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**COMPLIANCE and QUALIFICATION RULING**

In the matter of the Virginia Department of Transportation  
Ruling Number 2020-5096  
June 3, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”)<sup>1</sup> at the Virginia Department of Human Resource Management (“DHRM”) on whether his April 24, 2020 grievance with the Virginia Department of Transportation (the “agency”) was timely initiated.

FACTS

On or about February 24, 2020, the grievant was arrested due to alleged criminal conduct and incarcerated without a bond pending the disposition of the charge(s). The grievant executed a power of attorney on March 6 authorizing a family member to act as his agent on his behalf.<sup>2</sup> The agency notified the grievant on or about March 9 that he had been absent from work for 10 consecutive workdays due to his incarceration, and that he would be removed from employment with the agency effective March 24 if he was unable to return to work on or before that date. The agency allowed the grievant until March 23 to provide a response. After receiving the grievant’s response, the agency proceeded with its decision to remove him from employment effective March 24 because he was still incarcerated for an indeterminate period of time. The grievant was ultimately released on May 11 and the criminal charges against him were withdrawn.

EDR received a mailed copy of the grievance postmarked April 24, 2020. Upon receipt of the grievance, EDR forwarded it to the agency to proceed through the management steps.<sup>3</sup> The

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<sup>1</sup> 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.

<sup>2</sup> For purposes of this ruling, EDR considers the family member to have the authority to participate in the grievance procedure as the grievant’s agent.

<sup>3</sup> See *Grievance Procedure Manual* §§ 2.1, 2.4, 2.5, 3 (explaining that a grievance challenging a management action other than termination due to formal discipline or unsatisfactory job performance is not initiated directly with EDR and must first proceed through the management resolution steps). EDR has consistently held that a grievance initiated in a timely manner but with the wrong management representative will not bar a grievance for noncompliance. See, e.g., EDR Ruling No. 2004-892; EDR Ruling No. 2004-645. EDR is essentially the equivalent to the “wrong management representative.”

agency mailed the grievant a letter stating that his grievance had been administratively closed due to initiation noncompliance on or about May 5. In the letter, the agency explained that the grievance was not timely filed because the grievant was removed on March 24, but did not file his grievance until more than 30 calendar days had elapsed. The grievant now appeals that determination to EDR.

## DISCUSSION

### *Compliance*

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.<sup>4</sup> 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 agency bears the burden of establishing the date the employee knew or should have known of the management action or omission being grieved, if the agency contests the timeliness of the grievance on that basis.”<sup>5</sup>

In this case, the event that forms the basis of the grievance is the grievant’s removal from employment with the agency, which was effective on March 24, 2020. However, the information provided by the agency indicates that the grievant was informed of his removal by letter, which was sent to his home address via certified mail. The certified mail tracking information indicates that the letter was delivered to the grievant’s address on March 26. Assuming the grievant learned of his removal on the day the letter was delivered,<sup>6</sup> he should have initiated the grievance within 30 days of that date, *i.e.*, no later than April 25, 2020. Under the grievance procedure, “the postmark date is considered the initiation date” for grievances that are submitted by mail.<sup>7</sup> The mailed grievance received by EDR is postmarked April 24.<sup>8</sup> Accordingly, EDR finds that the grievance was timely filed and must be allowed to proceed.

The agency has requested that, if the grievance is reopened, EDR waive the management steps and immediately address whether the grievance qualifies for a hearing. EDR agrees that this is the most efficient method of addressing the underlying issue of the grievant’s removal.

### *Qualification*

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing. Even though

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<sup>4</sup> Va. Code § 2.2-3003(C); *Grievance Procedure Manual* §§ 2.2, 2.4.

<sup>5</sup> *Grievance Procedure Manual* § 2.2.

<sup>6</sup> It is unclear from the grievance record when the grievant knew that he had been removed from his position because he was incarcerated at the time. However, the letter confirming the grievant’s removal was delivered to his address on March 26, and thus he could not have known of the agency’s action before that date.

<sup>7</sup> *Grievance Procedure Manual* § 2.2.

<sup>8</sup> While the grievant’s family member claims they faxed the grievance to EDR on April 23, EDR did not receive the fax transmission and the grievant has not provided evidence to confirm that the grievance was submitted by fax on that date.

the grievant's employment was terminated, the termination does not fall into one of those categories of grievances that automatically qualifies for hearing as it was not based on formal discipline or unsatisfactory job performance.<sup>9</sup> Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>10</sup> Thus, claims relating to issues such as those alleged in this case do not qualify for a hearing unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, a misapplication or unfair application of policy, or a sufficient factual basis to question the underlying circumstances of the termination.<sup>11</sup> The grievant has not alleged discrimination, retaliation, or discipline. Therefore, the grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy or that there is a sufficient factual basis to question the reason for the termination. However, EDR finds that the grievance does not raise a sufficient question as to either of these theories.

Under Section H of DHRM Policy 1.60, *Standards of Conduct*, an employee who is "unable to meet the working conditions of his or her employment" under certain circumstances "may be removed" from employment.<sup>12</sup> Examples of events that would justify removal include, but are not limited to, "incarceration for an extended period."<sup>13</sup> Before removing an employee pursuant to Section H, the agency "shall gather full documentation supporting such action and notify the employee, verbally or in writing, of the reasons for such a removal, giving the employee a reasonable opportunity to respond to the charges."<sup>14</sup> An employee removed under these circumstances should be notified of the agency's decision "via memorandum or letter, not by a Written Notice form."<sup>15</sup>

The grievance procedure accords much deference to management's exercise of judgment. DHRM Policy 1.60 specifically allows an agency to remove an employee when they are incarcerated for an extended period. There appears to be no dispute in this case that the grievant was incarcerated on February 24, 2020, and remained so until May 11, a period of approximately 11 weeks. EDR finds that the agency's decision to remove the grievant from employment under these circumstances was consistent with the discretion granted under policy.

While the grievant raises factual arguments that question the basis for his arrest and incarceration, even if EDR assumes the grievant's arguments are true, the underlying basis for the termination was the grievant's unavailability to work for an extended period, which is not in dispute. Although the agency had discretion to place the grievant on leave without pay during the period of the incarceration,<sup>16</sup> EDR cannot find any policy provision that requires such action, and ultimately the agency chose not to do so. EDR has not reviewed evidence to demonstrate that the agency misapplied and/or unfairly applied any mandatory provision in DHRM Policy 1.60, that its

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<sup>9</sup> See *Grievance Procedure Manual* §§ 4.1(a), (b).

<sup>10</sup> See Va. Code § 2.2-3004(B).

<sup>11</sup> *Id.* §§ 2.2-3004(A), 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

<sup>12</sup> DHRM Policy 1.60, *Standards of Conduct*, at 18.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See DHRM Policy 4.45, *Leave Without Pay - Conditional/Unconditional*.

decision remove the grievant was so unfair that it amounted to a disregard of the intent of DHRM Policy 1.60, or that the agency's actions were otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing.<sup>17</sup>

EDR's qualification rulings are final and nonappealable.<sup>18</sup>



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<sup>17</sup> EDR notes that, despite his removal, nothing in DHRM Policy 1.60 prevents the grievant from applying for vacant positions with the agency in the future.

<sup>18</sup> See Va. Code § 2.2-1202.1(5).