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COMPLIANCE RULING

In the matter of the Department of Corrections
Ruling Number 2022-5293
August 12, 2021

The 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 in relation to the grievant’s January 27, 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 the grievance.

FACTS

On or about January 27, 2021, the grievant initiated a grievance with the agency. The grievant sought pay to cover her absence from January 8 through 11, 2021, when she was not at work due to the agency’s consideration of her light duty restriction. During the management steps, the agency states that the grievant was granted pay for those days retroactively and had her leave restored. The grievant also sought reassignment to work in an area of the facility that could accommodate her light duty restriction. Correspondence to the grievant during the pendency of the grievance indicates that the agency granted the accommodation temporarily. However, the grievant has not returned to work since January 2021.

The agency states that the agency head’s qualification determination was emailed to the grievant on June 22, 2021. Having received no further response from the grievant, the agency states that it sent a notice of noncompliance to the grievant via email on or about July 7, 2021.¹ In its notice of noncompliance, the agency requested a response from the grievant within five workdays of receipt of the notice. As more than five workdays have elapsed since the agency notified the grievant of the alleged noncompliance and the grievant has not yet advanced or concluded the grievance, the agency seeks a compliance ruling to administratively close the grievance.

¹ For purposes of this ruling, EDR will assume the grievant received the agency’s emailed notice of noncompliance because there is nothing to indicate that it 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).

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.² 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.³ 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.⁴

In this case, the grievant appears to have failed to advance or conclude the grievance within five workdays of receiving the agency head's qualification determination as required by the grievance procedure.⁵ Section 4.3 of the *Grievance Procedure Manual* provides that when the grievant does not appeal the agency head's denial of qualification, the agency should provide the grievant with a notice of noncompliance, which has occurred. The grievant has not advanced or concluded the grievance since receiving the agency's notice of noncompliance. Section 4.3 further provides that if the grievant does not respond to the notice of noncompliance within five workdays of receipt, the agency may consider the grievance as concluded. Although the agency is not required to seek EDR's approval to close a grievance at this stage,⁶ the agency nevertheless did so here.

EDR has reviewed no information that prevents the agency from considering this grievance concluded at this time. EDR is not aware of any communication from the grievant, either to the agency or EDR, to indicate her desire to continue the grievance at this point or to describe any reason why she has been unable to respond as yet.⁷ Therefore, the agency may consider the grievance closed. If the grievant later seeks to appeal the agency head's denial of qualification, EDR will consider whether just cause exists to consider her request for a qualification ruling at

² *Grievance Procedure Manual* § 6.3.

³ *See id.*

⁴ 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.

⁵ *See Grievance Procedure Manual* § 4.3.

⁶ *Id.*

⁷ On August 2, 2021, EDR received a "dismissal grievance" from the grievant challenging what she believes is her termination from employment. The agency has indicated that the grievant has not been terminated, but rather remains on leave without pay. Because the grievant has not been terminated, her "dismissal grievance" cannot proceed under the dismissal grievance provisions of the grievance procedure. *Grievance Procedure Manual* § 2.5. EDR will communicate with the grievant and agency about this matter separately. The "dismissal grievance" paperwork will be sent to the agency for consideration in the applicable grievance resolution steps and/or a determination of compliance with the grievance process.

that time.⁸ Generally speaking, a 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

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⁸ *Grievance Procedure Manual* § 4.3.

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