

Issue: Compliance – Grievance Procedure (30 Day Rule); Ruling Date: February 27, 2017; Ruling No. 2017-4498; Agency: Department of Social Services; Outcome: Grievant in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution¹

RECONSIDERED COMPLIANCE RULING

In the matter of the Virginia Department of Social Services
Ruling Number 2017-4498
February 27, 2017

The Virginia Department of Social Services (the agency) requests that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management reconsider EDR Ruling Number 2017-4469, which addressed compliance with filing deadlines in the grievant's two dismissal grievances. The agency again asserts that the grievant did not initiate her grievances within the 30 calendar-day time period required by the grievance procedure. For the reasons discussed below, EDR finds no basis to change the outcome of the original ruling and, accordingly, the dismissal grievances may proceed as previously directed.

The grievant initiated two dismissal grievances directly with EDR on December 27, 2016. According to the grievant, she was terminated pursuant to two Written Notices, each dated November 16, 2016, but not received by her until November 29, 2016. The agency asserts that the grievant had actual notice of her termination on November 18, 2016. When combined with the grievant's knowledge learned through the notices provided during predisciplinary due process, the agency asserts that the grievant had sufficient information such that she knew or should have known of the management action being grieved for the 30 calendar-day clock to begin on November 18.

While EDR understands the agency's position on this point, as discussed in the prior ruling, EDR's past rulings have generally held that the date of delivery of the Written Notice forms the basis of the grievance for purposes of determining when a grievance should have been initiated.² Indeed, the Written Notice form itself states, "If you wish to appeal this disciplinary action, you may do so under the provisions of the Employee Grievance Procedure within 30 calendar days of your receipt of this Written Notice." It would be new ground for EDR to charge an employee with the combined knowledge gained during predisciplinary due process with information about the final action to put an employee on notice to challenge such an action without actually having received the Written Notice, as contemplated on the Written Notice itself. This form seems to indicate that an employee will be on notice that the 30-day clock begins once the Written Notice is received. Consequently, EDR finds the agency's arguments in

¹ Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as "EDR" in this ruling to alleviate any confusion. EDR's role with regard to the grievance procedure remains the same post-merger.

² EDR Ruling No. 2017-4469.

this regard unpersuasive in overriding the generally accepted practice that an employee's 30 calendar days begin when he/she receives the Written Notice.

The agency has also taken issue with EDR's analysis of the mailings in this case. The Written Notices were mailed to the grievant via certified and regular U.S. Mail on November 17, 2016. Tracking information indicates that the post office attempted delivery of the certified mailing on November 18, without success. A second delivery attempt was made on November 19, but the delivery was refused.³ The grievant later retrieved the certified mailing from the post office on November 29. She states that she never received the Written Notices by regular mail.

The agency asserts that it is "unreasonable" to assume that if the post office attempted original delivery of the certified mailing on November 18 that the regular mailing did not reach the grievant's home until November 29. While not expressly stated, the agency appears to argue that EDR should presume that the grievant received the Written Notices by regular mail on or around November 18. EDR has generally followed the standard rule that the mailing of correspondence, properly addressed and stamped, raises a presumption of receipt by the addressee.⁴ However, the Supreme Court of Virginia has held that "[a]bsent proof of the normal course of the mails and the time usually required to convey a letter from the place of dispatch to the place of delivery, the law indulges no presumption as to the *time* it was received."⁵ As such, without evidence about how long it takes mail to arrive in the normal course, there is no date by which EDR can presume receipt of the mailing to begin the 30 calendar-day period for a grievance to be filed.

In this case, there is some evidence that might suggest how long it would take the regular mail to have reached the grievant's address. As pointed out by the agency, the evidence of the first attempted delivery of the certified mailing on November 18 is highly suggestive of how long it would have taken the regular mailing to have reached the grievant. Accordingly, it is not unreasonable to presume that the regular mailing would have been delivered by November 18 in the normal course. Such a presumption, however, is not irrefutable or conclusive. In this case, the grievant has previously stated she never received the Written Notices by regular mail. Further, and most importantly, the grievant has submitted an affidavit confirming this fact and reiterating that the first time she received the Written Notices was on November 29. In consideration of all of this information, even if EDR applies the presumption of receipt of the regular mailing on November 18, that presumption is overcome by the grievant's sworn statement in this case. Accordingly, EDR again finds that the facts do not support that the grievant received the Written Notices prior to November 29, 2016.⁶

³ Though not expressly raised by the agency in its reconsideration request, it should be noted that in the prior ruling EDR considered and addressed whether the refused delivery of the certified mail placed the grievant on constructive or other notice. *Id.* EDR declined to extend such notice based on the refused delivery in the prior ruling as there was no indication that the grievant herself refused the delivery. The grievant has indicated at this time that it was actually her son who refused the delivery, not the grievant, so EDR's determination in this regard remains unchanged.

⁴ *See, e.g.,* Washington v. Anderson, 236 Va. 316, 322, 373 S.E.2d 712, 715 (1988).

⁵ Davis v. Am. Interins. Exch., 228 Va. 1, 4-5, 319 S.E.2d 723, 724-25 (1984).

⁶ While there is understandably frustration about EDR's assessment of the timing of the mailings in this case, it should be noted an agency has this issue within its control by conducting a face-to-face meeting to deliver

As found in the prior ruling, the grievances initiated on December 27, 2016 are timely and will be allowed to proceed. If it has not already done so, the agency is directed to submit a Form B to EDR within five workdays of the date of this ruling.

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



Christopher M. Grab
Director
Office of Employment Dispute Resolution

disciplinary actions to an employee, thus directly starting the 30-day clock. Further, as noted in the prior ruling, the grievant arrived at the agency's facility on November 18 to retrieve her personal items. The agency still could have given her copies of the disciplinary actions on that day she arrived at the facility and avoided any dispute about when the 30 calendar-day period began. Instead, the agency was left to rely on whenever the grievant would actually receive the mailings, which was not within its direct control.

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