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COMPLIANCE RULING

In the matter of Virginia State University
Ruling Number 2022-5367
March 14, 2022

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) in relation to her grievance initiated on January 5, 2022, with Virginia State University (the “university” or “agency”). The grievant alleges that the university has failed to comply with the response requirements set forth in the grievance procedure.

FACTS

On or about January 5, 2022, the grievant initiated a grievance challenging an overall rating of “Below Contributor” on her annual performance evaluation, as well as a subsequent performance improvement plan. She also claimed that she had been “endur[ing] continued bullying and harassment” from her supervisor. As relief, she requested changes to her performance evaluation, “[f]ormal revocation” of the performance improvement plan, and for her supervisor “to cease and desist all bullying and harassment.” On February 16, 2022, she notified the university president that she had not received the response she was due according to the time requirements of the grievance procedure. On February 21, 2022, university human resources staff emailed to the grievant a “summary report” responding to the allegations in the grievance. On February 23, 2022, the grievant requested a compliance ruling from EDR, on grounds that the agency did not return its response via the Grievance Form A, did not notify her of her procedural options, and did not adequately address certain issues raised in the grievance. She also requested that EDR “render a decision against the noncomplying party on the unresolved issues”

DISCUSSION

The grievance process is intended to provide the parties with an expeditious avenue for resolving workplace issues.¹ Consistent with this goal, the five-workday rule requires the parties to a grievance to take appropriate action, depending on the procedural stage of the grievance, within five workdays of receipt of the grievance.² Thus, for example, a grievant must advance or

¹ See *Grievance Procedure Manual* § 1.1.

² See *id.* §§ 3.1, 3.2, 3.3.

conclude their grievance within five workdays of receiving each step response, and each step-respondent is required to issue their response within five workdays of receiving the grievance. The response must be provided in writing “on the Grievance Form A or an attachment” and must “address the issues and the relief requested and should notify the employee of their procedural options.”³

If procedural noncompliance occurs, the grievance procedure requires both parties to address it through a specific process.⁴ 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.⁵ 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.⁶

Here, it appears that the university’s human resources staff acted as the first-step respondent to the grievance,⁷ ultimately providing a substantive response to the grievant in the form of a “report” with several attachments. The report accurately identified the issues articulated by the grievant, concluding that the grievant’s performance rating should change but that the performance improvement plan should stay in place. As to the grievant’s allegations of “continued bullying and harassment,” the report stated that management had addressed all incidents of which they were aware and recommended that the supervisor’s supervisor “should frequently monitor the interactions between” the grievant and her supervisor “to ensure [that the grievant] continues to be treated fairly . . . and to serve as an objective arbitrator if there are further dispute[s] regarding work performance.” However, there is no indication that the university returned the Grievance Form A to the grievant with the “First Resolution Step” section completed, which would have then prompted the grievant to indicate on the form whether she wished to conclude or advance her grievance.

³ *Id.* § 3.1.

⁴ *Id.* § 6.3.

⁵ *See id.*

⁶ 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.

⁷ In her notice of non-compliance to the university president, the grievant indicated her belief that “Human Resources” was out of compliance for not timely responding to her grievance. The university’s subsequent written response was signed by two members of the university’s human resource management. Although a grievant typically must initiate a grievance with their immediate supervisor, nothing in the grievance procedure prohibits the parties from agreeing on alternate step respondents. *See generally Grievance Procedure Manual* §§ 2.4, 8.4.

Accordingly, in order to cure any non-compliance with the requirements of the grievance procedure, the university must, **within five workdays of the date of this ruling**, return the Grievance Form A to the grievant with the appropriate fields completed by the person serving as the grievant's first-step respondent. In advising the grievant of her procedural options to advance or conclude her grievance, the university should also identify whom the next step respondent in this grievance will be. EDR also encourages the university, if it has not already done so, to take any required or appropriate action in response to the grievant's allegations that she has experienced "continued" bullying and harassment.⁸ To the extent the grievant disagrees with the first-step response that will ultimately be provided, or the evidence offered in support of it, she will have the option to advance the grievance to the second management resolution step.⁹

The grievant has additionally requested that a decision be made by EDR on the unresolved issues, due to the agency's alleged noncompliance. 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 the grievance procedure,¹⁰ as stated above, we favor 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. The agency's actions here do not rise to the level that would justify a finding of substantial noncompliance or the extreme sanction of EDR awarding substantive relief in favor of the grievant at this time. The noncompliance can be easily corrected as identified above and the grievance can proceed accordingly.

EDR's rulings on matters of compliance are final and nonappealable.¹¹

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⁸ DHRM Policy 2.35, *Civility in the Workplace*, places affirmative obligations on agency management to respond to credible complaints of prohibited conduct and take steps to ensure that such conduct does not continue. Specifically, "[a]gency managers and supervisors are required to: Stop any prohibited conduct of which they are aware, whether or not a complaint has been made; Express strong disapproval of all forms of prohibited conduct; Intervene when they observe any acts that may be considered prohibited conduct; Take immediate action to prevent retaliation towards the reporting party or any participant in an investigation; [and t]ake immediate action to eliminate any hostile work environment when there has been a complaint of workplace harassment . . ." DHRM Policy 2.35, at 6.

⁹ Typically, a grievant's supervisor's supervisor serves as the second-step respondent and conducts a meeting to discuss the issues of the grievance. See *Grievance Procedure Manual* § 3.2. To the extent the parties wish to proceed with an alternate second-step respondent, they may do so by mutual agreement. See *id.* § 8.4.

¹⁰ Va. Code § 2.2-3003(G).

¹¹ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).