

Issues: Compliance – Grievance Procedure (Resolution Steps and 5-Day Rule);
Ruling Date: April 6, 2009; Ruling #2009-2200, 2009-2201; Agency: Virginia
Department of Transportation; Outcome: Agency Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Transportation
Ruling Nos. 2009-2200, 2009-2201
April 6, 2009

Both the grievant and the Virginia Department of Transportation (VDOT or the agency) have requested compliance rulings with respect to the grievant's November 14, 2008 grievance. The grievant asserts that the first-step respondent failed to respond to his grievance appropriately; the agency asserts that the grievant has failed to advance his grievance in a timely manner.

FACTS

The grievant is employed by the agency as an Equipment Repair Technician. On October 16, 2008, a high level supervisor (who was not grievant's immediate supervisor) issued the grievant a Group II Written Notice for alleged "insubordination, abuse of state resources, and violation of Internet Policy 1.75."¹ On November 14, 2008, the grievant initiated a grievance with the first step respondent, his immediate supervisor, to challenge the disciplinary action.²

On November 19, 2008, the grievant's immediate supervisor provided the grievant with his first-step response, which stated: "The Standard of Conduct was issued directly by [high-level supervisor], bypassing myself, so therefore I am unable to respond due to the fact that I am unfamiliar with the circumstances surrounding this matter." By e-mail dated December 2, 2008, the grievant advised the first-step respondent and the agency head that the agency's response was out of compliance with the grievance procedure. Specifically, the grievant asserted that the first-step respondent had failed to adequately investigate and respond to the grievant's claims.

¹ The grievant asserts that he was actually given two Group II Written Notices for the same alleged conduct. He received the first Written Notice on October 16, 2008, but was allegedly subsequently advised by the agency that the initial Written Notice form was incorrect. The grievant apparently signed a corrected Written Notice on October 22, 2008.

² The grievance procedure provides that generally employees must initiate a grievance with the first-step respondent, who is usually the immediate supervisor. *Grievance Procedure Manual* § 2.4. However, if the grievance involves a Written Notice issued by someone other than the grievant's immediate supervisor, the employee may opt to initiate the grievance with the person who issued the discipline. *Id.* In this case, the grievant elected to initiate his grievance with his immediate supervisor as the first step respondent.

By letter dated December 4, 2008, the first-step respondent replied to the grievant's notice of noncompliance. The first-step respondent asserted that the agency was not out of compliance with the grievance procedure, the response was issued in a timely manner, and the grievant would have an opportunity at the second-step meeting to discuss any disputed facts and issues. The first-step respondent further advised the grievant that he was out of compliance, as he had failed to advance or close his grievance in a timely manner or to appeal the agency's alleged non-compliance to this Department.

In a letter received by this Department on December 23, 2008, the grievant requested a compliance ruling from the EDR Director. That same day, this Department also received a letter from the agency, asking that the grievant's November 14th grievance be closed for noncompliance. Both requests are addressed below.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.³ That process assures that the parties first communicate with each other about the purported noncompliance, and resolve any compliance problems voluntarily without EDR'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. If the party fails to correct the alleged noncompliance, the other party may request a ruling from EDR. Should EDR find that a party violated a substantial procedural requirement, EDR may render a decision against that noncomplying party on any qualifiable issue, unless the noncomplying party can establish just cause for its noncompliance. Rendering such a decision is reserved for the most egregious of circumstances; for instance, if a party ignores a previous compliance order from EDR, a ruling in favor of the opposing party may be granted.

Grievant's Claim of Noncompliance

The grievant asserts that the first-step response did not satisfy the requirements of the grievance procedure. Section 3.1 of the *Grievance Procedure Manual* provides that "[a]fter receiving the written grievance, the first-step respondent should identify the issues, gather information and review the facts." Section 3.1 further provides that the written first-step response "must address the issues and the relief requested and should notify the employee of his procedural options." While the agency is correct that the grievant will have an opportunity to discuss "disputed facts and issues" at the second-step meeting, that does not render moot the first-step respondent's independent duty to provide a written response in compliance with the grievance procedure.

In his first-step response, the immediate supervisor identified the management action being grieved as the grievant's receipt of a Standards of Conduct disciplinary action, but there is no indication that he "gather[ed] the information or review[ed] the facts" such that he could

³ See *Grievance Procedure Manual* § 6.3.

provide a reasoned response to the grievance and the primary issues contained therein. Such issues would include, for example, the alleged conduct giving rise to the disciplinary action and the Grievance Form A's written challenges to that disciplinary action. Indeed, while the first step respondent may have attempted to address "the issues and the relief requested," the response only states that the discipline was issued by the higher level supervisor, and that because the first-step respondent was unfamiliar with the circumstances, he was unable to respond.⁴ In the absence of having first hand knowledge of the issuance of the Written Notice, the first step respondent was required, under the grievance procedure, to familiarize himself with the basic facts and circumstances surrounding the events giving rise to the grievance, such that he could provide a reasoned response.

In providing such a response, the grievance procedure requires that a first step respondent address the issues and the relief requested, in light of the facts and circumstances surrounding the Written Notice. While we recognize that it may be difficult for a first-step respondent to respond where he or she has not taken the action being grieved, the burden imposed by the grievance procedure under this particular circumstance is not an onerous one. The grievance procedure does not require the first step respondent to act as a full-fledged investigator before providing a response, and the first-step response need not be in-depth or extensive. What is not permissible, however, is the abdication of the first-step respondent's duty in this case to (i) become familiar with the fundamental facts and circumstances of the case, (ii) provide a reasoned response to the primary issues presented and relief requested by the grievance, and (iii) notify the grievant of his procedural options.

Agency's Request to Close Grievance

The agency asserts that it should be allowed to close the grievant's grievance, on the ground that he failed to timely advance or conclude his grievance or to appeal to this Department. However, even assuming the grievant had earlier been noncompliant, his appeal to this Department for a compliance ruling, which was received on the same date as the agency's request for a closure ruling, effectively moved his grievance forward and thereby brought the grievant back into compliance. Accordingly, the issue of the grievant's noncompliance is now moot, and the agency's request to close the grievance is denied.

CONCLUSION

For the reasons discussed above, this Department concludes that the agency has failed to comply with the grievance procedure by providing an inadequate first-step response. The agency is directed to have the designated first-step respondent provide the grievant with a revised written response to the grievance, consistent with this ruling, within five workdays of receipt of this ruling. This response must address the primary issues raised by the grievance, as well as the relief requested, in light of the first step respondent's familiarization with the facts and circumstances of this case. The agency's request to close the grievance is denied.

⁴ While the initial first step response did not "notify the employee of his procedural options," such options were outlined in the first-step respondent's December 4, 2008 response to the grievant's notice of noncompliance.

This Department's rulings on matters of compliance are final and nonappealable and have no bearing on the merits of the grievance.⁵

Claudia T. Farr
Director

⁵ Va. Code § 2.2-1001(5).