



JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

COMPLIANCE and CONSOLIDATION RULING

In the matter of the University of Virginia Medical Center
Ruling Numbers 2023-5535, 2023-5536
March 28, 2023

This ruling addresses whether a dismissal grievance filed against the University of Virginia Medical Center (the “agency”), which is currently pending for a hearing, may be consolidated with a grievance dated January 25, 2023, which is currently pending in the management resolution steps. This ruling also addresses the grievant’s request for a compliance ruling concerning a step respondent’s response in the January 25, 2023 grievance. For the reasons discussed below, the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) finds that consolidation of these grievances into a single hearing is appropriate and practicable. EDR also has no basis to determine that the agency has failed to comply with the grievance procedure in the January 25, 2023 grievance.

FACTS

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 January 25, 2023 grievance appears to have proceeded to the single management step, and a response was provided on or about March 13, 2023. The step respondent has upheld the Group II Written Notice, but in so doing, rescinded the original and replaced it with a new Group II Written Notice with a re-issued date of March 13, 2023.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 re-issued 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 has requested this ruling to challenge the agency’s action of rescinding and re-issuing the Written Notice during the grievance process. The grievant seeks to have the new documents dismissed “with prejudice” due to the agency’s bad faith and noncompliance.

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Subsequent to the first Written Notice, the grievant has received two additional Group II Written Notices, dated February 17, 2023, and has been terminated from employment with the agency. The grievant submitted dismissal grievance paperwork to EDR and the matter has already been appointed to a hearing officer (Case Number 11948). The agency has requested that the January 25, 2023 grievance be consolidated for a hearing with the dismissal grievance matter. The grievant objects to the consolidation request on the following grounds: 1) the issues are different and so the evidence will be different, 2) the agency issued the disciplinary actions separately, and 3) the hearing officer assigned may be biased as his undergraduate degree is from the agency.

DISCUSSION

Compliance

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹ 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.² 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.³

Section 6.3 of the *Grievance Procedure Manual* provides that a grievant's notice of noncompliance must be made to the agency head. As the grievant has not shown that he first notified the agency head of the alleged noncompliance, the grievant's ruling request is premature. However, in the interest of resolving matters expeditiously, and given the unusual nature of the request presented by the grievant, EDR will address the grievant's claims.

In his ruling request, the grievant takes issue with the first Written Notice being rescinded and re-issued in the January 25, 2023 grievance. EDR interprets these claims as alleged noncompliance with the grievance procedure and a step respondent's authority thereunder. However, neither the grievance statutes nor the *Grievance Procedure Manual* provide limitations

¹ *Grievance Procedure Manual* § 6.3.

² *See id.*

³ 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.

on the authority of a step respondent to provide relief under the grievance procedure.⁴ While the grievant likely does not perceive the reissuance of the Written Notice as a form of relief, EDR does not interpret the grievance procedure to prohibit a step respondent from making changes and/or re-issuing a Written Notice during the resolution steps. EDR would note that there may be limitations as to how far an agency may go in “correcting” a Written Notice in this manner. Having viewed the original and reissued Written Notices, however, EDR does not find that the changes were so significant to rise to the level of noncompliance with the grievance procedure. Both versions appear to address the same courses of conduct by the grievant, though worded differently. The issues of whether the changes made are consistent with state and agency human resources policy (or, potentially, issues of due process) can be addressed further in the instant grievance process, such as at hearing, assuming the grievance proceeds to that level.

Consolidation

Approval by EDR in the form of a compliance ruling is required before two or more grievances may be consolidated in a single hearing. Moreover, EDR may consolidate grievances for hearing without a request from either party.⁵ EDR strongly favors consolidation and will consolidate grievances when they involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.⁶

The grievant objects to consolidation on grounds that the disciplinary matters are separate and different. However, EDR does not perceive the disciplinary actions in this case to be so divergent or complicated that consolidation is impracticable.⁷ The grievant also asserts that the hearing officer assigned to Case Number 11948 may be biased because his undergraduate degree is from the agency. While it does not appear that the hearing officer has yet had the opportunity to consider whether he should recuse himself due to this issue,⁸ EDR does not find that the hearing officer’s undergraduate degree, in and of itself, renders him incapable of providing a fair hearing. EDR’s approach to recusal is generally consistent with the manner in which the Court of Appeals of Virginia approaches the judicial review of recusal cases.⁹ The Court of Appeals has indicated that “whether a trial judge should recuse himself or herself is measured by whether he or she harbors ‘such bias or prejudice as would deny the defendant a fair trial.’”¹⁰ EDR finds the Court of Appeals’ standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such

⁴ A step respondent’s relief or remedy is “subject to the agency head’s approval.” Va. Code § 2.2-3003(D).

⁵ *Grievance Procedure Manual* § 8.5.

⁶ *See id.*

⁷ For example, both grievances involve disciplinary charges related to the grievant’s management of his work laptop and access. In addition, all Written Notices challenged by the grievant were issued by the same member of management.

⁸ *See Rules for Conducting Grievance Hearings* § III(G).

⁹ While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.

¹⁰ *Welsh v. Commonwealth*, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); *see Commonwealth v. Jackson*, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) (“In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.”).

actual bias or prejudice as to deny a fair and impartial hearing or decision.¹¹ The party moving for recusal of a judge or hearing officer has the burden of proving the judge's bias or prejudice.¹² At this time, the grievant has not met this burden to show bias with regard to the hearing officer's undergraduate degree. Accordingly, the grievant's objections do not present sufficient grounds to deny the agency's request for consolidation in this case.

EDR finds that consolidation of the January 25, 2023 grievance with the dismissal grievance (Case Number 11948) is appropriate. These grievances involve the same grievant and appear likely to share common themes, claims, and witnesses. The grievances relate to conduct by the grievant that resulted in similar and/or related disciplinary actions leading to his termination. Further, we find that consolidation is not impracticable in this instance and is more efficient than requiring all participants to prepare for two separate hearings. As the matters have also occurred relatively closely in time, we conclude that these considerations are well within the "limited circumstances" that may merit consolidation after a hearing officer has been appointed.¹³

For the reasons described above, the pending dismissal grievance will be consolidated with the January 25, 2023 grievance, once it is qualified for a hearing by the agency head (or designee), for a single hearing.¹⁴ Upon receipt of qualification correspondence in the January 25, 2023 grievance, EDR will advise the parties and the hearing officer accordingly and circulate updated appointment correspondence as appropriate.¹⁵

EDR's rulings on compliance are final and nonappealable.¹⁶

Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹¹ EDR Ruling No. 2012-3176.

¹² See *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

¹³ See *Grievance Procedure Manual* § 8.5.

¹⁴ Pursuant to the fee schedule established by EDR's Hearings Program Administration policy, consolidated hearings shall be assessed a full fee for the first grievance and an additional half fee for the second grievance. See EDR Policy 2.01, *Hearings Program Administration*, Attach. B. If EDR determines that a case is so complex that it is the equivalent of multiple hearings, EDR may direct the agency to pay up to an additional \$2100 for the hearing. *Id.*

¹⁵ Should the January 25, 2023 grievance be otherwise resolved and/or withdrawn prior to qualification, the dismissal grievance will proceed to hearing alone.

¹⁶ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).