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COMPLIANCE AND QUALIFICATION RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2022-5361
February 14, 2022

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether the agency has failed to comply with the requirements of the grievance procedure and whether his September 24, 2021 grievance with the Virginia Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

On or about September 24, 2021, the grievant initiated an expedited grievance claiming retaliation. In support, he described an email from his facility's timekeeper notifying him that his pay must be docked for time away from work. In his grievance, the grievant argued that pay-docking was not appropriate under the circumstances and that such scrutiny of his time indicated retaliation.[1] After investigating the matter, the agency concluded that the timekeeper's notification was in error, but the mistake was corrected and the grievant's pay was not ultimately docked. Accordingly, the agency head declined to qualify the grievance for a hearing.

While the grievance was pending, the grievant requested documents from the agency in connection with his retaliation claim. EDR addressed that request in Ruling No. 2022-5335, ordering the agency to produce "[a]ny correspondence, electronic or otherwise, sent to [the timekeeper at the grievant's facility] directing her to scrutinize the time of individuals with low leave balances." The grievant contends that the agency has failed to comply with that order and therefore requests a decision against the agency on the merits. Because the grievant's request also appears to request qualification for a hearing, EDR will also consider the request to be an appeal of the agency head's determination that the grievance does not qualify.

[1] The grievant alleged that the agency was retaliating against him for his "reports of wrongdoing by [agency] management in late 2020 and [his] subsequent grievance."

DISCUSSION

Alleged Non-Compliance

The grievance procedure requires both parties to address procedural noncompliance through a specific process.[2] That process assures that the parties first communicate with each other about the noncompliance and resolve any compliance problems voluntarily, without EDR's involvement. Specifically, the party claiming noncompliance must notify the other party of any noncompliance in writing and allow five workdays for the opposing party to correct it.[3] 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, which 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.[4]

In this case, the grievant claims that the agency has failed to comply with EDR's order to produce documents he requested in connection with his grievance. Specifically, he contends that the agency's production was not timely and ultimately rendered only non-responsive documents. As an initial matter, it does not appear that the agency had an opportunity to address the grievant's non-compliance allegations before he presented them to EDR.[5] Moreover, upon review of the grievant's request, he does not allege that responsive documents exist but have been improperly withheld, or any basis for such an argument. Rather, the grievant alleges that the agency produced a memorandum written by one of its human resource officers and a PowerPoint presentation on timekeeping procedures in general. Although he expresses disagreement with the content of the memorandum, we do not perceive such a dispute to present an issue of compliance with the grievance procedure. While the record suggests that the agency's production was not timely given EDR's instructions, it appears that any such non-compliance was ultimately corrected. Nothing in the record before EDR indicates that the agency's delay was the result of bad faith or was significant to find that substantial noncompliance has occurred. Accordingly, EDR cannot find that an adverse decision on the merits would be warranted.

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[2] *Grievance Procedure Manual* § 6.3.
[3] *See id*.
[4] While in cases of substantial noncompliance with procedural rules the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party, 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 to be 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.
[5] The record indicates that the agency produced its response on February 2, 2022, and the grievant requested EDR find the response non-compliant on February 3, 2022.

Qualification for Hearing

State employees with access to the grievance procedure may generally grieve anything related to their employment, but only certain grievances qualify for a hearing.[6] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[7] Thus, claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question whether discrimination, retaliation, or discipline may have improperly influenced management's decision, whether state policy may have been misapplied or unfairly applied, or whether a performance evaluation was arbitrary or capricious.[8]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[9] Typically, then, the threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[10] Adverse employment actions include agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[11]

Here, the grievant alleges that the agency has engaged in continuing "retaliation against [him], stemming from [his] reports of wrongdoing by [agency] management in late 2020 and [his] subsequent grievance." The allegedly retaliatory act described in the grievance is that the timekeeper at his facility advised the grievant that his pay would need to be docked for time he spent in in-service training and military service, as he did not have other leave available to cover the time. The grievant contended not only that it would be improper to dock his pay under the circumstances, but also that the timekeeper's notification demonstrated agency management's excessive scrutiny of his activity.

The agency has consistently agreed with the grievant that the timekeeper was incorrect about the need to dock the grievant's pay, and management has maintained that such docking never actually occurred because the timekeeper's mistaken belief was quickly corrected. Nevertheless, while the grievance was pending, the agency determined that the grievant had indeed been underpaid in his paychecks from September 16 to November 1, 2021. According to the agency, this error was the result of an increase to his salary earlier in the year that apparently did not upload from the Personnel Management Information System ("PMIS") to the separate payroll system used

[6] *See Grievance Procedure Manual* § 4.1.
[7] Va. Code § 2.2-3004(B).
[8] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[9] *See Grievance Procedure Manual* § 4.1(b).
[10] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[11] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

by the Department of Accounts.[12] The agency totaled the amounts the grievant had not received for the affected pay periods and added that total to the grievant's paycheck of November 16, 2021.[13] Following this action, the agency maintains that the grievant has now received all the pay he was due for 2021. With no evidence to call the agency's claim into doubt, it appears that any adverse employment action experienced by the grievant has been corrected, and thus it is not apparent that further relief could be granted by a hearing officer as to the issue of pay.

The grievant disagrees, asserting in his request for qualification that his "paycheck on 9/3/2021 was short by $186.72." However, such a claim does not appear to be consistent with the allegations set forth on the Grievance Form A. Those allegations do not reference September 3, 2021 or a short paycheck. On the form, the grievant references emails dated September 23, 2021 indicating that the grievant's pay would need to be docked; *i.e.* it had not already been docked. Moreover, as explained above, the agency has consistently maintained that the pay-docking described by the timekeeper never occurred. Because the grievant's claim related to a September 3, 2021 paycheck is not fairly within the scope of the initial grievance allegations, and because EDR finds no evidence in the record that might substantiate such a claim, we cannot find that this grievance presents a sufficient question whether the grievant has experienced an adverse employment action that qualifies for a hearing.

Finally, even if the grievance presented an adverse employment action, we cannot find that evidence in the record would raise a sufficient question of retaliation. A claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether (1) he engaged in a protected activity; (2) he suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.[14] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[15] Here, the agency has offered non-retaliatory explanations for the timekeeper's email and for incorrect amounts paid to the grievant beginning on September 16, 2021. Specifically, the agency concedes that its timekeeper made a mistake of policy and that an apparent technical error prevented the grievant's salary update from uploading to the state payroll system. Although it appears that the grievant is not persuaded by these explanations, we do not find evidence in the grievance record to raise a sufficient question whether the reasons offered by the agency are a pretext for retaliation.

CONCLUSION

For the reasons expressed above, the facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure at this time.[16] Should the grievant

[12] The agency has indicated that upload to the payroll system is normally an automatic process, and it is unknown why that process did not occur when agency staff updated the grievant's salary information in PMIS.
[13] The total amount of back pay added to the grievant's November 16, 2021 paycheck was approximately $595.
[14] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).
[15] *Id.*
[16] *See Grievance Procedure Manual* § 4.1.

perceive that future acts or omissions by the agency are retaliatory, nothing in this ruling prevents the grievant from raising such concerns in a future timely grievance.

EDR's qualification rulings are final and nonappealable.[17]

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[17] *See* Va. Code § 2.2-1202.1(5).