



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 Department of Behavioral Health and Developmental Services
Ruling Number 2020-5072
March 26, 2020

The Department of Behavioral Health and Developmental Services (the “agency”) has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”)¹ on whether the grievant’s March 16, 2020 dismissal grievance is in compliance with the grievance procedure.

FACTS

On or about March 11, 2020, the agency issued to the grievant a Group II Written Notice of disciplinary action. The notice cited “[r]epeated failure to follow supervisor’s instructions regarding contacting supervisor directly to advise of unscheduled absences or tardiness; meeting requests/calendar entries; providing final provider packages to support staff; pulling information from OLIS; refraining from exhibiting unprofessional behavior and disruptive behavior.” Citing a prior active Group II Written Notice, the March 11 Group II Written Notice indicated termination by accumulation of discipline.² On or about March 16, 2020, the grievant filed a dismissal grievance identifying ten numbered issues. In summary, the dismissal grievance appeared to challenge the validity of a Notice of Improvement Needed (“NOIN”) the grievant had received in September 2019; the agency’s subsequent failure to provide supervisory support following the NOIN; denial of due process during the grievant’s disciplinary meeting and termination; retaliation by agency management; denial of access to resources the grievant sought in connection with a separate active grievance; and a “racially hostile work setting.” The requested relief included reinstatement with back pay and “[r]emoval of any and all disciplinary/adverse documents in [the grievant’s] personnel file from September 2019-present.”³

¹ The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

² Also on or about March 11, 2020, the agency issued to the grievant a separate Group I Written Notice for continued failure to perform job duties timely.

³ The grievant also requested mandatory training for certain managers and the “[a]bility to work from home to avoid a racially hostile work setting pending placement in another agency.”

On March 18, 2020, the agency requested a compliance ruling from EDR to address whether certain issues were not properly raised in the grievant's dismissal grievance. In particular, the agency contended that the grievant had already attempted to raise issues related to the September 2019 NOIN in previous grievances and, thus, "[t]he only issue that should proceed to hearing is the March 11, 2020, termination of her employment."⁴ In response, the grievant contends, among other things, that her dismissal grievance may appropriately challenge the NOIN because the agency referenced it on the March 11 Group I Written Notice.⁵

DISCUSSION

If a Grievance Form A does not comply with the requirements for initiating a grievance, the agency may notify the employee, using the Grievance Form A, that the grievance will be administratively closed.⁶ Because dismissal grievances are initiated directly with EDR, an agency is essentially unable to follow this process as outlined. Accordingly, the agency in this matter requests a ruling from this Office as to the issue of alleged noncompliance in the initiation of the dismissal grievance.

Issues Not Properly Raised

As to any challenge to the validity of the September 2019 NOIN, this issue does not independently qualify for determination by a hearing officer in this matter. The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance.⁷ 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. The grievance procedure further provides that a grievance must not challenge the same management action challenged by another grievance.⁸ Here, the grievant filed prior grievances on December 30, 2019 and February 6, 2020, both challenging the September 2019 NOIN. EDR recently ruled that the agency could administratively close the February 6 grievance because it untimely and duplicatively challenged the same NOIN cited in the December 30 grievance.⁹ For the same reasons explained in that ruling, to the extent that the present dismissal grievance seeks to directly challenge the merits of the NOIN, the November 2019 performance

⁴ The grievant previously filed a grievance with the agency on December 30, 2019, challenging the September 2019 NOIN, her November 2019 performance evaluation, and other supervisory actions. *See* EDR Ruling No. 2020-5057. The agency administratively closed the December 30 grievance on grounds that none of the issues were timely raised under the grievance procedure. *See id.* The grievant did not request a ruling on the matter from EDR but, on February 6, 2020, initiated a second grievance alleging that the agency had failed to "provide supervisions to substantiate their allegations" in the September 2019 NOIN and subsequent performance evaluation. *See id.* The agency administratively closed the February 6 grievance as untimely and duplicative. *See id.* In a ruling dated March 13, 2020, EDR agreed with the agency's assessment and concluded that the February 6 grievance should remain closed. *See id.*

⁵ The grievant also contends that EDR has improperly refused to investigate alleged retaliation against her and that the agency has imposed an improper fee for providing grievance-related records the grievant requested in connection with one of her grievances. As discussed below, both the issues of alleged retaliation and production of evidence related to this matter may appropriately be presented to the hearing officer for resolution.

⁶ *Grievance Procedure Manual* § 6.2.

⁷ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.2.

⁸ *Grievance Procedure Manual* § 2.4.

⁹ EDR Ruling No. 2020-5057.

evaluation the grievant received, and/or the adequacy of supervision through February 6, 2020, the dismissal grievance is both duplicative and untimely.

However, while the merits of the prior performance actions are not qualified for hearing as independent issues, those actions appear to be relevant background for the agency's disciplinary actions. Thus, the hearing officer retains discretion to admit and consider relevant evidence regarding those performance actions either in support of the agency's March 11 disciplinary actions as grounds for termination or in support of any relevant defense or mitigating factor put forward by the grievant in response to the agency's case against her.

Similarly, to the extent that the dismissal grievance attempts to challenge allegedly discriminatory acts that occurred on or before February 12, 2020 (reflecting the 30-calendar-day period prior to the dismissal grievance's initiation date), those issues would be untimely under the grievance procedure.¹⁰ A review of the dismissal grievance does not identify allegations of new discriminatory acts after that date. Nevertheless, subject to the hearing officer's authority to administer the hearing, the grievant is entitled to present relevant evidence in support of defenses that discrimination and/or retaliation improperly motivated the agency's disciplinary action against her.¹¹ In the event that the hearing officer agrees with any such defenses and orders the grievant's reinstatement, such an order could be accompanied by directives to provide a work environment free from discrimination and/or retaliation.¹²

In sum, EDR concludes that the March 16 dismissal grievance properly challenges the agency's March 11, 2020 disciplinary actions against her; *i.e.* the Group I and Group II Written Notices and resulting termination of employment. At the hearing, the agency will have the burden to prove that these actions were warranted and appropriate, and the grievant will have the opportunity to prove any defenses relevant to those actions, as determined by the hearing officer. To the extent that the dismissal grievance attempts to raise other claims for hearing, independent from the agency's disciplinary action, those issues are not raised in compliance with the grievance procedure.

Due Process

The dismissal grievance also raises multiple issues related to how the agency has carried out the disciplinary process leading to termination of the grievant's employment. In particular, the grievant asserts procedural and/or policy-based deficiencies related to the agency's disciplinary meeting with her and her subsequent removal from the workplace.

¹⁰ For example, the Grievance Form A alleges that the agency declined to offer the grievant a "Safety Plan" in December 2019. Because such issues would be untimely in any event, EDR declines to opine on whether any such issues would qualify for a hearing independently. *See generally Grievance Procedure Manual* § 4.

¹¹ The Grievance Form A asserts that agency management has failed to address the grievant's "long standing allegations of racial discrimination, a racially hostile work setting, or the perpetuation of racial trauma against [the grievant] by the administration," and also that certain managers have a "long history of retaliation" against her. While these general assertions do not establish race discrimination or retaliation as independent issues (*i.e.* issues to be decided apart from the agency's disciplinary case), these statements are reasonably read to assert legitimate defenses under the grievance procedure. *See Rules for Conducting Grievance Hearings* § VI(B)(1).

¹² *See Rules for Conducting Grievance Hearings* § VI(C)(3).

Prior to certain disciplinary actions, those with a property interest in continued employment absent cause are generally entitled to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.¹³ Such pre-disciplinary notice and opportunity to be heard need not be elaborate, nor resolve the merits of the discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."¹⁴ On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.¹⁵ The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through the administrative hearing process.¹⁶

EDR generally presumes, as do many courts, that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.¹⁷ Because the grievant has initiated a post-disciplinary hearing process by timely filing her dismissal grievance, it appears that the process due to her is either in progress or pending. The *Rules for Conducting Grievance Hearings* provide that in every disciplinary action presented, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."¹⁸ Thus, the agency, which bears the burden of proof at hearing, must provide notice of the charges and supporting facts stated in a sufficiently clear manner to allow for a full and fair defense of the charges. In this context, to the extent that the grievant seeks particular procedural protections and/or remedies to ensure her

¹³ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985); *McManama v. Plunk*, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). State policy requires that

[p]rior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60, *Standards of Conduct*, § E(1). Significantly, the Commonwealth's Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."

¹⁴ *Loudermill*, 470 U.S. at 545-46.

¹⁵ *Detweiler v. Va. Dep't of Rehabilitative Services*, 705 F.2d 557, 559-561 (4th Cir. 1983); *see Garraghty v. Va. Dep't of Corr.*, 52 F.3d 1274, 1284 (4th Cir. 1995) ("The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting *Carter v. W. Reserve Psychiatric Habilitation Ctr.*, 767 F.2d 270, 273 (6th Cir. 1985))).

¹⁶ *See Virginia Code Section 2.2-3004(E)*, which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See Va. Code §§ 2.2-3005, 2.2-3006; see also Grievance Procedure Manual §§ 5.7, 5.8* (discussing the authority of the hearing officer and the rules for the hearing).

¹⁷ *E.g., Va. Dep't of Alcoholic Bev. Control v. Tyson*, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also EDR Ruling No. 2013-3572*, at 5 (and authorities cited therein). Nothing in this ruling should be read to conclude or suggest that the agency did in fact violate any due process requirements at the pre-disciplinary stage.

¹⁸ *Rules for Conducting Grievance Hearings* § VI(B) (citing *O'Keefe v. U.S. Postal Serv.*, 318 F.3d 1310, 1315 (Fed. Cir. 2002) (holding that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.")).

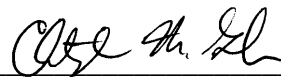
rights to sufficient notice and opportunity to be heard, the grievant may present those requests to the hearing officer for his or her consideration.¹⁹

Documents and Discovery

Finally, in her Grievance Form A, the grievant has alleged that agency managers “improperly removed [her] from the work grounds . . . for the sole purpose of hindering and obstructing [her] ability to engage in the grievance process by denying her access to resources and tools needed to address ongoing grievances.”²⁰ For its part, it appears that the agency has also unsuccessfully sought documents and other records from the grievant. For purposes of this compliance ruling, those issues have not been presented to EDR for resolution, and this ruling does not address them. To the extent that the parties are engaged in ongoing disputes regarding the production and/or exchange of evidence **related to the March 16 dismissal grievance**, those disputes should be presented to the assigned hearing officer for resolution following the issuance of this ruling and appointment of a hearing officer.

CONCLUSION

For the reasons set forth above, EDR concludes that the grievant’s March 16, 2020 dismissal grievance shall proceed as discussed above. The agency is directed to submit a fully completed Form B to EDR **within five workdays of the date of this ruling**. EDR’s rulings on matters of compliance are final and nonappealable.²¹



Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁹ Further, if a party believes that a hearing officer’s pre-hearing order is inconsistent with the grievance procedure, the party may request that EDR issue a compliance ruling to resolve the alleged noncompliance. *See Grievance Procedure Manual* § 6.4.

²⁰ It appears that the grievant filed a separate grievance on February 28, 2020, challenging the agency’s notice of intent to take disciplinary action against her. Should a party wish to have other grievances consolidated with the dismissal grievance, one or both may request a ruling from EDR on that issue. *See Grievance Procedure Manual* § 8.5.

²¹ *See* Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).