

Issue: Compliance – Grievance Procedure (30-Day Rule); Ruling Date: March 1, 2016; Ruling No. 2016-4313; Agency: Department of Behavioral Health and Developmental Services; Outcome: Grievant Not in Compliance.



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

COMPLIANCE RULING

In the matter of Department of Behavioral Health and Developmental Services
Ruling Number 2016-4313
March 1, 2016

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management on whether her January 27, 2016 grievance with the Department of Behavioral Health and Developmental Services (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 timely initiated. For the reasons set forth below, this grievance is untimely and may be administratively closed.

FACTS

The grievant is employed by the agency as a Clinical Social Worker. On January 27, 2016, she initiated a grievance that appears to challenge ongoing issues in the workplace. Among other things, the grievant alleges that she has been [f]alsely accused of not doing [her] work” and of behaving unprofessionally, that she was “wrongfully removed” from her former work unit due to an issue with a coworker in violation of agency policy, and that the same coworker “treated [her] in a demeaning, dismissive, and degrading way” and engaged in discrimination against her. The grievant further alleges that she was issued a Notice of Improvement Needed/Substandard Performance in retaliation for raising her concerns about the coworker’s conduct.¹ The agency has declined to allow the grievance to proceed on the basis that it was not timely filed. The grievant now appeals that decision to 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.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. In this case, the agency contends that the grievant did not file the grievance within thirty calendar days of the management actions or omissions she disputes.

¹ It appears the Notice of Improvement Needed/Substandard Performance was reduced to a Counseling Memorandum, and may have later been removed from the grievant’s supervisory file and/or personnel file.

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

Fairly read, the grievance challenges an ongoing series of allegedly improper actions in the workplace. A claim of harassment, retaliation, or other workplace conduct that is ongoing, such as that alleged here, is raised in a timely manner if some agency action alleged to be part of the harassing or intimidating conduct occurred within the thirty calendar days preceding the initiation of the grievance.³

The allegedly discriminatory, retaliatory, and/or otherwise improper conduct cited by the grievant appears to have occurred no later than October 2015. For example, the grievant asserts that she experienced issues with the coworker between March 2015 and September 2015, at which time she was transferred to a different work unit. The Notice of Improvement Needed/Substandard Performance was issued by the grievant's supervisor in August 2015. In October 2015, the grievant met with the director of her facility and requested that he investigate her concerns with her coworker and supervisor. On October 21, 2015, the facility director issued a written determination that the grievant's claims of improper conduct were unsubstantiated and declined to take further action.⁴

Considering the totality of the circumstances in light of the issues set forth in the grievance, EDR concludes that the grievant has not presented evidence that any action related to the ongoing pattern of allegedly discriminatory, harassing, and/or improper behavior occurred within the thirty calendar days that preceded the initiation of the grievance, i.e., on or after December 28, 2015. The fact that the facility director declined, on January 13, 2016, to re-visit his October 2015 determination, does not trigger a new thirty day period in which a grievance about earlier claims can be filed. As a result, we must conclude that the grievance was not timely filed.

Furthermore, the grievant has not provided EDR with any information that would justify her late filing. EDR has long held that it is incumbent upon each employee to know his or her responsibilities under the grievance procedure.⁵ 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, we conclude that the grievant has failed to demonstrate just cause for her delay.

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 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).

⁴ In the grievance, the grievant states that she contacted the facility director on December 23, 2015, to express her disagreement with his conclusion, provide additional information, and request that he "review [his] investigation as [she had] concerns with regards to its accuracy." We find that the grievance may not proceed because the grievant's claims regarding the conduct of her coworker and supervisor, which are the primary focus of the grievance, all relate to management actions or conduct that occurred more than thirty calendar days before she initiated the grievance. This ruling in no way prevents the grievant from raising her concerns about her coworker's and/or her supervisor's allegedly conduct at a later time if such conduct continues or worsens, so long as any grievance presenting those issues is timely filed.

⁵ See, e.g., EDR Ruling Nos. 2006-1349, 2006-1350; EDR Ruling No. 2002-159; EDR Ruling No. 2002-057.

CONCLUSION

For the reasons set forth above, EDR concludes that the grievance was not timely initiated and there is no just cause for the delay. The grievance will be marked as concluded due to noncompliance and EDR will close its file. EDR's rulings on matters of compliance are final and nonappealable.⁶



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⁶ Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).