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COMPLIANCE RULING

In the matter of the Department of Corrections
Ruling Number 2021-5204
February 5, 2021

The Department of Corrections (the “agency”) has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) in relation to the grievant’s July 30, 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 his grievance.

FACTS

On or about July 30, 2020, the grievant initiated an expedited grievance with the agency.¹ The agency sent the single management step response, dated August 31, to the grievant by certified mail; it was delivered to his home address on September 19. The agency emailed the grievant on September 30 asking him to return the grievance and indicate whether he wished to advance or conclude “as soon as possible.” It appears that the grievant was subsequently on an extended leave of absence from late October to early December 2020.

Having received no further response from the grievant indicating whether he wished to advance or conclude the grievance after he received the second step response, the agency states that it sent, via U.S. Mail, a notice of noncompliance to him on November 25.² In its notice of noncompliance, the agency requested a response from the grievant within five workdays of his receipt of the notice. Since more than five workdays have elapsed since the grievant presumably received notice of his alleged noncompliance and he has not yet advanced or concluded his grievance, the agency seeks a compliance ruling allowing it to administratively close the grievance.

¹ The grievant initially submitted his grievance to the second-step respondent using the regular Grievance Form A instead of the Expedited Form A. The agency used the expedited process because the grievant was challenging his receipt of a Group III Written Notice with a disciplinary demotion. *See Grievance Procedure Manual* § 3.4 (stating that grievances involving “a separation not considered a ‘dismissal’ . . . , demotion, suspension without pay, or any other action that results in an actual loss of wages” are eligible for the expedited process).

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).

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 in writing and allow five workdays for the opposing party to correct any noncompliance.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, who 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 an EDR ruling finds that either party to a grievance is in noncompliance, the 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 agency formally notified the grievant of his noncompliance with the grievance procedure via a letter mailed on or about November 25, 2020, while he was on approved leave. Ordinarily, a grievant is not required to proceed with a grievance during an approved absence from work.⁶ Since the grievant returned to work in early December 2020, however, he appears to have taken no action to advance or conclude his grievance. Considering the totality of the circumstances, the grievant therefore appears to have failed to advance or conclude his expedited grievance within five workdays of receiving the agency's single management step response, as required by the grievance procedure.⁷ In addition, the agency has notified the grievant of his noncompliance and he has not advanced or concluded his grievance.

As the grievant has apparently failed to advance or conclude his grievance in a timely manner, he has failed to comply with the grievance procedure. EDR therefore orders the grievant to correct his noncompliance **within ten workdays of the date of this ruling** by notifying his human resources office in writing that he wishes either to conclude the grievance or request qualification of his grievance for a hearing from the agency head. If he does not, the agency may administratively close the grievance without any further action on its part. 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

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 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 *Grievance Procedure Manual* § 9 (defining a "workday" as the "[n]ormal work schedule (excluding authorized leave time) for the individual responsible for taking the required action"); *see, e.g.*, EDR Ruling No. 2018-4677; EDR Ruling No. 2013-3881

⁷ *See Grievance Procedure Manual* § 3.4.

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

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