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COMPLIANCE RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2021-5186
January 7, 2021

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 (DHRM) in relation to the grievant’s June 29, 2020 grievance. 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 grievance.

FACTS

On or about June 29, 2020, the grievant initiated a grievance with the agency. The grievance proceeded through the management resolution steps, and the third-step respondent provided his response via letter to the grievant dated September 28, 2020.¹ Although the response contained instructions for advancing or concluding the grievance, the grievance form used in this case apparently omitted the fields for the third management step, including the field for the employee to conclude or advance her grievance.² By letter emailed to the grievant on November 2, 2020, the agency notified the grievant that it had not received an indication from her whether she wished to advance or conclude her grievance and requested that she do so within five workdays to correct noncompliance with the grievance procedure. On November 9, 2020, the grievant replied: “I wasn’t aware that I could continue my grievance after receiving a letter from [the third-step respondent]. I will definitely send in my response to the next step as soon as possible.” On December 4, 2020, the agency again emailed correspondence to the grievant inquiring whether she

¹ 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 third-step response because there is nothing to indicate that it was improperly addressed.

² In general, each management step response must be accurately reflected on the Grievance Form A returned to the grievant. *See, e.g.*, *Grievance Procedure Manual* § 3.3. In this case, the grievance form used appears to have combined the first page of the standard Grievance Form A with the second page of an alternate document: the Grievance Form A – Expedited Process. Although the point at which this discrepancy arose during the grievance process is not clear from the record, EDR observes that this hybrid Form A is not necessarily compliant with the grievance procedure and may well have hindered the grievance process at the third step. In cases such as this where an incorrect form is used at the outset, this procedural problem could potentially be corrected by appending appropriate (correct) pages to the original (incorrect) form and including a clarifying explanation.

still wished to advance her grievance. Having received no further response from the grievant on December 10, the agency requested that EDR issue a compliance ruling allowing the agency to administratively close the grievance.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.³ 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.⁴ 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.⁵

In this case, the available facts show that, contrary to the grievance procedure's requirements, the grievant has not advanced or concluded her grievance within five workdays of receiving the agency's third-step response.⁶ However, the record indicates procedural problems with the third-step response instructions. While it appears that the grievant received the substance of the response, the grievance form apparently contained no field for the third step of the process, including for the grievant to note her own response and advance the grievance. In light of this ambiguity, according to the grievant, she attempted to work with her local human resources staff to advance her grievance, apparently unsuccessfully. The grievant has also indicated that she was locked out of her work email for some days during this period and, as a result, did not timely receive the agency's follow-up inquiry on December 4. The grievant has now indicated to EDR, and to the agency, her intention to advance her grievance and seek qualification for a hearing. Because the grievant has now made her desire to advance her grievance reasonably clear despite the procedural confusion at the third step, any non-compliance related to the third-step response appears to have been effectively corrected.

EDR therefore denies the agency's request to administratively close the grievance on non-compliance grounds and orders the agency to forward the Grievance Form A to the agency head (or designee) for a qualification determination, to be provided to the grievant **within five workdays of the date of this ruling.**

³ *Grievance Procedure Manual* § 6.3.

⁴ *See id.*

⁵ 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.

⁶ *See Grievance Procedure Manual* § 3.3.

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

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