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COMPLIANCE RULING

In the matter of the Department of Corrections
Ruling Number 2021-5240
April 7, 2021

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management in relation to his March 4, 2021 grievance with the Department of Corrections (“the agency”). The grievant seeks a ruling from EDR addressing the appropriate step respondents in this case and the handling of the grievance.

FACTS

The grievant submitted this grievance on or about March 4, 2021, challenging disciplinary action issued by the Captain. The grievant is a canine handler for the agency. While the grievant works within one of the agency’s facilities, the highest-level manager in his reporting line at the facility where he works is currently the Captain.¹ The Captain then reports to a senior manager in the agency’s central office. Because the grievance challenged a disciplinary action issued by the Captain and the grievant has raised the issue of discrimination, he sought an alternate second-step respondent other than the Captain. The agency states it verbally agreed with the grievant to “collapse the first and second steps” and have the grievance response provided by the senior manager over the canine unit. The agency maintains that the senior manager is normally the third-step respondent for grievances in the canine unit. The grievant realized after meeting with and receiving a response from the third-step respondent that he would not have any other resolution steps at the agency in his grievance. The grievant states that he should have received at least two steps and had only requested an alternate second-step respondent rather than waiving a step in his grievance. He also asserts that he was not given a “fair due process hearing” as he was “not allowed to ask questions or fully engage in my own hearing.”

DISCUSSION

Under the grievance procedure, each agency must designate individuals to serve as respondents in the resolution steps. A list of these individuals shall be maintained by the agency’s Human Resources Office and is also available on EDR’s website. Each designated step respondent

¹ The highest-level manager would normally be the Major, but that individual is currently on leave.

shall have the authority to provide the grievant with a remedy, subject to the agency head's approval.² Pursuant to its statutory responsibilities, EDR has long collected and maintained each agency's designated step respondents. This assures that each agency's management-resolution-step respondents are appropriate, known to employees and to EDR, and that this phase of the grievance process is administered consistently and fairly.

An agency's careful designation of step respondents, and consistent adherence to those designations, is crucial to an effective grievance process. Step respondents have an important statutory responsibility to fulfill and should decline to serve only in extenuating circumstances, such as extended illness or serious injury. Further, if a step respondent cannot serve in that capacity pending a particular grievance, management should seek an agreement with the grievant on a substituted step respondent and should put any agreement in writing. Absent an agreement between the parties or other special circumstances, the agency must adhere to the designated list of step respondents.

The agency's canine unit is not specifically described in its designated step respondents, nor does that unit fit neatly into any of the designated lists. However, in most of the agency's divisions, the second-step respondent is normally the "organizational unit head" and the third-step respondent is a senior manager, including in the Division of Institutions. Somewhat confusing matters, the senior manager in charge of the canine unit has been described as the "unit head" in correspondence in the grievance file. However, the "organizational unit head" in most agency divisions appears to be the most senior manager in an employee's reporting line at an employee's work location or facility. In this case, therefore, the Captain would appear to fit that description. The agency appears to be appropriately considering the Captain as the second-step respondent for canine unit employees at the grievant's work location while the Major is on leave. Following this further, the senior manager in charge of the canine unit appears to appropriately be considered as the third-step respondent. Therefore, even though the agency's designations do not appear to describe the canine unit in particular, EDR finds that the agency has complied with the grievance procedure with the step respondents it has chosen to use in this case.

The grievant initially sought an alternate second-step respondent, as is his choice under the grievance procedure given the issues raised.³ In response, the agency states that it verbally agreed with the grievant to "collapse" the first and second steps and have the grievant receive a response by the third-step respondent.⁴ The grievant now wants to have more than one management step in his grievance. It is not clear whether the grievant is indicating that he did not verbally agree with the agency about the steps in this case or that he did not understand what he agreed to at that time. EDR encourages grievance participants to reach agreements about procedural matters in a grievance. However, the grievance procedure also provides that such agreements be confirmed in writing, such as email, to avoid future confusion.⁵

Although the agreement between the agency and the grievant in this case does not appear to have been confirmed in writing, EDR is loathe to undo an apparent agreement of this type absent

² See Va. Code § 2.2-3003(D).

³ *Grievance Procedure Manual* § 3.2.

⁴ EDR would observe that this is a sensible agreement in this case. Ordinarily, it appears that this grievance would have simply gone to the Major at the second-step. However, since that individual was on leave, the agency had few options, if any, for an appropriate replacement second-step respondent given the organization of the grievant's unit.

⁵ See *Grievance Procedure Manual* § 8.4.

evidence of a compelling basis to do so, which has not been presented here. If we were to go back to the point of the apparent agreement between the parties and direct that the second step be repeated with a replacement second-step respondent, that individual would be at a management level lower than the third-step respondent who has already addressed this grievance. Such an additional step would appear to inject unnecessary delay into the grievance process here. We are also persuaded by the fact that in this case the grievant has received a better opportunity to be heard in the grievance steps than he might have otherwise received. In a usual case, the grievant would have had a second-step meeting and response from his Major and only a written response from the senior manager of his unit, the third-step respondent. In this case, the grievant had the opportunity to meet with that third-step respondent and received a detailed response to his grievance. Considering the totality of the situation, EDR cannot find that the agency has failed to comply with the grievance procedure or that there is a basis to undo the agreement reportedly made.

The grievant has additionally asserted that he did not receive a “fair due process hearing” with the opportunity to ask questions. The grievant appears to be referring to the due process meeting that typically occurs prior to the issuance of disciplinary action.⁶ According to the third-step response, the grievant attempted to ask questions and have further engagement during the due process meeting. As the due process meeting is not part of the grievance process, EDR has no authority to rule on the matter as an issue of compliance with the grievance procedure. However, the grievant may properly raise issues with due process at the grievance hearing he will receive in this matter. It should be further noted that at the grievance hearing, the grievant will have the opportunity to present witnesses and evidence on his behalf, cross-examine the agency’s witnesses, and have the case decided by an impartial hearing officer appointed by EDR.

CONCLUSION

For the reasons set forth above, EDR finds that the agency is in compliance with the grievance procedure. The grievant’s ruling request is respectfully denied. The agency is directed to submit the grievance paperwork for a determination by the agency head as to whether the grievance qualifies for a hearing. The qualification determination should be made **within five workdays of the date of this ruling.**

EDR’s rulings on matters of compliance are final and nonappealable.⁷

Christopher M. Grab
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⁶ See DHRM Policy 1.60, *Standards of Conduct*.

⁷ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).