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COMPLIANCE RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2022-5409
May 20, 2022

The Department of Behavioral Health and Developmental Services (the “agency”) has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) in relation to the grievant’s February 22, 2022 grievance. The agency alleges that the grievant has failed to comply with the time limits set forth in the grievance procedure for advancing or concluding the grievance.

FACTS

On or about February 22, 2022, the grievant initiated a grievance with the agency. On March 10, 2022, after receiving the first-step response, the grievant elected to advance her grievance to the second step. On or about March 14, 2022, the second-step respondent completed her written response, noting that the grievant was currently away from work on short-term disability leave.¹ According to the agency, this response was mailed to the grievant on March 15, 2022.² Having apparently received no indication from the grievant whether she wished to advance or conclude the grievance, the agency sent the grievant a notice of noncompliance dated April 26, 2022.³ As more than five business days have elapsed since the agency notified the grievant of the alleged noncompliance and the grievant has not yet advanced or concluded the grievance, the agency seeks a compliance ruling allowing it to administratively close the grievance.

¹ See generally DHRM Policy 4.57, *Virginia Sickness and Disability Program*.

² Although the agency has represented that it sent the second-step response to the grievant by certified mail, the record contains no documentation of the mailing. Therefore, we are unable to determine whether the grievant received it for purposes of compliance with the grievance procedure. Cf., e.g., *Washington v. Anderson*, 236 Va. 316, 322, 373 S.E.2d 712, 715 (1988) (holding that the mailing of correspondence, properly addressed and stamped, raises a presumption of receipt of the correspondence by the addressee). For the reasons explained in the Discussion section below, EDR finds it unnecessary to verify at this time whether the agency effectively provided the second-step response to the grievant.

³ EDR notes that the notice of non-compliance somewhat misstates the non-compliance remedy indicated by the grievance procedure. The notice advised the grievant that the agency would “close the file” on the grievance if it did not receive her response within five workdays. However, the remedy provided by the grievance procedure is to seek a compliance ruling from EDR (as the agency has done), which typically provides an additional opportunity for the grievant to respond. See *Grievance Procedure Manual* § 6.3.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.⁴ That process assures that the parties first communicate with each other about the noncompliance, and resolve any 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.⁵ If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from EDR, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When EDR finds that either party to a grievance is in noncompliance, its ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for the delay in conforming to EDR's order.⁶

The grievance process is intended to provide the parties with an expeditious way to resolve workplace issues.⁷ To support this goal, the five-workday rule requires the parties to a grievance to take appropriate action, depending on the procedural stage of the grievance, within five workdays of receipt of the grievance.⁸ Thus, for example, a grievant must advance or conclude their grievance within five workdays of receiving each step response, and each step-respondent is required to issue their response within five workdays of receiving the grievance. The *Grievance Procedure Manual* defines “workdays” as the “[n]ormal work schedule (excluding authorized leave time) for the individual responsible for taking the required action.”⁹

Ordinarily, then, a grievant would not be required to proceed with a grievance while on an approved absence from work. In addition, participation in the grievance process is considered to be an approved work-related activity that would not normally be undertaken while an employee is on short-term disability leave.¹⁰ Here, the record appears to indicate that the grievant was out of work on short-term disability leave beginning in March 2022, and the grievant has informed EDR that she remains out on leave at this time. Because it appears that the grievant has been and is

⁴ *Grievance Procedure Manual* § 6.3.

⁵ *See id.*

⁶ Although the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party in cases of substantial noncompliance with procedural rules, EDR favors having grievances decided on the merits rather than procedural violations. Thus, EDR will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, EDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

⁷ *See Grievance Procedure Manual* § 1.1.

⁸ *See id.* §§ 3.1, 3.2, 3.3.

⁹ *Id.* § 9.

¹⁰ *See, e.g.,* DHRM Policy 4.57, *Virginia Sickness and Disability Program*. The record indicates that the second-step respondent issued her response without holding the required meeting with the grievant because the grievant's short-term disability made her unavailable. *See generally Grievance Procedure Manual* § 3.2. However, we note that the grievance process would not require the grievant to schedule the second-step meeting – a work-related activity – during a period of approved short-term disability leave. Moreover, although the parties may agree to waive certain requirements of the grievance procedure, such agreements must be mutual and in writing. *Id.* § 8.4 The record does not reveal whether the grievant in this case agreed to waive the meeting.

currently out on approved leave, we find nothing in the record to indicate that she was required to act on the second-step response, assuming she did in fact receive it.

For the foregoing reasons, EDR is unable to conclude that the grievant has failed to comply with the grievance procedure at this time. The grievant has expressed to EDR that she wishes to pursue the grievance when she returns to work. Accordingly, it does not appear that either party will be required to take any action until that time. Upon the grievant's return to work, she may address compliance concerns she may have with the agency's actions at the second management resolution step,¹¹ or she may indicate whether she wishes to advance or conclude her grievance.¹² Pursuant to the standard requirements of the grievance procedure, she must make her election within five of her workdays following receipt of the second-step response (and following her return to work).¹³

EDR's rulings on matters of compliance are final and nonappealable.¹⁴

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¹¹ See *Grievance Procedure Manual* § 6.3.

¹² *Id.* § 3.2.

¹³ *Id.*

¹⁴ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).