Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date: September 4, 2008; Ruling #2009-2084; Agency: Department of Motor Vehicles; Outcome: Grievant In Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Motor Vehicles
Ruling Number 2009-2084
September 4, 2008

The Department of Motor Vehicles (DMV or the agency) has requested a compliance ruling regarding the grievant's July 17, 2008 grievance. The agency seeks to close the grievance because it purportedly fails to state sufficient facts for management to respond and adequately exercise procedural guarantees.

FACTS

The grievant was employed by the agency as an Auditor II.[1] In the spring of 2008, the grievant reported alleged fraud and gross mismanagement within her Division to the agency's Human Resource (HR) Director. In an April 28, 2008 letter, the HR Director told the grievant to put her concerns in writing and they would be investigated. The April 28th letter was copied to the Commissioner. The grievant subsequently provided the HR Director with an undated account of her concerns.

In a May 19, 2008 letter, the HR Director informed the grievant that her concerns had been investigated and found unsubstantiated. The May 19th letter also outlined alleged deficiencies in the grievant's work performance. The May 19th letter was copied to the Commissioner, the Division Director, (who serves as second step respondent) and the Division Manager.

On May 29, 2008, the Division Manager presented the grievant with a memorandum outlining her concerns about the grievant's purported failure to timely complete work. In particular, the memorandum focuses on an audit of the agency's purchasing process. On May 30, 2008, the grievant provided a written response to her supervisor's May 29th memorandum.

On or about June 9, 2008, the grievant's immediate supervisor, in the presence of the Division Director, issued the grievant a Group II Written Notice for failure to follow her supervisor's instructions and to perform work as assigned. Specifically, the grievant

[1] Since the filing of the instant grievance, the grievant's employment was terminated.

was disciplined for failing to complete an audit of the agency's purchasing process.[2] At that time, the three discussed the Written Notice and grievant's response to the Written Notice.

On or about July 8, 2008, the grievant challenged the Written Notice by initiating a grievance using an Expedited Grievance Form A. The agency notified the grievant, by letter dated July 9, 2008, that she was in noncompliance with the grievance process because she had used an expedited form to initiate a grievance that did not involve pay loss. The agency also asserted that the grievance was noncompliant because "[t]he 'Form A' must state the facts in support of the claim." The agency asserted that "[t]he items listed as 'facts' on the 'Grievance Form A-Expedited Process' are topics, not facts."

On July 17, 2008, the grievant re-submitted her grievance on a standard Grievance Form A. The grievance was identical to the one initiated on July 8th except that it was initiated on a standard Grievance Form A rather than an expedited grievance form.

On July 25, 2008, the agency sought closure of the grievance on the basis that the fact section of the grievance contained only "topics" and did not explain the facts of her grievance sufficiently to allow the agency to respond to the grievance or "provide procedural guarantees."

DISCUSSION

One of the primary purposes of the grievance procedure is to promote early resolution of disputes. To that end, the Grievance Form A "must state the claim, the facts in support of the claim, and the relief requested."[3] The grievance procedure, however, is generally silent as to how much information must be provided when filing a grievance and during the subsequent resolution steps. In the past, this Department has looked 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*.[4] The Standards of Conduct describes the pre-disciplinary notice that must be given to an employee prior to 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.[5] While the oral or written notification need not provide all

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[2] The grievant was disciplined because she purportedly failed to "Re-read the Internal Audit manual and the IIA standards. After which [she was] expected to document [her] understanding and present it to [her] manager."

[3] *Grievance Procedure Manual* § 2.4.

[4] *See* EDR Ruling 2003-080.

[5] DHRM Policy 1.60. 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-

information pertaining to the charges, it must provide the employee with *sufficient* facts to which he or she can respond prior to the issuance of formal discipline.[6]

Similarly, when an employee pursues a grievance, this Department will generally require the same level of notice that an agency is required to provide prior to issuing formal discipline. This simply requires the employee to provide a brief explanation of facts supporting his claim.[7] Those facts need not be detailed, but must be sufficient for the agency to provide a reasoned response. As explained below, it appears that the grievant has provided sufficient information to the agency on her Grievance Form A, especially against the backdrop of her May 30th written response and previous conversations with management, such that management could provide a reasoned response to the July 17th grievance.

In this case the grievant stated the following as issues in her July 17, 2008 Grievance Form A:

> *1. Group II Written Notice; 2. Unfair application of policies, rules and regulations; 3. Retaliation for complying with any law or reporting violations of law to a government authority; and 4. Retaliation for good faith reporting of incidences of fraud and gross mismanagement.*

In the fact section of her July 17th grievance, the grievant listed the following:

> *1. The Letter and spirit of the Code of Virginia and the Virginia Department of Human Resource Management Manuals; 2. Internal Audit Manual and references contained thereof; 3. Prior and current audit files/ work papers with the Internal Audit Office; 4. Evidence of past practice (i.e. performance measures and work volume to allocated time); 5. Arbitrary and capricious and inconsistent management; 6. Written and otherwise documented evidence.*

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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.

[6] Pre-disciplinary 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, 1440 (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 apprises the vulnerable party of the nature of the charges and general evidence against him. *Gniotek* 808 F.2d at 244.

[7] By analogy in pleadings, 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, 859 (M.D.N.C. 2001) (internal quotations and citations omitted)).

The listing of "facts" in the July 17th grievance is undeniably more a catalog of sources of potentially supportive laws, policies and evidence than a recounting of the events and circumstances surrounding her grievance. However, a fair reading of the Grievance Form A, including the language above, plainly indicates that the grievant seeks the removal of her Group II Written Notice.[8] Furthermore, the grievant had previously discussed the Written Notice with both her supervisor and the second step respondent (Division Director) when they first presented it to her.[9] Similarly, although the grievant does not expressly state in her grievance exactly what "fraud and gross mismanagement" she reported or to whom, the Commissioner, the Division Director, and the Division Manager (immediate supervisor) were all copied on the May 19, 2008 letter from the HR Director that outlined the grievant's allegations of fraud and mismanagement. Thus, it appears that the agency knew or should have known of the fraud and mismanagement claims to which the grievant refers in her grievance.[10] For this reason, we cannot conclude that the agency had insufficient notice of the grievant's claims or concerns such that it could not provide a reasoned response to this grievance.

As a general rule, potential ambiguity caused by sparse or poorly drafted grievances, or management step responses to grievances, can and should be resolved during the resolution steps by having the parties simply ask for further clarification of unclear statements. Such inquiry is the preferred means to eliminate ambiguity and can provide clarification without undue delay, such as that associated with requiring a grievant to re-file a grievance. Moreover, while only one opportunity for a face-to-face fact-finding meeting is guaranteed by the grievance procedure, parties are generally not prohibited from seeking clarification from each other.[11]

Here the agency has, in a sense, asked for clarity by asserting that the grievant has listed on the Form A topics rather than facts. However, as discussed above, we cannot

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[8] *See* Issues section of Grievance Form A which lists the Group II Notice as an issue. *See also* Relief section which seeks to have the Written Notice rescinded as the sole requested relief.

[9] The grievant had already presented to her immediate supervisor a written response to her supervisor's request for information regarding the grievant's alleged failure to adequately perform her audit of the purchasing process.

[10] Similarly, the Grievance Form A expressly lists "retaliation" as a factor pertaining to the Group II Written Notice, thus one can reasonably draw the inference that the grievant is claiming the Written Notice to be a retaliatory act.

[11] One exception would be a case involving retaliation or discrimination by a step respondent. Under the grievance procedure, if a grievant does not want to meet with the second step respondent because her grievance alleges retaliation or discrimination by the second step respondent, then she can either: (1) request that the agency designate another second-step respondent; or (2) waive the face-to-face meeting with the original second-step respondent and receive only a written second-step response to the grievance. (If the grievant waives the face-to-face meeting with the original second step respondent, the agency must allow her to meet with the third-step respondent.) *Grievance Procedure Manual* § 3.2. Thus, if a grievant has alleged, as is the case here, that the second step respondent has retaliated against her, and the grievant has elected to meet with the third step respondent and receive only a written response from the second step respondent, then the second step respondent would only be able to request additional clarification through a writing. Furthermore, any such request for additional clarification must be limited in scope addressing only truly ambiguous aspects of the grievance.

say that the Form A as a whole lacks sufficient specificity to allow the agency to respond, or at minimum, ask specific questions. We do not mean to imply that an agency should have to forage for information or be forced to guess at the meaning of an ambiguous grievance--the grievant bears the responsibility of providing adequate information to allow the agency to reasonably respond. However, where a grievant has recently provided such information to those in grievant's direct line of supervision, the agency cannot, in good faith, maintain that because the information is not on the Form A, it does not have sufficient information to respond to the grievance.

Finally, we feel compelled to note that the agency's request to close the grievance because it potentially lacks clarity on the claims in the Form A is not the preferred way to "adequately exercise its procedural guarantees." While closure of a grievance in the case of a grievant's substantial noncompliance with the grievance process is appropriate, mere ambiguity in the drafting of a grievance does not automatically establish substantial noncompliance. The agency has the opportunity to seek clarifying information at all grievance steps, particularly at the face-to-face meeting.[12] If information genuinely needed for a reasoned response during the management steps is withheld, particularly during the face-to-face fact-finding meeting, then the agency can seek a compliance ruling from EDR.[13] If the grievance is qualified for hearing, the agency may seek further clarification through the assigned hearing officer during a pre-hearing conference.[14]

Proper Step-Respondent

The agency also asserts that the grievant has improperly attempted to advance her grievance to the third step.

The grievant expressly stated in her original grievance, initiated on July 8th on the Expedited Form A, that she was claiming acts of retaliation by both the first and second respondents (the Division Manager and Director), and that she wished to "waive the face-to-face meeting with the second-step respondent and receive only a written second-step response to the grievance." In the July 9, 2008, letter of noncompliance from the agency to the grievant, the agency stated the following:

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[12] The purpose of the second step meeting is fact finding (*Grievance Procedure Manual* § 3.2) and the intent of this meeting, as with all the management resolution steps, is that parties make a good faith attempt to resolve the issues grieved prior to hearing, if possible. Accordingly, both parties are encouraged to present information relevant to the grievance at this meeting and to deal in good faith (*Id*.).

[13] *See Grievance Procedure Manual* § 6.3. Notice of noncompliance and an opportunity to cure are required before seeking a ruling from EDR. Also, in virtually every case where this Department is asked to rule on the noncompliance of either party, this Department will order the noncompliant party to correct the noncompliance before authorizing closure of a grievance or, in the case of agency noncompliance, awarding relief to a grievant. *See* EDR Ruling #2003-080 (Grievant ordered to provide further information to agency instead of allowing agency to close grievance); EDR Ruling #2007-1470 (Agency repeatedly ordered to provide documents to grievant before EDR ordered relief in favor of grievant).

[14] *See Rules for Conducting Grievance Hearings* III (D).

> You allege retaliation by your first and second-step respondents and wish to waive the face-to-face meeting with the second step respondent and receive only a written second-step response to the grievance. Because the grievance requires that there be at least one face-to-face meeting between the employee and management during the management resolution steps, the person with whom you must request a meeting is the person who would otherwise serve as the third-step respondent, [Commissioner] (§3.2 Second Resolution Step Meeting).

It is true that the grievant checked the box indicating that she wished to advance her grievance to the third step. However, her response is understandable and cannot be considered noncompliant given (1) the above instruction from the agency, [15] and (2) the lack of any explicit provision in the *Grievance Procedure Manual* of precisely how to indicate on the Grievance Form A an intent to advance a grievance asserting retaliation by the first two step respondents. Further, the grievant has expressed to this Department a willingness to meet with the third step respondent, if he desires.[16] Thus, the intent of the grievant appears clear: she wishes to advance her grievance and will meet with the third step respondent if he wants. Accordingly, within 5-workdays of the receipt of this ruling, the Assistant Commissioner or Deputy Commissioner must schedule and hold a face-to-face meeting with the grievant, unless both parties wish to waive this meeting. In the event that both parties wish to waive the meeting, the third step respondent shall provide a written response only to the grievance within 5-workdays of receipt of this ruling.

This Department's rulings on compliance are final and nonappealable.[17]

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Claudia T. Farr
Director

[15] The instruction is essentially correct except that this Department has indicated that if both parties wish to waive the face-to-face meeting, they may do so. *See* Grievance Procedure FAQ #13. If either party insists on the meeting, however, then it must occur. *Id. See also* EDR Ruling 2003-120. The instruction, however, is inaccurate in that the agency asserts that the third step respondent is the Commissioner. The agency has designated the Assistant Commissioner or Deputy Commissioner as the third step respondent. *See* August 2004 Step Respondent Designation.

[16] She states that if the third step respondent does not wish to meet, she wishes to have a hearing officer hear her case.

[17] Va. Code § 2.2-1001.