



EMILY S. ELLIOTT
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) 225-2151
(TTY) 711

COMPLIANCE RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2021-5155
September 22, 2020

The Virginia Department of Corrections (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 May 20 and May 26, 2020 grievances. The agency alleges that the grievant has failed to comply with the time limits set forth in the grievance procedure for advancing or concluding her grievances.

FACTS

On or about May 20, 2020, the grievant initiated a grievance with the agency regarding the agency’s instruction that she must report to work while she was allegedly experiencing COVID-19 symptoms.¹ The grievant initiated a second grievance on May 26, challenging her receipt of two notices of intent to issue disciplinary action. In her May 26 grievance, the grievant argues that the agency failed to consider her illness and other surrounding factors. The grievant subsequently resigned from her position with the agency on May 26.

The second-step respondent provided a single written response, dated June 12, 2020, which addressed the relief sought in both grievances, and completed the respective second resolution step sections on each Grievance Form A.² By letter dated August 7, the agency notified the grievant that it had not received an indication from her whether she wished to advance or conclude her May 20 grievance.³ In its notice of noncompliance, the agency requested a response from the grievant

¹ According to the grievant, she was advised to self-isolate by medical personnel. She further alleges that she reported to work as directed and was then instructed to return home because of her symptoms.

² The second-step respondent indicated that the response was sent to the grievant via certified mail, but the agency has not provided tracking information for the certified mailing.

³ The mailing of correspondence, properly addressed and stamped, raises a presumption of receipt of the correspondence by the addressee. *E.g.*, *Washington v. Anderson*, 236 Va. 316, 322, 373 S.E.2d 712, 715 (1988). Accordingly, for purposes of this ruling EDR will assume the grievant received the agency’s notice of noncompliance sent by regular mail because there is nothing to indicate that it was improperly addressed.

within five workdays of her receipt of the notice. On September 9, the agency requested that EDR issue a compliance ruling allowing it to administratively close the May 20 grievance.⁴

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.⁵ 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.⁶ 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.⁷

In this case, the available facts show that, contrary to the grievance procedure's requirements, the grievant has not advanced or concluded either of her grievances within five workdays of receiving the agency's second-step response.⁸ Moreover, approximately eight weeks after providing its second-step response to the grievances, the agency sent the grievant effective notice of her noncompliance and advised her of the opportunity to correct it. No evidence suggests that the grievant has subsequently taken appropriate steps to advance or conclude her grievances.

Because the grievant has apparently failed to advance or conclude her grievance in a timely manner, she has failed to comply with the grievance procedure. EDR therefore orders the grievant to correct her noncompliance **within 10 workdays of the date of this ruling** by notifying her human resources office in writing that she wishes to either advance or conclude the grievances. If she does not, the agency may administratively close the grievances without any further action on its part. The grievances may be reopened only upon a timely showing by the grievant of just cause for the delay (for example, a serious illness, or other circumstances beyond the grievant's control).

⁴ Although the agency's notice of noncompliance and closure request do not explicitly reference both grievances, this ambiguity appears to be an oversight. A reasonable interpretation of these communications is that they relate to the agency's second-step response as sent to the grievant, which addressed both the May 20 and 26 grievances as reflected on the completed second-step field for each Form A.

⁵ *Grievance Procedure Manual* § 6.3.

⁶ *See id.*

⁷ 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.

⁸ *See Grievance Procedure Manual* § 3.2.

EDR's ruling on matters of compliance are final and nonappealable.⁹

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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