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COMPLIANCE RULING

In the matter of the Department of Social Services
Ruling Number 2023-5546
May 8, 2023

The grievant seeks a compliance ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) on whether her March 28, 2023 grievance with the Department of Social Services (the “agency”) is in compliance with the grievance procedure. The agency has asserted that the grievance challenges issues that are not timely under the grievance procedure. For the reasons set forth below, EDR determines that the grievance is timely and shall be permitted to proceed.

FACTS

On or about March 29, 2023, the grievant initiated a grievance with the agency identifying two issues: “disability discrimination” and “breach of confidentiality.” The grievance included a narrative timeline, which described among other issues the grievant’s request for full-time telework as a disability accommodation. It appears that, during the subsequent months that the agency was considering her request, the grievant took two extended leaves of absences using her short-term disability benefits.¹ On or about December 8, 2022, agency management denied her request for full-time telework but approved two days of telework per week. The grievant then applied for a third period of short-term disability, which was approved to begin on December 21, 2022.

The grievant’s narrative essentially describes a situation in which the agency has denied her a reasonable accommodation to perform her job duties remotely, which contributed to the exacerbation of medical issues and need for additional disability leave. The grievant further claims that, while she was on leave, a colleague made disparaging comments to others about the grievant and her need for leave. The grievant contends that, based on her comments, the colleague knew information about the grievant’s leave that she would not know unless their supervisor improperly shared that information. As relief, the grievant has proposed remedies including backpay, reassignment, fully paid leave, and accountability.

In her grievance narrative, the grievant also informed the agency that she had not filed the grievance sooner because she had been “admitted into intensive clinical care for 8 weeks (related

¹ See generally DHRM Policy 4.57, *Virginia Sickness and Disability Program*.

to my disabilities). . . . It has only been since the past week, that I have been cognitively steady to prepare this statement.” On March 30, 2023, the agency provided a written response to the grievant, stating that “any actions taken place prior to February 28, 2023, are not timely and will be administratively closed due to noncompliance.” However, the first-step respondent nevertheless provided a written response that addressed many of the issues raised in the grievant’s narrative, while noting the view that the majority of the claims were untimely to be addressed through the grievance process. The grievant now seeks a ruling on whether the agency’s administrative closure of portions of her grievance complies with the grievance procedure.

DISCUSSION

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance.² When an employee initiates a grievance beyond the 30-calendar-day period without just cause, the grievance is not in compliance with the grievance procedure and may be administratively closed. However, EDR has consistently held that a claim of workplace conduct that is ongoing is raised timely if some agency action alleged to be part of the ongoing conduct occurred within the 30 calendar days preceding the initiation of the grievance.³

Here, while the grievance identifies “December 2022” as the date the grievance occurred and includes a narrative of events dating to March 2022, the description of the issues is fairly read to allege continuing workplace conduct that the record suggests is ongoing as of the date of this ruling. Essentially, the grievant claims that the agency wrongly denied her requested disability accommodation without sufficient explanation as to why the request was not reasonable. The grievant further alleges that this determination was based on input from her supervisor that may have been motivated by hostility toward the grievant. Without deciding the issue on the merits, EDR would view a failure to provide reasonable accommodations as ongoing conduct, such that each workday that the grievant was allegedly denied a reasonable work accommodation to which she was entitled effectively starts a new 30-calendar-day period.⁴ Therefore, EDR does not agree with the agency’s stated view that any actions taking place prior to February 28 would necessarily be untimely. If such actions are part of a pattern of ongoing conduct that extends into the 30-calendar-day period, they would be considered timely. Because the issue of failing to accommodate the grievant’s disability and/or facilitate an interactive accommodations discussion

² Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.2.

³ See Nat’l R.R. Pass. Corp. v. Morgan, 536 U.S. 101, 115-18 (2002) (holding the same in a Title VII hostile work environment harassment case); see also Graham v. Gonzales, No. 03-1951, 2005 U.S. Dist. LEXIS 36014, at *23-25 (D.D.C. Sept. 30, 2005) (applying *Morgan* to a claim of retaliatory hostile work environment/harassment); Shorter v. Memphis Light, Gas & Water Co., 252 F. Supp. 2d 611, 629 n.4 (W.D. Tenn. 2003); see, e.g., EDR Ruling No. 2020-4951; EDR Ruling No. 2015-4118; EDR Ruling No. 2014-3695 (“[T]he time period(s) listed in the box for ‘date grievance occurred’ on Grievance Form A is not the sole determining factor of what issues are challenged in a grievance.”)

⁴ A similar analysis applies in a situation where a grievant challenges their salary. In those cases, EDR has consistently held that each time that the grievant is allegedly paid less than the amount to which they were entitled (*i.e.*, each paycheck) effectively begins a new grievance filing period. See, e.g., EDR Ruling No. 2023-5529. EDR also observes that requiring an employee to work in the absence of a needed accommodation could in some cases amount to a discriminatory, hostile, or abusive work environment, which also would typically be considered “ongoing conduct” for timeliness purposes. See generally DHRM Policy 2.35, *Civility in the Workplace*.

appears to be an ongoing issue,⁵ we do not find support in the grievance procedure to administratively close the grievance as it relates to that issue.

Moreover, even assuming that denial of the grievant's disability request should have been viewed as a discrete issue that occurred on December 8, 2022, EDR finds that the grievant has presented just cause for untimely filing related to that issue. The grievance procedure defines "just cause" as "[a] reason sufficiently compelling to excuse not taking a required action in the grievance process."⁶ Here, the grievant has provided information to the effect that her disability was significantly exacerbated by the agency's denial of her accommodation request to the point that she was admitted for several weeks of "intensive clinical care" related to her disability during the 30 calendar days following the agency's determination. Because the grievant's stated reason for any untimeliness appears to relate to her experiencing prolonged and significant disability, with supporting medical documentation, EDR concludes that such disability would constitute just cause even for an untimely filing.

For the reasons discussed above, EDR finds no basis to conclude that the grievance initiated on March 29, 2023 fails to comply with sections 2.2 and 2.4 of the *Grievance Procedure Manual*. Accordingly, the grievance must be permitted to proceed in full. To the extent that the first-step response has not been returned using the Grievance Form A, the first-step respondent should complete the Form A and return it to the grievant within five workdays of this ruling. The grievant may then elect whether to advance or conclude her grievance and so indicate on the Form A, pursuant to the standard requirements of the grievance procedure.

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

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⁵ For example, the grievant alleges that she has sought and not received information about why her accommodation request was denied, in order to understand her options.

⁶ *Grievance Procedure Manual* § 9.

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