

Issue: Compliance – Grievance Procedure (30-Day Rule); Ruling Date: February 1, 2013; Ruling No. 2013-3491; Agency: Virginia Department of Health; Outcome: Grievant Not in Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Human Resource Management*  
*Office of Employment Dispute Resolution*

**COMPLIANCE RULING**

In the matter of the Virginia Department of Health  
Ruling Number 2013-3491  
February 1, 2013

The grievant has requested a ruling on whether her November 19, 2012 grievance with the Virginia Department of Health (the agency) is in compliance with the grievance procedure. The agency asserts that the grievance does not comply with the grievance procedure because it was not initiated timely. For the reasons set forth below, EDR determines that the grievance is untimely and may be administratively closed.

FACTS

In her grievance, the grievant has challenged her performance evaluation, which she received on October 10, 2012. The grievant submitted her grievance to challenge the performance evaluation on or about November 19, 2012. Because more than 30 days had elapsed since the grievant received the performance evaluation, the agency has administratively closed the grievance, alleging that it was not initiated timely. The grievant now appeals that determination to the Office of Employment Dispute Resolution (EDR).

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.<sup>1</sup> 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 event that forms the basis of this grievance is the grievant's receipt of her performance evaluation on October 10, 2012. Therefore, she should have initiated her grievance within 30 days, i.e., no later than November 9, 2012. Because the grievant did not initiate her grievance until November 19, 2012, the challenge to her performance evaluation is untimely. The only remaining issue is whether there was just cause for the delay.

The grievant states that she has had certain medical issues that prevented her from filing this grievance on time. However, EDR has long held that illness or impairment does not automatically constitute "just cause" for failure to meet procedural requirements. To the

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<sup>1</sup> Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.

contrary, in most cases it will not.<sup>2</sup> Illness may constitute just cause for delay only where there is evidence indicating that the physical or mental impairment was so debilitating that compliance with the grievance procedure was virtually impossible.<sup>3</sup>

To assess the grievant's claim of just cause for a delayed filing, we will focus on the period in which she should have filed her grievance, October 11, 2012 to November 9, 2012, to determine what issues may have prevented her from filing the grievance on time. First, although the grievant went out of work on short-term disability beginning on or around November 12, 2012, she was at work during the above period. During EDR's investigation for this ruling, additional information was sought from the grievant in the form of a Health Care Provider Certification. This form, developed by EDR, requests that the grievant have her health care provider, preferably a physician or licensed psychologist, to complete a certification as to the grievant's capacity for initiating a grievance. The grievant returned this form, signed by a health care provider, who does not appear to be a physician or licensed psychologist, indicating that the grievant did not have the capacity to initiate her grievance between October 10, 2012 and November 18, 2012. EDR does not generally contradict the certifications of a health care provider. In this case, however, to honor the grievant's Health Care Provider Certification form would ignore critical contrary facts.

After the grievant received her performance evaluation on October 10, 2012, the grievant initiated another grievance on October 15, 2012, challenging certain issues in the workplace. During the period discussed above, the grievant also took actions to pursue that grievance by advancing the grievance to the second step on October 28, 2012, and participating in a second step meeting on November 5, 2012. In short, the grievant accomplished the very thing she states she was unable to do during her 30-day period to challenge her performance evaluation: file and pursue a grievance. While EDR is sympathetic to the grievant's experience, given the totality of the circumstances, and especially in light of the grievant's pursuit of a separate grievance during the relevant time period, we are unable to find that the grievant was incapacitated to the point that she was unable to protect her grievance rights to such an extent that there was just cause for her late filing.

### CONCLUSION

For the reasons set forth above, EDR concludes that the grievance was not timely initiated and there is no evidence of just cause for the delay. The parties are advised that the grievance should be marked as concluded due to noncompliance and no further action is required. EDR's rulings on matters of compliance are final and nonappealable.<sup>4</sup>



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Director  
Office of Employment Dispute Resolution

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<sup>2</sup> See EDR Ruling No. 2006-1201; EDR Ruling Nos. 2003-154, 155.

<sup>3</sup> *Id.*; see also EDR Ruling No. 2005-1040.

<sup>4</sup> See Va. Code § 2.2-1202.1(5).