

Issue: Compliance – Grievance Procedure (30-Day Rule); Ruling Date: October 7, 2015; Ruling No. 2016-4234; Agency: Department of General Services; Outcome: Grievant In Compliance.



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

COMPLIANCE RULING

In the matter of the Department of General Services
EDR Ruling Number 2016-4234
October 7, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether his September 10, 2015 grievance with the Department of General Services (the “agency”) was timely initiated.

FACTS

The grievant was employed by the agency as a Procurement Officer I. On or about June 2, 2015, the grievant was given a Notice of Improvement Needed/Substandard Performance (“NOIN”). The agency issued a second NOIN to the grievant on July 7. As a result of the NOINs, the agency informed grievant on July 31 that he was not eligible to receive a 2% salary increase approved by the General Assembly for state employees, which was effective on August 10. On August 28, the grievant notified the agency that he intended to resign from his position effective September 11.

The grievant initiated a grievance on September 10, 2015, one day before his resignation became effective. In the grievance, the grievant alleges that the agency did not have a basis for issuing the NOINs, argues that the NOINs were not issued consistent with state policy, challenges the agency’s decision to block the salary increase for him, and claims that his supervisor engaged in workplace harassment that created a hostile work environment. The grievant further argues that the agency engaged in disability discrimination because it allegedly failed to approve a reasonable accommodation for him according to the requirements of the Americans with Disabilities Act. On or about September 11, the agency notified the grievant that the grievance had been administratively closed because it was untimely. The grievant now seeks a ruling from EDR to determine whether the grievance was timely filed.

DISCUSSION

Timeliness

The grievance procedure provides that an employee must initiate a written grievance within thirty 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.¹ When an employee initiates a grievance beyond the thirty 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 submission of the grievance is outside the [thirty] calendar day time frame,” apparently on the basis that the grievant received both NOINs and was also notified that he would not receive the salary increase more than thirty days before initiating the grievance.

Based on EDR’s review of the grievance record, the primary event that forms the basis of the grievance appears to be the agency’s decision to block the 2% salary increase for the grievant because of the NOINs. The NOINs themselves were issued more than thirty days before the grievance was initiated on September 10, 2015 and thus are not timely to be challenged directly. The grievant, however, has indicated that he “was not attempting to make the [NOINs] the center of the grievance,” but was instead arguing that “they were not properly prepared . . . and were then used as the basis to deny [the] salary increase.” In other words, the grievant appears to allege that he should have received the salary increase despite the NOINs under the terms approved by the General Assembly and applicable policy guidance issued by DHRM, and that the agency’s decision to block the salary increase was a misapplication and/or unfair application of policy.

Furthermore, a fair reading of the grievance indicates that the grievant’s claims of workplace harassment and disability discrimination could be understood to encompass the circumstances surrounding the agency’s decision that the grievant was not eligible to receive the salary increase. For example, the grievant appears to assert that the agency’s failure to grant him a reasonable accommodation was, at least in part, one reason the NOINs were issued. He further seems to argue that the NOINs and, by extension, the decision to block the salary increase, were a part of the overall pattern of allegedly harassing and discriminatory behavior in which his supervisor allegedly engaged. As a result, EDR cannot conclude that the grievant’s claims regarding the denial of the salary increase are completely unrelated to his assertions of discrimination and workplace harassment, particularly to the extent those claims may be theories as to why the agency’s actions in blocking the salary increase were improper (i.e., that the agency blocked the salary increase in order to harass and/or discriminate against the grievant). Thus, the question EDR must address is when, for purposes of the grievance procedure, the grievant “knew or should have known” that he would not receive the salary increase, which will define the thirty calendar-day time period in which a grievance would have been timely initiated.

The agency appears to argue that the grievance is untimely on the basis that the grievant was notified he would not receive the salary increase on July 31, 2015, which occurred more than thirty calendar days before the grievance was initiated on September 10.² While EDR understands the agency’s reasoning that the grievant “knew or should have known” of the management action on July 31 for purposes of initiating a grievance, in this case, the grievant

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

² Section 8.3 of the *Grievance Procedure Manual* provides that, “[i]n computing any period of time required by the grievance procedure, the day of the event from which the designated period of time begins to run shall not be included.” Using July 31 as the triggering date that would have begun the thirty calendar-day timeline would mean that the grievance should have been filed no later than August 30.

had no definitive knowledge that he would not receive the salary increase until September 1, when he received his paycheck for the pay period in which the salary increase became effective for eligible employees. Indeed, the grievant explicitly claims that, after he was initially notified by his supervisor that he would not receive the salary increase on July 31, he “never received any additional confirmation or formal communication from [Human Resources] that [he] was not receiving” the salary increase until “the September 1 payroll payment”

Whether the grievant’s statement on this point is accepted as true or not, it was possible, though perhaps unlikely, that management’s decision to block the salary increase for the grievant could have changed between July 31 and September 1. In that sense, the management action challenged in this case is best analogized to grievances involving layoff. In layoff grievances, EDR has long held that the final event forming the basis of such a grievance is the actual effective date of layoff, not a grievant’s receipt of a Notice of Layoff or Placement indicating that such an action will likely occur in the future.³ In challenges to layoffs, EDR considers the effective date of layoff as the final date the thirty-day filing clock begins to run because circumstances can change from the time the employee receives his Notice of Layoff or Placement to the time that he is actually laid off. A grievant may initiate a grievance at any point prior to the final effective date of layoff, but EDR permits such a grievance to be filed within thirty calendar days of a grievant’s actual separation by layoff. Applying this reasoning to the facts presented in this case, EDR concludes the grievant’s challenge to the denial of the salary increase, and the claims associated therewith, such as disability discrimination and/or hostile work environment, is timely.

Alleged Substantial Noncompliance

The grievant appears to further request that EDR waive the management resolution steps and qualify the grievance for a hearing. While the parties to a grievance may modify “pre-qualification rules during the management resolution steps,” which could include waiving the management resolution and proceeding directly to the qualification phase of the grievance process, such decisions must be mutually agreed upon by the parties.⁴ Although the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party in cases of substantial noncompliance with the grievance procedure,⁵ EDR favors having grievances decided on the merits rather than procedural violations. The agency’s action in administratively closing the grievance, if it can be considered noncompliance, does not rise to the level that would justify such extreme action in this case. Accordingly, the relief requested by the grievant is denied.

CONCLUSION

For the reasons set forth above, EDR concludes that the grievance was timely initiated and must be allowed to proceed. This ruling does not address the merits of the claims presented

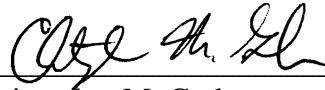
³ See EDR Ruling No. 2014-3738; EDR Ruling No. 2013-3627; EDR Ruling No. 2011-2707; EDR Ruling No. 2010-2623; EDR Ruling No. 2004-784.

⁴ *Grievance Procedure Manual* § 8.4.

⁵ Va. Code § 2.2-3003(G).

in the grievance and only decides that the grievance was timely filed. The grievance must therefore be returned to the appropriate step-respondent for a response and proceed through the remainder of the grievance process to the extent discussed in this ruling.

EDR's rulings on matters of compliance are final and nonappealable.⁶



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⁶ *Id.* §§ 2.2-1202.1(5), 2.2-3003(G).