 2004 meeting with the grievant and other agency employees. Additionally, unlike the March 29, 2004 grievance, the June 18, 2004 grievance includes an allegation of retaliation.⁴ Accordingly, this Department does not view the issues raised in the June 18, 2004 grievance as challenging the same action as the

¹ The agency claims that the second step meeting was held on September 29, 2004 and that the second step response was mailed to the grievant on October 5, 2004. The agency alleges that the grievant has failed to advance or conclude the September 2, 2004 grievance.

² See *Grievance Procedure Manual* § 2.4.

³ *Id.*

⁴ It should be noted that the first step-respondent incorrectly advised the grievant in her first management resolution response that the grievant “could not include a previously filed grievance in a retaliation claim.” The *Grievance Procedure Manual* specifically provides that claims of retaliation for participation in the grievance process may qualify for hearing. See *Grievance Procedure Manual* § 4.1(b). As such, contrary to the first management resolution step response, the grievance procedure contemplates and allows claims of retaliation for previous grievance activity.

March 29, 2004 grievance and as such, the June 18, 2004 grievance shall proceed through the management resolution steps.

Alleged Noncompliance of SBE

The grievance procedure requires both parties to address procedural noncompliance through a specific process.⁵ That process assures that the parties first 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.⁶ Should this Department find that the agency violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department may resolve the grievance in the grievant's favor unless the agency can establish just cause for its noncompliance. Resolution in a party's favor is reserved for the most egregious of circumstances. For instance, if a party repeatedly ignores previous compliance orders from this Department, a ruling in favor of the opposing party may be granted.

The grievant contends that the agency is out of compliance with the grievance procedure because the second-step respondent failed to (1) schedule a face-to-face meeting; (2) return the original Form A documents; and (3) inform the grievant of her procedural option to appeal the second step response.⁷

As a general rule, at the second resolution step, a face-to-face fact-finding meeting must be held.⁸ However, if the second step respondent concludes that the grievance fails to comply with the requirements for initiation of a grievance, as in this case, the second step-respondent is under no obligation to conduct the fact-finding meeting. However, when the agency administratively closes a grievance for

⁵ *Grievance Procedure Manual*, § 6.

⁶ *Grievance Procedure Manual*, § 6.

⁷ Although not specifically raised with this Department, in her notice of noncompliance to the agency head, the grievant alleged the following additional grievance procedure violations: (1) the agency failed to notify her in writing of the alleged noncompliance as set forth in § 6.3 of the *Grievance Procedure Manual*; and (2) the agency should have notified her at the first management resolution step if her grievance failed to comply with the grievance procedure provisions for initiating a grievance. If this Department had been asked to rule on these two allegations of noncompliance, the agency would have likely been found to be in compliance with the grievance procedure as to both issues. First, because the noncompliance alleged by the agency deals with failure to comply with the requirements for initiating a grievance, § 2.4 and § 6.2 control how to notify the grievant of the noncompliance, not § 6.3 as alleged by the grievant. Moreover, § 2.4 of the *Grievance Procedure Manual* specifically provides that if the alleged noncompliance is failure to properly initiate a grievance, "[t]he agency may raise noncompliance at any point through the agency head's qualification decision," and as such, SBE was not obligated to raise the issue of noncompliance at the first resolution step as alleged by the grievant.

⁸ *See Grievance Procedure Manual* § 3.2.

failure to comply with the grievance procedure initiation requirements, management must “notify the employee, using the ‘Form A,’ that the grievance will be administratively closed due to noncompliance.”⁹ Moreover, the agency must “notify the employee on the ‘Form A’ that the employee has a right to request a compliance ruling from the EDR Director to overturn the closing of the grievance.”¹⁰

In the present case, the grievant contends that SBE informed her of the closure of her June 18th grievance through an August 30, 2004 memorandum only and failed to return the original Form A documents when it administratively closed her grievance. Consequently, the grievant claims that she was denied the opportunity to indicate on the proper forms her intentions regarding appeal of the agency’s decision. In the response section of the second management resolution step, the second step-respondent appropriately wrote “See Attachment.”¹¹ The agency contends that the attachment referenced is the August 30th memorandum advising the grievant that the grievance is being administratively closed for noncompliance with the grievance procedure. There is no dispute that the grievant received the August 30th memorandum. However, it is unclear whether the grievant received the Form A along with the August 30th memorandum. If this Department assumes the facts in a light most favorable to the grievant, the agency’s only violation is failure to return the Form A to the grievant, which directed the grievant to the August 30th memorandum. The Form A does not include an option to seek a ruling from EDR on whether her grievance duplicates an earlier grievance. Such requests may be made either in the “Employee’s comments” section of the Form A or through a separate document addressed to the Director of this Department, which was done here. Furthermore, the grievant’s failure to seek such a ruling through the Form A is not a violation of the grievance procedure. As such, even if this Department were to assume that the agency failed to return Form A to the grievant with the August 30th attachment, such error was harmless.

In the notice of closure, however, the agency fails to inform the grievant of her right to request a compliance ruling from EDR, but instead refers the grievant to the *Grievance Procedure Manual* for “additional clarification.” As such, SBE has failed to comply with the grievance procedure requirement that the grievant be informed of her right to seek a compliance ruling from the EDR Director. However, while this Department does not condone SBE’s noncompliance, in this case, any harm that may have accrued to the grievant as a result of the agency’s failure to provide adequate notice of her procedural option to seek a ruling from EDR was

⁹ *Grievance Procedure Manual* § 2.4.

¹⁰ *Id.*

¹¹ The grievance procedure permits a grievant to detail her issues, facts and requested relief in attachments to the Form A if necessary. See *Grievance Procedure Manual* § 2.4. Likewise, the second step-respondent may provide a written response on the Form A or in an attachment to the Form A. See *Grievance Procedure Manual* § 3.2.

minimal given that the grievant exercised her appeal rights anyway. As such, despite the agency's noncompliance with a substantial procedural requirement of the grievance procedure, this Department declines to resolve the grievance in the grievant's favor.

Qualification and Consolidation

The agency appears to be requesting a qualification determination on the June 18th grievance if this Department concludes, as it has done here, that the agency improperly administratively closed the grievance. In addition, if qualified, the agency seeks consolidation of the March 29th, June 18th, and September 2nd grievances for a single hearing.

As a general rule, this Department issues qualification decisions when requested by the grievant and after the grievance has proceeded through the management resolution steps of the grievance process. Moreover, written approval by the Director of this Department or her designee in the form of a compliance ruling is required before two or more grievances are permitted to be consolidated in a single hearing. EDR strongly favors consolidation and will grant consolidation when grievances involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.¹²

At this time, a request for qualification of the June 18, 2004 grievance is premature as the grievance has not proceeded through the management resolution steps and the grievant has not yet requested qualification for hearing from the agency head. Likewise, consolidation of the March 29th, June 18th and September 2, 2004 grievances for hearing is inappropriate because the grievances are at different stages in the grievance process. Specifically, the March 29th grievance is with this Department for a qualification determination while the June 18th and September 2nd grievances are at the second management resolution step of the grievance process. Once the June 18th and September 2nd grievances have advanced through the management resolution steps and reach the qualification stage, either party can renew a request for consolidation of all qualified grievances to this Department.¹³

¹² *Grievance Procedure Manual* § 8.5.

¹³ This Department is compelled to note, however, that to efficiently and expeditiously resolve any or all pending grievances, the parties may mutually agree to forego the remaining management resolution steps if they so desire. To do this, the parties would need to (1) agree in writing that they wish to qualify the grievances for hearing, specifically naming in the agreement which grievances they desire to qualify; and (2) seek the appointment of a hearing officer, and again, specifically naming the grievances they wish to advance to hearing. Once the parties have agreed to qualify the grievances for hearing, either party may seek a consolidation ruling from this Department on those grievances they have mutually agreed to qualify and advance to hearing.

CONCLUSION

This Department concludes that the June 18, 2004 grievance does not duplicate the March 29, 2004 grievance and may proceed through the management resolution steps. Accordingly, within 5 workdays of receipt of this ruling, the grievant must notify the agency that she wishes to either conclude her June 18, 2004 grievance or advance it to the second resolution step. This grievance does not make a determination about the merits of the June 18, 2004 grievance, only that it is in compliance with the grievance procedure. Moreover, the agency's qualification and consolidation requests are premature at this time. This Department's rulings on matters of compliance are final and nonappealable.¹⁴

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¹⁴ Va. Code § 2.2-3003(G).