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COMPLIANCE RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2022-5343
January 11, 2022

The Virginia Department of Transportation (the “agency”) has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management in relation to the grievant’s January 1, 2022 dismissal grievance.

FACTS

The grievant submitted a dismissal grievance to EDR by email on January 1, 2022,¹ challenging the grievant’s disciplinary termination. Among other points, the dismissal grievance purports to challenge: 1) a November 1, 2021 counseling memo, 2) a Group II Written Notice issued on November 18, 2021, and 3) a second Group II Written Notice with termination issued on December 2, 2021. In response to EDR’s notification of receipt of the grievance, the agency has objected that the dismissal grievance is untimely to challenge the November 1, 2021 counseling memo and the November 18, 2021 Written Notice.² The agency also objects to consideration by the hearing officer of the grievant’s argument that Executive Directive 18 is discriminatory and illegal.

DISCUSSION

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.³ 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 challenging a disciplinary action, the 30-calendar-day timeframe begins on the date that management presents or delivers the Written Notice to the employee.⁴ Further, the *Grievance Procedure Manual* states that “[a]n employee who

¹ Although the Grievance Form A was signed on December 31, 2021, the form was emailed to EDR on January 1, 2022.

² The agency does not dispute that the grievance is timely as to the December 2, 2021 Written Notice to challenge the grievant’s termination.

³ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* §§ 2.2, 2.4.

⁴ E.g., EDR Ruling No. 2019-4845; EDR Ruling No. 2015-4181; EDR Ruling No. 2013-3582.

wishes to appeal a disciplinary action must file a grievance within 30 calendar days of *receipt* of the Written Notice.”⁵

Here, the dismissal grievance was filed more than 30 calendar days after the grievant’s receipt of the November 1, 2021 counseling memo and November 18, 2021 Written Notice. Consequently, the agency is correct that the dismissal grievance is not timely to challenge the merits of the counseling memo and November 18 Written Notice, making both actions outside the hearing officer’s authority to award relief. Nonetheless, some of the facts relating to the counseling memo and November 18, 2021 Written Notice may be relevant to the grievant’s arguments about the December 2, 2021 Written Notice and accompanying termination. If the hearing officer finds that this is the case, both parties may present evidence about the counseling memo and November 18 Written Notice (and its underlying facts) as background information at the hearing on this matter.

The agency additionally argues that the grievant’s assertion that Executive Directive 18 is discriminatory and illegal cannot be considered by the hearing officer. The agency cites to Section 5.9 of the *Grievance Procedure Manual* in support of its argument, which states that hearing officers “may not grant relief that is inconsistent with law, policy, or the grievance procedure.” While the *Manual* expressly provides that a hearing officer cannot order the establishment or revision (including, presumably, rescission) of a policy,⁶ a hearing officer can consider whether a policy is discriminatory or illegal in its application as to an employee.⁷ Thus, the grievant is free to raise her arguments at the hearing about the alleged discriminatory and/or illegal application of Executive Directive 18 in her case. EDR does not sustain the agency’s objection, but we also do not prevent the agency from raising a similar or related objection, to the extent warranted, for consideration by the hearing officer.

CONCLUSION

The January 1, 2022 dismissal grievance is timely to challenge the December 2, 2021 Group II Written Notice with termination. Because we find that the grievance is untimely to challenge the November 1, 2021 counseling memo and November 18, 2021 Group II Written Notice as discussed above, the hearing officer will not have the authority to order relief regarding those management actions.⁸ A hearing officer will be appointed for the grievant’s qualified challenge to the December 2, 2021 Written Notice and the accompanying termination, including the surrounding issues, in a forthcoming letter.

EDR’s rulings on matters of compliance are final and nonappealable.⁹

⁵ *Grievance Procedure Manual* § 2.2 n.2 (emphasis added). The Written Notice form includes similar language.

⁶ *Grievance Procedure Manual* § 5.9(b).

⁷ *E.g., Rules for Conducting Grievance Hearings* § VI(B)(1) (requiring the hearing officer to consider “whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination)”).

⁸ *See Rules for Conducting Grievance Hearings* § V(C) (“Challenges to management actions or omissions that have not been qualified in the grievance assigned to the hearing officer are not before that hearing officer, and may not be resolved or remedied.”).

⁹ *See* Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).

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