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COMPLIANCE RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2021-5235
March 25, 2021

The Department of Behavioral Health and Developmental Services (the “agency”) has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management in relation to the grievant’s January 28, 2021 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 January 28, 2021, the grievant initiated a grievance with the agency. The grievant subsequently resigned from her position with the agency on February 9.¹ Based on the management actions she was challenging, the grievant appears to have initiated her grievance with the manager who would normally have been the second-step respondent.² The agency therefore collapsed the ordinary three-step grievance process into two steps. A combined second/third step response was emailed to the grievant on March 3.

Having received no further response from the grievant, the agency then sent, also via email, a notice of noncompliance to her on March 12, 2021.³ In its notice of noncompliance, the agency requested a response from the grievant within five workdays of her receipt of the notice. As more than five workdays have elapsed since the agency notified the grievant of her alleged

¹ The grievant appears to have submitted a letter of resignation on or about February 4, although the letter itself is undated. The date the grievant notified the agency of her intent to resign is immaterial to EDR’s analysis of the compliance matter at issue in this case.

² This simple and somewhat common result is consistent with EDR’s longstanding practices. *E.g.*, EDR Ruling No. 2009-2321 n.1; *see* EDR Ruling No. 2017-4429; EDR Ruling No. 2016-4260; EDR Ruling No. 2013-3583. Number 16 of EDR’s Grievance FAQs, which are available at <http://www.dhrm.virginia.gov/edr>, also discusses this type of situation.

³ For purposes of this ruling, EDR will assume the grievant received the agency’s emailed second/third step response and notice of noncompliance because there is nothing to indicate that they may have been sent to an incorrect email address or was otherwise improperly addressed. *Cf., e.g.*, *Washington v. Anderson*, 236 Va. 316, 322, 373 S.E.2d 712, 715 (1988) (holding that the mailing of correspondence, properly addressed and stamped, raises a presumption of receipt of the correspondence by the addressee).

noncompliance and the grievant has not yet advanced or concluded her grievance, the agency seeks a compliance ruling allowing it to administratively close the grievance.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.⁴ That process assures that the parties first communicate with each other about the noncompliance, and resolve any 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.⁵ 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 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.⁶

In this case, the grievant appears to have failed to advance or conclude her grievance within five workdays of receiving the agency's combined second/third management step response, as required by the grievance procedure.⁷ Moreover, the agency notified the grievant of her noncompliance and she has not advanced or concluded her grievance.

As the grievant has apparently failed to advance or conclude her grievance in a timely manner, she has failed to comply with the grievance procedure. EDR therefore orders the grievant to correct her noncompliance **within ten workdays of the date of this ruling** by notifying the agency's human resources office in writing whether she wishes to advance or conclude the grievance.⁸ If she 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.⁹

⁴ *Grievance Procedure Manual* § 6.3.

⁵ *See id.*

⁶ Although the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party in cases of substantial noncompliance with procedural rules, 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.

⁷ *See Grievance Procedure Manual* §§ 3.2, 3.3.

⁸ Due to the modification of the steps process here, the grievant's next procedural option would be to request qualification for a hearing from the agency head.

⁹ *See Va. Code* §§ 2.2-1202.1(5), 2.2-3003(G).

March 25, 2021
Ruling No. 2021-5235
Page 3

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