

Issue: Compliance – Grievance Procedure (30 Day Rule); Ruling Date: December 7, 2016; Ruling No. 2017-4442; Agency: Department of Behavioral Health and Developmental Services; Outcome: Grievant in Compliance (in part).



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

COMPLIANCE RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2017-4442
December 7, 2016

The grievant has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management on whether her October 20, 2016 grievance with the Department of Behavioral Health and Developmental Services (the “agency”) was timely initiated.¹ For the reasons discussed below, the grievance is untimely in part, but was timely filed with respect to certain issues and may proceed.

FACTS

On or about September 14, 2016, the grievant received a Group II Written Notice for failing to follow policy and/or instructions. In particular, the agency charged that the grievant failed to call in at least two hours before the start of her shift for an unscheduled absence. On or about October 20, 2016, the grievant initiated a grievance challenging the Group II Written Notice, as well as the agency’s handling of other absences, which the grievant asserts were protected under the Family and Medical Leave Act and state policy. On October 24, 2016, the agency notified the grievant that her grievance had been administratively closed due to initiation noncompliance. The grievant now appeals that determination to EDR.

DISCUSSION

The grievance procedure provides that an employee must initiate a written grievance within thirty calendar days of the date 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 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 grievance, fairly read, challenges two separate management actions. First, the grievance challenges the issuance of the Written Notice on September 14, 2016, for an absence taken to address the grievant’s own medical concerns. In addition, it challenges the

¹ While the Grievance Form A indicates September 20, 2016 as the date of initiation, it does not appear to be disputed that the grievance was, in fact, initiated on October 20, 2016.

² Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.

agency's application of its occurrence policy to the grievant's absences to address her daughter's medical needs, which the grievant argues are protected under the Family and Medical Leave Act and state policy. The grievant alleges that the agency has erred by counting FMLA-protected leave against her under the occurrence policy.

The grievant's allegations regarding the Written Notice are untimely, as the Written Notice was issued more than 30 calendar days prior to the initiation of the October 20, 2016 grievance. The grievant asserts that she was delayed due to her attempts to obtain documentation from the agency prior to initiating the grievance, but under the facts and circumstances presented in this case, the grievant has not established that she had just cause for initiating her grievance outside the 30 calendar day period.³ As such, the grievant's claim regarding the Written Notice is time-barred.

In contrast, however, the grievant's claim regarding absences taken to care for her daughter is timely. 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 improper conduct occurred within the thirty calendar days preceding the initiation of the grievance.⁴ Here, the grievance includes a document appearing to show that the grievant attended a doctor's visit with her daughter on September 21, 2016. The grievance was initiated on October 20, 2016, within 30 calendar days from the September 21 appointment. As the grievant has identified at least one agency action allegedly occurring within the 30 calendar day period, EDR considers the grievant's claim regarding the application of the agency's occurrence policy to be timely.

CONCLUSION

For the reasons set forth above, EDR concludes that the grievant's claim regarding the Written Notice is untimely and may not proceed. However, the grievant's assertion regarding the application of the agency's occurrence policy to her potentially FMLA-protected leave must be allowed to proceed as discussed above. EDR's rulings on matters of compliance are final and nonappealable.⁵



Christopher M. Grab
Director
Office of Employment Dispute Resolution

³ The grievant in this case has not presented any evidence that the agency deliberately attempted to delay providing information or to hinder the grievant's ability to initiate a grievance.

⁴ See EDR Ruling 2016-4313; see also 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); 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).

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