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COMPLIANCE RULING

In the matter of the Department of Corrections
Ruling Number 2023-5485
January 27, 2023

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management on whether his November 10, 2022 grievance with the Department of Corrections (the “agency”) complies with the grievance procedure.

FACTS

On or about July 11, 2022, the grievant received a Group II Written Notice, which included a demotion. The grievant sought a hearing through the agency pursuant to the Correctional Officer Procedural Guarantee Act¹ (COPGA). The hearing was reportedly held on September 20, 2022. A divided panel recommended that the disciplinary action be reduced to a Group I Written Notice without a demotion. That recommendation was sent for consideration by the agency head, who rendered a “final” decision in a document dated October 12, 2022. The agency head did not accept the panel’s recommendation and upheld the original disciplinary action. Following receipt of the agency head’s decision, the grievant filed the grievance at issue in this ruling on or about November 10, 2022. In terms of the issues raised, the grievance form indicates that the “[d]isciplinary action itself and the [agency head’s] failure to abide by the panel’s recommendation are at issue.” The grievance also appears to allege that the agency violated the COPGA by failing to provide notice of how the grievant violated certain policies. The grievance additionally includes an allegation about a denial of due process through the agency head’s action. The agency has closed the grievance for initiation noncompliance. The grievant now appeals to EDR for a ruling on whether the grievance complies with the provisions of the grievance procedure and may be permitted to proceed.

DISCUSSION

In its closure letter, the agency cites to the initiation requirement of Section 2.4 of the *Grievance Procedure Manual* that a grievance is in compliance if it is “not pursued through another state process.” The agency essentially states that the grievant’s challenge to the

¹ Va. Code §§ 9.1-508 through -512.

disciplinary action through the COPGA means that he cannot pursue a grievance to challenge the same action. Further, the agency interprets a statutory provision within the COPGA as giving employees the option to pursue either a grievance or a hearing under COPGA.² The agency also cites to its own policy on COPGA matters, which states that “the [agency head] is not required to follow the panel’s recommendations. ... The decision of the [agency head] is final and non-appealable, and must be implemented fully within a reasonable period.”³

In the grievant’s compliance ruling request, he argues that the COPGA “does not require that a correctional officer give up his or her right to a grievance hearing if the officer opts for the hearing panel,” citing to language, or lack thereof, in the COPGA. The grievant further argues that Section 2.4 of the *Grievance Procedure Manual* does not preclude use of the grievance procedure in this context, asserting that use of other state processes, such as mediation for example, does not. The grievant also challenges the agency’s implementation of the COPGA in its policy (Operating Procedure 145.4), noting that there is no provision of the Code of Virginia that states the agency head’s decision is final and non-appealable. The grievant additionally points out differences between the COPGA and the analogous Law-Enforcement Officer Procedural Guarantee Act (LEOPGA),⁴ including a provision that exempts from coverage under the grievance procedure law-enforcement officers who proceed under the LEOPGA, but no comparable provision for the COPGA. Lastly, the grievant states that the agency has “arbitrarily and capriciously” denied his right to utilize the grievance process.

The General Assembly enacted the COPGA in 2018, which appears to be similar to the LEOPGA in many respects. One difference between the two Acts is relevant to this ruling. “Law-enforcement officers as defined in § 9.1-500 whose grievances are subject to Chapter 5 (§ 9.1-500 et seq.) and who have elected to resolve such grievances under those provisions” are specifically exempt from the grievance procedure.⁵ The Code of Virginia does not contain the same provision for correctional officers who proceed under the COPGA. If the Code included such language, the outcome of this ruling would be clear that the grievant would not have access to the grievance procedure in this case. Because this language does not appear in the Code, we are required to evaluate the issues further.

EDR interprets this grievance to be challenging three categories of issues: 1) the disciplinary action, 2) violation of the COPGA by not receiving notice of how the grievant specifically violated agency policies; and 3) the agency head’s determination to reject the panel recommendation and issues related thereto. As to the first issue (the disciplinary action issued to the grievant on July 11, 2022), we find that the November 10, 2022 grievance is not timely to challenge the disciplinary action itself. The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date they knew or should have known of the event or action that is the basis of the grievance.⁶ When an employee initiates a grievance beyond the 30-calendar-day period without just cause, the grievance is not in compliance with the grievance procedure and may be administratively closed. EDR has long held that in a grievance

² Va. Code § 9.1-509(C) (“The correctional officer shall also be given written notification of his right to initiate a grievance under the grievance procedure established by the Department of Human Resource Management or his right to request a hearing under this chapter.”).

³ Va. Dep’t of Corrections Op. Proc. 145.4, *Employee Grievances* § IX(F).

⁴ Va. Code §§ 9.1-500 through -507.

⁵ Va. Code § 2.2-3002.

⁶ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* §§ 2.2, 2.4.

challenging a disciplinary action, the 30-calendar-day timeframe begins on the date that management presents or delivers the Written Notice to the employee.⁷ Further, the *Grievance Procedure Manual* states that “[a]n employee who wishes to appeal a disciplinary action must file a grievance within 30 calendar days of receipt of the Written Notice.”⁸ While the agency did not specifically cite to this provision of the grievance procedure in closing the grievance, it is nonetheless relevant and applicable to the issues in consideration in this ruling. Consequently, unless the agency waives the issue of timeliness, which has not occurred, the grievance would not be eligible to proceed to challenge the Written Notice received four months prior to the initiation of the grievance.

Our interpretation of the COPGA also supports this result. The agency identifies the language in the COPGA stating that “[t]he correctional officer shall also be given written notification of his right to initiate a grievance under the grievance procedure established by the Department of Human Resource Management or his right to request a hearing under this chapter.”⁹ While this provision is not identical to a similar statement in the LEOPGA that specifically says an employee can utilize a grievance procedure or the LEOPGA hearing, “but not both,”¹⁰ the COPGA language appears to indicate a similar pronouncement. The COPGA provision does not state that a correctional officer can challenge a matter through the grievance procedure and a COPGA hearing; the provision says that the correctional officer can use the grievance procedure or a COPGA hearing. In this context, the “or” appears to be used to suggest a choice to the exclusion of the option not taken.¹¹ Had the legislature intended to indicate that a correctional officer could use both processes, this provision would have “and” as the conjunction.

As to the second issue of the grievance, the grievant asserts that the agency failed to provide him notice of “how, with specificity, I violated” the identified agency policies. The grievant also asserts that the agency did not identify “which parts of these policies I violated.” The grievance does not indicate when these alleged failures occurred. However, the grievance has described these allegations as violations of the COPGA. The COPGA requires that a correctional officer be “notified in writing of all charges, the basis therefor, and the action that may be taken” prior to the disciplinary action to be imposed.¹² As this appears to be the notice provision of the COPGA the grievant argues was violated, the argument is fairly read as a challenge to the pre-disciplinary due process notice presumably provided by the agency. Consequently, as with other disciplinary actions, we deem pre-disciplinary due process issues to be a part of the disciplinary action that follows for purposes of being challenged in a grievance. Accordingly, the grievance is untimely to challenge this issue as well. If the grievant wanted to pursue a grievance to challenge the failure to provide proper pre-disciplinary notice under this requirement of the COPGA, he should have done so within 30 calendar days of the issuance of the disciplinary action. Because he did not do so, as with the discussion above as to the disciplinary action itself, the grievance is untimely to

⁷ E.g., EDR Ruling No. 2019-4845; EDR Ruling No. 2015-4181; EDR Ruling No. 2013-3582.

⁸ *Grievance Procedure Manual* § 2.2 n.2 (emphasis added). The Written Notice form includes similar language.

⁹ Va. Code § 9.1-509(C).

¹⁰ Va. Code § 9.1-502(B).

¹¹ “[T]he use of the disjunctive word ‘or,’ rather than the conjunctive ‘and,’ signifies the availability of alternative choices.” *Rose v. Commonwealth*, 53 Va. App. 505, 514, 673 S.E.2d 489, 493 (2009) (quoting *Lewis v. Commonwealth*, 267 Va. 302, 314–15, 593 S.E.2d 220, 227 (2004)).

¹² Va. Code § 9.1-509(B)(1).

challenge this procedural matter.¹³ This issue would also not proceed based on our interpretation of the COPGA discussed in the previous paragraph.

The final issue to consider is the grievant's challenge to the agency head's decision to reject the panel's recommendation. EDR has not been called upon to decide how to consider a grievance of this type before this ruling request. On the one hand, the agency head has made a decision that pertains directly and personally to the grievant's employment, and the grievance procedure provides state employees the opportunity to file a grievance about such matters.¹⁴ On the other hand, the grievance appears to be an appeal of the COPGA process beyond the agency head.¹⁵ It appears that the agency has interpreted the grievance as an appeal and has understandably concluded that such an appeal is not contemplated by the COPGA, which led the agency to close the grievance. Nothing in the COPGA describes further proceedings or an appeal from the agency head's decision.¹⁶ We are additionally compelled to return to language in the COPGA that we interpret to state that a correctional officer can utilize the grievance procedure or the COPGA hearing.¹⁷ Viewing the totality of these provisions, we do not believe that the legislature intended the grievance procedure to serve as a process to address the agency head's decision to accept or reject a panel recommendation that is "advisory only."¹⁸

The agency has cited to the language in the grievance procedure that indicates a grievance complies with the initiation requirements of the grievance procedure if it is "not pursued through another state process."¹⁹ This language predates the existence of the COPGA and was not drafted with the COPGA process in mind. However, EDR interprets this provision to serve as a basis to conclude the grievance is noncompliant as an appeal of the agency head's decision, i.e., a continuation of the COPGA process to challenge the underlying Written Notice. The grievance procedure is not available as a means to continue a COPGA process that provides for no further appeals.

Based on the foregoing, EDR concludes that the grievance does not comply with the grievance procedure and will not proceed. The parties are advised that the grievance should be marked as concluded due to noncompliance and no further action is required. EDR's rulings on matters of compliance are final and nonappealable.²⁰

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Office of Employment Dispute Resolution

¹³ Because we determine that the grievance is untimely to challenge this issue, we need not reach the question as to whether it is a compliant use of the grievance procedure to challenge a violation of the COPGA.

¹⁴ See *Grievance Procedure Manual* § 2.4.

¹⁵ Agency policy indicates that the agency head's decision is final and non-appealable. Va. Dep't of Corrections Op. Proc. 145.4, *Employee Grievances* § IX(F).

¹⁶ The Code provides that the panel's recommendation "shall be advisory only but shall be accorded significant weight." Va. Code § 9.1-510(E).

¹⁷ Va. Code § 9.1-509(C).

¹⁸ Va. Code § 9.1-510(E).

¹⁹ *Grievance Procedure Manual* § 2.4.

²⁰ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).