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COMPLIANCE RULING

In the matter of the Department of Health
Ruling Number 2023-5481
November 16, 2022

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management on whether his October 17, 2022 grievance with the Department of Health (the “agency”) was properly initiated.

FACTS

On October 17, 2022, the grievant submitted a grievance in relation to multiple issues, including the denial of a director-level position on or about February 24, 2020 that allegedly was due to age discrimination. The grievance also addressed several months of alleged ongoing harassment and retaliation. In particular, the grievant claims that he has been retaliated against since his initial complaint of discrimination in 2020, including being given duties far below his pay grade, such as stapling papers, moving chairs, and other forms of physical labor, despite his official role being in Pay Band 6 as a General Administration Manager II since November of 2021. He also claims that he was given roles such as an interim Human Resources Director for which he had no experience or training. As of the date of the October grievance, the grievant has alleged that he continues to carry out duties outside of his pay grade, training, and experience. The grievant additionally claims that the agency’s human resources department has either denied or failed to give a decision on multiple requests for disability accommodations requests. The most recent accommodation request was on or about October 3, 2022. The agency administratively closed the grievance asserting that the grievance was not timely initiated on the basis that there was no action or event within the 30-calendar-day period of the grievance. The grievant now appeals that determination to EDR.

DISCUSSION

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he knew or should have known of the event or action that is the basis of the grievance.¹ 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

¹ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* §§ 2.2, 2.4.

administratively closed. However, 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.²

On initial reading, this grievance appears to primarily relate to the agency's failure to select the grievant for a position in February 2020. However, that claim cannot be considered timely. All grievances must be initiated within 30 calendar days of when the grievant knew or should have known of the event or action that is the basis of the grievance. Since the job rejection occurred on or about February 24, 2020, the associated age discrimination claim is untimely, and the grievance cannot proceed to challenge that issue.

The grievance must also be read as alleging a claim of retaliatory harassment, primarily that the grievant has been marginalized by reassignments since his complaint of discrimination in 2020. The grievant argues that his current work duties are not consistent with the Employee Work Profile (EWP) he was just issued in October 2022. In short, the grievant is assigned to a Pay Band 6 position, but alleges he is not given duties anywhere close to that level. As to whether the grievant is timely to initiate a grievance to raise this allegation, it is arguable that each day the grievant remains in this position, the clock begins again because it is an ongoing matter yet to be resolved. It is also reasonable to argue that the grievant should have filed a grievance when the reassignment occurred. However, the grievant also alleges that he has not had an EWP for years and the one received in October 2022 was the first that actually defined what his duties are supposed to be. The grievant has also compiled a thorough chronology of all of the alleged instances of retaliation since February 2020 that can be considered a singular ongoing pattern of retaliation. As the summarized facts and chronology suggest, there are several instances since the original discrimination claim, particularly increased physical duties outside of the grievant's pay grade, training, and experience, that continue to be relevant through the time of the grievance in October 2022. Based on the foregoing, with respect to the harassment and marginalization claim, particularly as to the assignment of physical duties below the grievant's pay grade and official role, EDR considers the grievance timely, and it must be permitted to proceed.

The claims related to the disability accommodation requests can also be considered timely. The grievant's accommodation request is an ongoing matter. Further, as the most recent request for disability accommodations was on October 3, 2022, the action that is being grieved falls within 30 calendar days of the filing of the grievance. Based on the foregoing, with respect to the disability accommodation requests, EDR considers the grievance timely, and it must be permitted to proceed.

CONCLUSION

For the reasons set forth above, EDR concludes that the grievance is timely initiated and must be allowed to proceed to the extent described above. This ruling does not address the merits of the claims presented in the grievance and only decides that the grievance was timely filed with

² 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 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. 2015-4118; EDR Ruling No. 2014-3695 (“[T]he time period(s) listed in the box for ‘date grievance occurred’ on the Grievance Form A is not the sole determining factor of what issues are challenged in a grievance.”).

respect to some claims and meets the initiation requirements of the grievance procedure. The agency is directed to return the grievance form and any attachments submitted by the grievant to the appropriate step respondent for a substantive response. The step respondent must respond to the grievance within five workdays of receipt.

EDR's rulings on matters of compliance are final and nonappealable.³

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³ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).