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QUALIFICATION RULING

In the matter of the University of Virginia
Ruling Number 2023-5552
April 27, 2023

This ruling addresses the qualification of a grievance initiated with the University of Virginia (the “agency” or “university”) on or about January 25, 2023, and recently amended on April 14, 2023. Based on the amendments, the parties have sought an appeal to the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) to clarify the scope of qualified issues.

FACTS AND PROCEDURAL HISTORY

On or about January 25, 2023, the grievant filed an expedited grievance with the agency challenging his receipt of a Group II Written Notice, dated January 6, 2023. The January 6, 2023 Written Notice identified two issues of failure to follow instructions or policy: 1) the grievant failed to enter certain paid time off requests into the agency’s system, and 2) the grievant failed to follow instructions to order a new computer due to the grievant’s apparent inability to connect to the agency’s virtual private network while working from home. The university did not respond to the January 25 grievance initially and the grievant was terminated based on additional Written Notices issued on February 17, 2023. Upon bringing this issue to the university’s attention, the initial step respondent provided a written response on the grievance form, dated February 23, upholding the Group II Written Notice. No meeting was held to address the January 25 grievance.

Shortly thereafter, the university appears to have realized the procedural anomalies and sought to correct the failure to adhere to the grievance procedure. A new step respondent was identified and a meeting held with the grievant on or about March 6. The step respondent provided a written response, again upholding the Group II Written Notice, on March 13, 2023. The step respondent rescinded the original Written Notice and replaced it with a new Group II Written Notice with a re-issued date of March 13, 2023. Though more details are included, the reissued Written Notice identified two issues of failure to follow instructions or policy: 1) the grievant failed to enter certain paid time off requests into the agency’s shared calendar, and 2) the grievant failed to take steps to resolve the technology issues that prevent him from appearing on webcam during virtual meetings or connecting to the agency’s virtual private network. The grievant initially contested the reissued Written Notice as a compliance challenge to the grievance process. At the same time, the university sought to consolidate the January 25 grievance with the grievant’s

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dismissal grievances that were filed with EDR. In EDR Ruling Numbers 2023-5535, 2023-5536, EDR determined that the university's decision to reissue the Written Notice did not fail to comply with the grievance procedure. EDR also consolidated the grievances for a single hearing, once the January 25 grievance completed the resolution steps.¹

The grievant appears to have not initially proceeded with the January 25 grievance after receiving the March 13 response from the step respondent and the reissued Written Notice. On April 13, the university notified EDR that it was waiving the remaining steps and sent the grievance paperwork to EDR for the January 25 grievance to join the dismissal grievances for the consolidated hearing. The parties and EDR exchanged correspondence about the procedural aspects of the case. Further, the grievant submitted a new grievance to the university on April 14, 2023, seeking to challenge the reissued Written Notice. A phone conference was held between EDR and the parties on April 18. The result of that conference was essentially that the parties would agree to consider the April 14 grievance as an amendment to the original January 25 grievance as a continued challenge to the reissued Written Notice.² The university reviewed the April 14 grievance paperwork (amendment) and objected to qualification of the amended grievance for hearing in certain respects. The grievant disagrees with the university's position, resulting in this ruling.

DISCUSSION

The university states clearly that all issues related to the reissued Written Notice (dated March 13, 2023) are qualified for a hearing. However, the university indicates that the grievant's allegations of "paid leave violations" are not qualified. In the grievant's April 14 grievance amendment, the grievant explains that there were three days he had sought and was approved to take leave. The grievant was later told to change his plans and allegedly did not take the leave. However, according to the grievant, because the leave was already in the system, leave was deducted from his balance and a correction was not made. The grievant's supervisor appears to have intended to allow the grievant to take leave at a later time, presumably without having to submit a leave request. Both the original and reissued Written Notice includes a three-day suspension for January 9-11, 2023. The grievant alleges that his supervisor issued the three-day suspension to essentially get back the three days the grievant had been asserting he lost as paid leave.

Because the grievant's challenge to the reissued Written Notice is qualified for a hearing, EDR deems the grievant's challenge to the loss of paid leave as qualified for hearing as well. The grievant has sought to have 24 hours of leave and/or pay provided as relief in his grievance; the original grievance appears to have included such a claim so this does not appear to be a newly

¹ EDR Ruling Nos. 2023-5535, 2023-5536.

² Amending a grievance while in process is unusual and often can be noncompliant with the grievance process. For example, "[o]nce the grievance is initiated, challenges to additional management actions or omissions cannot be added." *Grievance Procedure Manual* § 2.4. However, there may be appropriate reasons to do so. For example, when an agency has reissued a Written Notice with changes during the grievance process, it would typically be reasonable to allow a grievant to amend their grievance correspondingly to continue to challenge the reissued Written Notice. The grievant should be afforded such an opportunity in this case. Further, to the extent the April 14 grievance was intended as a new grievance, it would have been considered untimely as it was not submitted within 30 calendar days of the reissuance of the Written Notice on March 13. *Grievance Procedure Manual* § 2.2 n.2 ("An employee who wishes to appeal a disciplinary action must file a grievance within 30 calendar days of receipt of the Written Notice.").

added issue. The grievant's claim appears to be that his leave balance was deducted by 24 hours without taking any time off. It is unclear from the record available whether the grievant was paid for January 9-11, 2023, or if he was suspended without pay. Therefore, to the extent the grievant may have lost 24 hours of leave and/or pay, that question cannot be separated from the challenge to the Written Notice. Accordingly, the issue will be before the hearing officer when the case proceeds to hearing.

The April 14 grievance amendment also includes allegations about the university's failure to comply with the grievance procedure. Generally speaking, a new grievance is not to be used to "seek[] relief from alleged agency noncompliance with the grievance procedure."³ Moreover, questions of noncompliance with the management steps of the grievance process are not generally matters for consideration at hearing.⁴ Rather, such questions are to be addressed to EDR, usually by following the provisions for party noncompliance.⁵ EDR has final authority to rule on matters of compliance with the grievance procedure.⁶ As neither party has requested EDR to address these issues, we do not reach them here. However, to the extent such matters are questions for consideration by the hearing officer, we provide the following observations.

The grievant asserts that the university first ignored his January 25 grievance. However, the university corrected this noncompliance by responding during the management steps and proceeding with the grievance process. The grievant asserts that the university failed to provide a face-to-face meeting during the grievance steps. While the initial step respondent did not meet with the grievant, the next step respondent did. Consequently, the university has corrected the noncompliance. The grievant also argues that he should have been provided a face-to-face meeting to address the reissued Written Notice. As a matter of the grievance procedure, such a meeting was not required. The reissued Written Notice was provided following the single step respondent meeting in the January 25 grievance. As the resolution step at which the meeting occurs in expedited grievances had already been passed at that point, the university did not need to backtrack to provide another face-to-face meeting under the grievance procedure. Therefore, the university does not appear to have failed to comply with the grievance process by not providing another meeting in the management steps.

The grievant raises additional procedural arguments surrounding the reissued Written Notice⁷ and claims of retaliation. Because the grievant's challenge to the reissued Written Notice is qualified for hearing, the grievant will have the opportunity at the hearing to prove affirmative defenses against the Written Notice, including a claim that it was issued for retaliatory reasons.⁸

³ *Grievance Procedure Manual* § 2.4.

⁴ Indeed, if not raised in a ruling request to EDR prior to the hearing stage, noncompliance occurring during the management steps is generally considered waived. *See Grievance Procedure Manual* § 6.1.

⁵ *Grievance Procedure Manual* § 6.3.

⁶ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).

⁷ For example, as EDR noted in its prior ruling, while we did not find the reissuance of the Written Notice to be noncompliant with the grievance procedure, we have not resolved with finality additional questions as to whether the reissued Written Notice complies with state and agency policy and/or due process requirements. EDR Ruling Nos. 2023-5535, 2023-5536. The grievant will have the opportunity to raise such issues at hearing.

⁸ *Rules for Conducting Grievance Hearings* § VI(B)(1).

CONCLUSION

In sum, the amended grievance is qualified for hearing as a challenge to the reissued Written Notice and related issues, including affirmative defenses such as retaliation, due process, and the paid leave issue identified above. Furthermore, the grievance as amended remains subject to the consolidation determination expressed in EDR's prior ruling and, as such, may be heard in conjunction with all other matters pending before the appointed hearing officer. By separate correspondence, EDR will notify the hearing officer of all amendments to the scope of his appointment pursuant to EDR's rulings on these consolidated matters. The parties are advised to raise any subsequent concerns regarding hearing procedures directly with the hearing officer.

EDR's qualification rulings are final and nonappealable.⁹

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⁹ See Va. Code §§ 2.2-1202.1(5).