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COMPLIANCE RULING

In the matter of the Virginia Employment Commission
Ruling Number 2023-5435
July 28, 2022

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management in relation to his June 13, 2022 grievance with the Virginia Employment Commission (“the agency”). The grievant seeks a ruling from EDR addressing the appropriate step respondents in this case and his request for Civil and Work-Related Leave under the grievance procedure.

FACTS

On or about June 13, 2022, the grievant initiated a grievance with the agency to challenge, among other matters, a hostile work environment allegedly created by his supervisor. As the subject of the grievance involved his immediate supervisor, the grievant submitted his grievance to the Deputy Commissioner.¹ On June 27, the agency informed the grievant that the Deputy Commissioner would serve as both the first and second-step respondent. An initial meeting was held with the Deputy Commissioner on June 28, though it was agreed to continue the meeting at a later date due to the grievant’s objections about the first and second steps collapsing into a single step. The grievant submitted a notice of noncompliance to the agency on July 7. On the same day, the continued second-step meeting occurred between the Deputy Commissioner and the grievant. Additionally, on or about June 29, the grievant had requested to use 40 hours of Civil and Work-Related Leave to draft a notice of noncompliance and prepare for the second-step meeting. The agency informed him that it approves the use of such leave for up to eight hours for each step of the grievance process. Having provided notice of the alleged noncompliance, the grievant now seeks this compliance ruling.

DISCUSSION

The grievant’s notice of noncompliance identified a variety of additional issues. However, the grievant’s request for a compliance ruling from EDR appears to challenge only the Deputy Commissioner serving as a combined first and second-step respondent and the denial of Civil and Work-Related Leave.

¹ For purposes of this ruling, EDR assumes that the grievant’s immediate supervisor reports to the Deputy Commissioner.

Step Respondents

Under the grievance procedure, each agency must designate individuals to serve as respondents in the resolution steps. A list of these individuals shall be maintained by the agency's Human Resources Office and is also available on EDR's website. Each designated step respondent shall have the authority to provide the grievant with a remedy, subject to the agency head's approval.² Pursuant to its statutory responsibilities, EDR has long collected and maintained each agency's designated step respondents. This assures that each agency's management resolution step respondents are appropriate and known to employees and to EDR, and that this phase of the grievance process is administered consistently and fairly.

An agency's careful designation of step respondents, and consistent adherence to those designations, is crucial to an effective grievance process. Step respondents have an important statutory responsibility to fulfill and should decline to serve only in extenuating circumstances, such as extended illness or serious injury. Further, if a step respondent cannot serve in that capacity pending a particular grievance, management should seek an agreement with the grievant on a substituted step respondent and should put any agreement in writing. Absent an agreement between the parties, the agency must adhere to the designated list of step respondents. However, there are times when modification from the default steps is necessary and appropriate, such as when there are fewer layers of management in a grievant's reporting line.³

Due to the subject matter, the grievant filed his grievance directly with the Deputy Commissioner, who is his immediate supervisor's supervisor. The Deputy Commissioner would have normally been a third-step respondent for the agency.⁴ Because the grievant is entitled to at least one face-to-face meeting in the grievance process,⁵ the agency determined that this meeting, which is normally at the second step, would occur with the Deputy Commissioner. In such a situation, the first and second steps of the grievance process collapse into a single step,⁶ which would be handled as the second resolution step of a grievance.⁷ This is a simple and somewhat common result consistent with EDR's longstanding practices.⁸

Although the grievant is correct to point out that most modifications are through the agreement of both parties,⁹ given the manager with whom the grievant filed his grievance and the limited levels of management between the grievant and the agency head, the result reached by the agency here is the most appropriate for these circumstances. The grievant has suggested that other managers or Deputy Commissioners could be brought in as additional step respondents. However, the only reason to do so would be to manufacture three step respondent levels, which would not necessarily be "successively higher" as suggested by the Code.¹⁰ Further, it would appear to add

² See Va. Code § 2.2-3003(D).

³ See EDR Ruling No. 2013-3583. In addition, Number 16 of EDR's Grievance FAQs, which are available at <http://www.dhrm.virginia.gov/employmentdisputeresolution/grievancefaqs>, discusses this type of situation.

⁴ The agency's default designations actually list "Deputy Director" as the third step, but EDR assumes that such a title is consistent with Deputy Commissioner based on the other steps identified.

⁵ Va. Code § 2.2-3003(D).

⁶ See *Grievance FAQs No. 16* ("There are only two possible respondents to my grievance in my agency. How will my grievance proceed since there are three steps in the grievance procedure?").

⁷ See *Grievance Procedure Manual* § 3.2.

⁸ E.g., EDR Ruling No. 2017-4429; 2016-4196; EDR Ruling No. 2009-2321 n.1.

⁹ *Grievance Procedure Manual* § 8.4.

¹⁰ Va. Code § 2.2-3003(A).

individuals to the process who would presumably not have oversight over the grievant's work and managers. EDR would not support this result in this case as a potential impediment to the efficient operations of government.¹¹

Based on the foregoing, EDR finds that the agency has complied with the grievance procedure in utilizing the Deputy Commissioner as the second step in this grievance and foregoing a separate first step.

Civil and Work-Related Leave

The grievant requested and was denied approval for 40 hours of Civil and Work-Related Leave in relation to his grievance. Section 8.6 of the *Grievance Procedure Manual* addresses Civil and Work-Related Leave and is intended to be consistent with DHRM Policy 4.05 on the same subject. Neither the grievance statutes nor grievance procedure provide any additional rights to Civil and Work-Related Leave beyond what is intended to be covered by DHRM Policy 4.05. The relevant portion of the grievance procedure and Policy states that employees will be granted Civil and Work-Related Leave “[t]o prepare as grievant for the grievance procedure.”¹² The Policy and grievance procedure also state that the agency may establish “reasonable limits” on the use of Civil and Work-Related Leave to prevent abuse of state time.¹³

The grievant challenges the agency's adoption of an eight-hour limit to the use of Civil and Work-Related Leave at each step of the grievance process. While we understand the grievant's position, the agency has established a “reasonable limit” pursuant to state policy and the grievance procedure. EDR finds nothing improper with the agency's exercise of discretion in this regard. Furthermore, EDR does not find that limiting the grievant to the use of eight hours of Civil and Work-Related Leave is unreasonable in this case. Nothing in the Code of Virginia¹⁴ or the grievance procedure grants a grievant an entitlement to any particular amount of Civil and Work-Related Leave to “prepare for the grievance procedure.” EDR interprets this provision of the grievance procedure to award only a limited amount of work time to use for preparation of and for a grievance. Consequently, the agency's determination to limit a grievant to eight hours per resolution step is a reasonable exercise of the discretion granted by the grievance procedure and state policy. As such, EDR has no basis to find that the agency has failed to comply with the grievance procedure in this case.

CONCLUSION

For the reasons set forth above, EDR finds that the agency is in compliance with the grievance procedure. The grievant's ruling request is respectfully denied.

The grievant additionally states that the Deputy Commissioner issued a second-step response on July 18, 2022. Based on the issues raised in his noncompliance ruling request, the grievant has requested that EDR rule that the second-step response is “null-and-void.” As EDR has determined that the agency has complied with the grievance procedure, there is no basis for

¹¹ See Va. Code § 2.2-3003(C).

¹² *Grievance Procedure Manual* § 8.6; DHRM Policy 4.05, *Civil and Work Related Leave*, at 7.

¹³ *Id.*

¹⁴ The Code of Virginia does not include any provision that addresses use of leave for grievances. See Va. Code §§ 2.2-3000-3008.

EDR to direct that the second-step response already issued be rescinded. Accordingly, the next step in this grievance would be for the grievant to proceed to the next step. The grievant is directed to indicate on the grievance form whether he wishes to proceed to the next step or conclude the grievance **within five workdays of the date of this ruling.**¹⁵ In doing so, the grievant should provide the grievance paperwork to the appropriate next step and/or human resources, as may have been identified in the second-step response.

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

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¹⁵ See *Grievance Procedure Manual* § 3.2.

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