

Issues: Compliance – Grievance Procedure (5 Day Rule and 30 Day Rule); Ruling Date: November 17, 2017; Ruling No. 2018-4643; Agency: Department of Corrections; Outcome: Agency in Compliance (5 Day), Grievant Not in Compliance (30 Day).



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

COMPLIANCE RULING

In the matter of the Department of Corrections
Ruling Number 2018-4643
November 17, 2017

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management on whether his October 16, 2017 grievance with the Department of Corrections (the “agency”) was initiated in compliance with the grievance procedure.

FACTS

On October 16, 2017, the grievant initiated a grievance with the agency, alleging that it had not “followed and applied [policies] in a uniform, non-biased and non-discriminative manner,” and further arguing that he had been “subjected to discrimination[] as a direct result” of the agency’s alleged misapplication of policy. In the grievance, the grievant cites a series of actions that allegedly occurred in 2016 and 2017 as support for his claims. Having received no further response from the agency, the grievant sent, by email, a notice of noncompliance to the agency head on October 25.¹ In his notice of noncompliance, the grievant stated that more than five workdays had passed since he initiated the grievance and he had not received the first step response, as required by the grievance procedure.

On or about October 28, the grievant received a letter from agency management stating that his grievance had been administratively closed for failure to comply with Section 2.2 of the *Grievance Procedure Manual*. In the letter, the agency informed the grievant that the grievance was not timely filed because no management action had occurred within the thirty calendar days preceding October 16, 2017. The grievant disputes the agency’s decision and appeals to EEDR for a ruling on whether the grievance may proceed. The grievant further alleges that the agency’s notice of administrative closure does not comply with the grievance procedure and seeks a ruling from EEDR on that issue.

¹ For purposes of this ruling, EEDR will assume the agency received the grievant’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

Agency's Response to the Grievance

In his request for a ruling, the grievant argues that the agency's notice of administrative closure does not comply with the grievance procedure because the appropriate spaces on the Grievance Form A were not completely filled out. The grievant further asserts that he was initially told the grievance would be sent to the agency's regional ombudsman for a response, and that he did not receive the agency's notice of administrative closure within five workdays.

It appears the agency may have initially intended to refer the grievance to its ombudsman for resolution, and advised the grievant accordingly. Although the grievant's confusion is understandable, the agency, in its judgment, reviewed the grievance and determined that it should be closed due to initiation noncompliance. As a result, the agency's decision to send a notice of administrative closure instead of referring the grievance to the ombudsman was appropriate under the circumstances.²

Furthermore, Section 2.2 of the *Grievance Procedure Manual* states that, if a grievance is not timely filed, "management may notify the employee, using the Grievance Form A, that the grievance will be administratively closed due to noncompliance." Throughout the management resolution steps, it is permissible for agency management to deliver responses to a grievant either "on the Grievance Form A or an attachment."³ Here, the agency noted the date of receipt on the Grievance Form A and referred the grievant to an attachment explaining its basis for closing the grievance. Having reviewed the grievance record, EEDR finds that the agency's response substantially complies with the requirements of the grievance procedure.

In addition, although the agency did not initially provide the grievant with a response to his grievance within five workdays, the grievant did ultimately receive the notice of administrative closure. As a result, any issue regarding the timeliness of the agency's response is moot at this point. While the grievance statutes grant EEDR the authority to render a decision on a qualifiable issue against a noncompliant party in cases of substantial noncompliance with the grievance procedure,⁴ EEDR favors having grievances decided on the merits rather than procedural violations. The agency's noncompliance in this case does not rise to the level that would justify such extreme action. Accordingly, EEDR finds that any noncompliance with regard to the agency's delivery of the notice of administrative closure has been corrected and no further action is necessary.

Timeliness of Grievance

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

² Whether the grievance should remain closed due to initiation noncompliance is discussed further below.

³ *Grievance Procedure Manual* §§ 3.1, 3.2, 3.3, 4.3.

⁴ Va. Code § 2.2-3003(G).

that is the basis of the grievance.⁵ 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. In this case, the agency contends that the grievant did not file the grievance within thirty calendar days of the management actions or omissions he disputes.

In the grievance, the grievant alleges that the agency has not applied policy fairly to him as compared with other employees. In particular, the grievant states that an offender made at least two false complaints about him to agency management in October 2016. The agency did not take any action against the grievant as a result of the offender's complaints. Throughout 2017, the grievant made multiple inquiries to agency management about whether the offender would be charged or otherwise held accountable for the false complaints. The grievant was officially informed that no action would be taken against the offender on September 13, 2017.⁶ In support of his assertion that he has been treated differently than other agency employees, the grievant further claims the offender made false complaints about other employees during this time period. In his request for a ruling from EEDR, the grievant argues that he learned the offender had been charged with making false complaints against another employee on September 18, 2017, and that this event is the management action that forms the basis of his grievance.

Section 2.2 of the *Grievance Procedure Manual* provides that “[a]n employee’s grievance must be presented to management **within 30 calendar days** of the date the employee knew or should have known of the management action or omission being grieved.” In order to be timely, a grievance must challenge a management action or omission that relates to the grievant’s employment in some manner and occurred within the thirty calendar-day period; in this case, within the thirty calendar days preceding October 16, 2017, i.e., on or after September 16, 2017. With regard to the grievant’s allegation that the agency misapplied and/or unfairly applied policy to him by declining to address his concerns about the offender’s complaint, the grievance is untimely. The grievant received notice that the agency would not take action against the offender on September 13, 2017, and the grievant did not initiate his grievance within thirty calendar days of that day (i.e., by October 13, 2017).

Similarly, that the grievant learned the agency had taken action against the offender due to issues with another agency employee within the thirty calendar-day period does not constitute a sufficient basis for EEDR to conclude the grievance was timely initiated. The agency’s actions in relation to another employee did not extend the thirty calendar-day period within which the grievant could initiate a grievance to address issues with his own employment, nor did the management action at issue sufficiently relate to the grievant’s employment such that a new thirty calendar-day period began. In summary, EEDR has reviewed nothing to indicate that a management action or omission relating to the grievant occurred within thirty calendar days of the date the grievance was initiated. Accordingly, EEDR concludes that the grievance is not timely and will remain administratively closed.

⁵ *Id.* § 2.2-3003(C); *Grievance Procedure Manual* § 2.2.

⁶ It is unclear to EEDR why a period of almost one year elapsed between the offender’s original complaints and the agency’s decision to definitively respond to the grievant’s concerns about the offender’s actions.

Furthermore, the grievant has not provided EEDR with any information that would justify his late filing. EEDR has long held that it is incumbent upon each employee to know his or her responsibilities under the grievance procedure.⁷ A grievant's lack of knowledge about the grievance procedure and its requirements does not constitute just cause for failure to act in a timely manner. Thus, EEDR concludes that the grievant has failed to demonstrate just cause for his delay.

CONCLUSION

For the reasons set forth above, the agency's notice of administrative closure substantially complies with the requirements of the grievance procedure. In addition, EEDR finds that the grievance was not timely initiated and there is no just cause for the delay. Accordingly, the grievance will be marked as concluded due to noncompliance and EEDR will close its file.

EEDR's rulings on matters of compliance are final and nonappealable.⁸



Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

⁷ See, e.g., EDR Ruling Nos. 2006-1349, 2006-1350; EDR Ruling No. 2002-159; EDR Ruling No. 2002-057.

⁸ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).