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COMPLIANCE RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2021-5184
February 11, 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 April 15, 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 April 15, 2020, the grievant initiated a grievance with the agency to challenge a formal disciplinary action. The grievance proceeded through the management resolution steps, and it appears that the agency produced written responses at the first, second, and third steps. However, 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.¹ Accordingly, the grievance form indicates that the grievant received the second-step response and then, on June 15, 2020, elected to “request qualification of [her] grievance for hearing.” Following this election to request qualification, according to the agency, it provided a third-step response letter dated September 20, 2020, although the grievance record does not indicate how or when the grievant received the letter. In any event, by letter dated November 3, 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.² On November 25, 2020, the agency requested that

¹ In general, each management step response must be 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, which does not include a third management resolution step. The point at which this discrepancy arose during the grievance process is not clear from the record.

² 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 notice of noncompliance because it was addressed to the grievant at the address she provided on her original grievance form.

EDR issue a compliance ruling allowing the agency to administratively close the grievance on grounds that it had not been advanced or concluded.

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 hybrid Form A included in the grievance record is not necessarily compliant with the grievance procedure and may have hindered the grievance process at the third step.⁶ Based on the record, it appears that, after the second management resolution step, the grievant elected to request qualification for hearing as one of the available choices on the form used. Subsequently, the record suggests that the grievant either received the third-step response letter in response to her qualification request, or possibly did not receive the third-step letter.⁷ In either case, the record does not reflect that the grievant received instructions as to the next available options under the circumstances. In cases such as this where an incorrect form is used at the outset, this procedural problem can potentially be corrected by appending appropriate (correct) pages to the original (incorrect) form and including a clarifying explanation. Here, however, with no third-step field on the grievance form used, and no other evidence tending to show that the grievant received the third-step response – putting the grievance on its standard track and thus requiring a response from the grievant – EDR cannot conclude that the grievant failed to comply with the grievance procedure.

Nevertheless, the record indicates that the grievant did receive the agency's notice of noncompliance dated November 3, 2020, but did not respond. Further, EDR has attempted to contact the grievant via multiple means to independently determine her intentions as to the grievance process. It does not appear that the grievant has offered any response to the agency's or

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* EDR Ruling No. 2021-5186.

⁷ No address or other mail heading is included with the third-step response letter in the file, and no other evidence in the record tends to show that the grievant received it.

EDR's inquiries. Thus, although we do not find that the grievant is out of compliance with the grievance procedure, we conclude that under these unusual circumstances the grievant's silence, if it continues, may reasonably be considered an effective decision to conclude the grievance rather than proceed.

Accordingly, if the grievant offers no confirmation to her human resources office **within 20 workdays of the date of this ruling** that she intends to advance her grievance further, the agency may administratively close the grievance after that period with no additional action required on its part. Thereafter, the grievance 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).

EDR's rulings on matters of compliance are final and nonappealable.⁸

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⁸ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).