

Issue: Compliance/Discrimination/Race; Ruling Date: August 12, 2003; Ruling #2002-218; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation, and Substance Abuse
Services/ No. 2002-218
August 12, 2003

The grievant has requested a ruling on whether her July 31, 2002 grievance with the Department of Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS or Agency) qualifies for a hearing. The grievant claims that there is a pattern of disparate treatment in the way management administers discipline to its employees. Specifically, she claims that African-Americans in her facility are punished more harshly than other employees. For the following reasons, this grievance is out of compliance with the grievance procedure and therefore does not qualify for a hearing.

FACTS

The grievant is a Registered Nurse with DMHMRSAS. On December 2, 2001, the grievant failed to properly assess whether a client was suffering from swelling in her left arm. The grievant's action prompted an abuse/neglect investigation pursuant to internal policy. The incident did not result in any disciplinary action against the grievant. Later in the same week, the client had surgery for a fracture in her left arm. The grievant was the Charge Nurse over the weekend following the client's surgery and administered two doses of medication to the client. The following Monday, another employee determined that the client was in pain and did not receive sufficient pain medication over the weekend, prompting another investigation of client abuse/neglect. The agency determined that the grievant would benefit from additional training in the area of pain management and issued her a counseling memorandum on December 19, 2001.¹ While the grievant received training, her Charge Nurse duties were assigned to another employee, which she asserts resulted in a temporary reduction of her pay.²

On June 1, 2002, another Charge Nurse over-medicated a client. The agency determined that a counseling memorandum was not necessary, because the employee immediately recognized the error and corrected it. The grievant claims that it was not fair

¹ The grievant did not file a grievance concerning the December 2001 counseling memorandum. She maintains, however, that the counseling is unfair, because she is not convinced that the client was in any pain (the client was not grimacing or grinding her teeth to indicate a problem). Furthermore, she notes that other nurses were caring for the client over the weekend and did not indicate that she was suffering. She claims that she erred on the side of caution, because there is danger in over-medicating a client.

² The grievant stated during this Department's investigation that the Charge Nurse earns an additional \$1.50 an hour and is the "nurse-in-charge" on the shift.

that she should receive a counseling memorandum, additional training for under-medication of a client, and a loss of Charge Nurse pay while another employee who over-medicated a client, did not.³ She further notes that on June 11, the other employee received a promotion.

The grievant is African-American and the other employee is Filipino. Their supervisor is also Filipino. The grievant maintains that the other nurse was not disciplined because their supervisor shows favoritism to Filipinos. As evidence of discrimination, the grievant notes that the last seven nurses hired at the facility have been Filipino, even though several African-Americans have applied for the positions, and that the two most recent promotions have gone to Filipino nurses. Moreover, she claims that her supervisor commented in the presence of another employee that she would only hire Filipino nurses in the future.⁴

DISCUSSION

Thirty Day Rule

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date she knew or should have known of the event or action 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 addition, any grievance that does not pertain directly and personally to the grievant's own employment may be closed for noncompliance.⁶

Reading these procedural requirements together, the timeliness issue to be decided here is whether the grievant's own employment was directly and personally affected by an "event or action" during the 30-calendar days immediately preceding the

³ The agency views the circumstances surrounding the two purported medication error cases as being distinguishable. In the case of the co-worker, the agency appears to place significance on the fact that the nurse in that case immediately recognized her error. In the grievant's case, there does not appear to have been any recognition of a potential problem. Furthermore, the agency determined that it made little sense to send the co-worker to a pain management class when the incident in which she was involved did not relate to pain—it involved blood sugar levels and insulin.

⁴ Agency data indicates that from February 2001 to August 2002, six Asian applicants were selected for positions in the unit, while five African Americans and two white applicants were selected. However, the data further suggests that for the seven positions offered to African-American and white applicants, there were no Asians interviewed. In other words, only where a person of Asian descent was not in the applicant pool was a non-Asian selected. Moreover, the agency reported that ten disciplinary actions issued in the unit from July 2000 to February 2002 were issued to African-American employees, while no disciplinary actions were issued to Asian or white employees.

⁵ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4(1), page 6.

⁶ *Grievance Procedure Manual* § 2.4 (3), page 3.

initiation of her grievance.⁷ In this case, it was not. Grievant's own employment was directly and personally affected by the December 2001 "events or actions" in which she received the counseling memorandum, was required to attend a pain management class, and had her Charge Nurse duties temporarily removed. Although she knew that her employment had been directly and personally affected in December 2001, her grievance was not filed within 30 calendar days of those events or actions. Significantly, the racial discrimination alleged in this grievance does not describe an ongoing "hostile work environment" that existed within the 30 calendar day period preceding this grievance.⁸ Rather, this grievance alleges a series of separate, isolated discriminatory "events or actions," none of which directly and personally affected her employment in the 30 days prior to the filing of the grievance (July 1, 2002 to July 31, 2002).

The grievant claims that there was just cause for her untimeliness because she did not have reason to believe that the December 2001 "events or actions" directly affecting her employment were discriminatory until a similarly situated employee of a different race was not counseled for committing a similar offense in June 2002. This Department has previously held, however, that the 30 calendar day rule is triggered by the grievant's knowledge of the "event or action" directly affecting the grievant's employment, not by the grievant's knowledge of the alleged *impropriety* of that "event or action."⁹ In this case, the events directly and personally affecting the grievant's employment occurred in December 2001, not when the grievant knew that other employees may have been treated differently.

This Department's rulings on matters of compliance are final and nonappealable.¹⁰

Claudia T. Farr
Director

⁷ Compare *Brinkley-Obu v. Hughes Training*, 36 F.3d 336, 351 (4th Cir. 1994)(for an Equal Pay Act claim to be timely, the employer's alleged wrongful conduct must have *affected the plaintiff* during the statute of limitations period).

⁸ See *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 2068 (2002). (U.S. Supreme Court holds that "consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as any act contributing to that hostile environment takes place within the statutory time period.")

⁹ See, e.g., EDR Ruling No. 2003-126; compare *Hamilton v. 1st Source Bank*, 928 F. 2d 86, 88-89 (4th Cir. 1990) (court noting that the statutory trigger date in Title VII discriminatory discharge cases is the date of the employee's notice of the employer's "act" (the discharge), not the employee's notice of the employer's discriminatory motivation behind the act).

¹⁰ Va. Code § 2.2-1001(5).

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