

Issue: Compliance/Work Conditions/Supervisory Conflict; Ruling Date: October 1, 2003; Ruling #2003-098 and #2003-112; Agency: Department of Corrections; Outcome: grievance was timely (April 30th grievance) and May 27th is duplicative.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULINGS OF DIRECTOR

In the matter of Department of Corrections
No. 2003-098 & 2003-112
October 1, 2003

The grievant has requested compliance rulings in his grievances dated April 30, 2003 and May 27, 2003 with the Virginia Department of Corrections (DOC or the agency). The agency administratively closed both grievances, claiming that the grievant failed to initiate the April grievance within the required 30 calendar day period and that the May grievance was duplicative of another grievance. For the reasons set forth below, this Department concludes that the April 30th grievance was timely filed with respect to certain, but not all, of the grievant's claims and that the May 27th grievance is duplicative of a May 9, 2003 grievance.

FACTS

April 30th Grievance

The grievant is employed as a Corrections Sergeant with a DOC facility. On April 30, 2003, the grievant initiated a grievance alleging that he had been subjected to a hostile work environment.¹ During the investigation for this ruling, the grievant advised the investigating consultant that he used the term "hostile work environment" here to describe co-worker and supervisory conflict, and that he was not alleging any form of unlawful discrimination in this grievance. Additionally, he claims the Superintendent has taken vindictive or retaliatory actions against him because of prior grievance activity. In support of these contentions, the grievant alleges the following incidences occurred in 2003 as a result of the claimed hostile work environment and/or retaliation:

¹ The grievant had previously initiated a grievance in April of 2002, alleging that the actions of co-workers created a hostile work environment. He claims that he concluded that grievance in May of 2002 because the Superintendent had verbally assured him that he would handle the matter. In this grievance, the grievant now alleges that the Superintendent failed to remedy the problem and, thus, the Superintendent's actions, or lack thereof, have fostered the continuation of a hostile work environment.

February – Request to attend Therapeutic Community class denied
March 24 – Request to attend firearms training denied
March 25 - Receipt of an unfair letter of reprimand
March 28 – Request to remove letter of reprimand denied
April – Request to attend general instructor class denied
April 9 – Grievant informed that his supervisor transferred inmate who had allegedly supplied the grievant with names of employees and inmates who had falsified information about the grievant
April 30 – Request to meet with the Regional Director still had not been arranged by the grievant’s supervisor.

Furthermore, the grievant asserts that the Superintendent constantly violates policies and procedures and shows favoritism to other employees and inmates. As evidence, the grievant contends the Superintendent improperly returned an inmate to the general population, failed to post all internal job openings, failed to eliminate all reserved parking spaces, and continues to select certain employees and inmates to have lunch with at the maintenance shop on a daily basis. In further support of all his claims (co-worker and supervisory conflict, retaliation, misapplication or unfair application of policies, and favoritism) the grievant maintains that management continuously fails to address the conduct of other employees who have allegedly engaged in inappropriate workplace behavior or who have violated policies or procedures, while the grievant has been unfairly reprimanded.

May 27th Grievance

The agency contends that the May 27, 2003 grievance is duplicative of an earlier grievance initiated on May 9, 2003. In early 2003, the grievant applied for a supervisory security position at another DOC facility and was selected for an interview. After the initial interview, however, he was not chosen to continue in the selection process. Subsequently, on May 9, 2003, he initiated a grievance challenging management’s decision, alleging that the hiring facility was “enforcing the tradition of the [Region] in overlooking qualified or deserving Afro-Americans.”² As relief, the grievant seeks “reasonable consideration and equal opportunity for promotion and advancement without being subject to retaliation or racial prejudice.”³ The May 9th grievance proceeded through the management resolution step process, but the relief sought by the grievant was not granted, and the agency head denied qualification of the grievance.⁴

On May 27, 2003, he initiated another grievance, this time alleging that he is more qualified for the supervisory security position than the selected candidate, and that

² See Grievance Form A, Attachment #1, dated May 9, 2003.

³ See Grievance Form A, Attachment #3, dated May 9, 2003.

⁴ The grievant has requested a qualification determination from this Department regarding the May 9th grievance.

management failed to offer him the position due to of retaliation and/or racial discrimination. The first step respondent stated that the May 27th grievance related to the May 9th grievance and, thus, was a multiple, or duplicative grievance and out of compliance with the grievance process.

DISCUSSION

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he 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,⁶ the grievance is not in compliance with the grievance procedure, and may be administratively closed. An employee's grievance may also be closed if the grievance duplicates another grievance challenging the same action or arising out of the same facts.⁷

I. Whether the April 30th Grievance Was Timely Filed

The April 30th grievance raises several issues and challenges numerous management actions. DOC asserts that none of the alleged incidents occurred within 30 calendar days of the initiation of the grievance. However, as discussed below, certain challenges were timely filed and can proceed through the grievance process as separate claims for which relief may be granted.

Supervisory/Co-worker Conflict and Retaliation

With respect to the grievant's supervisory/co-worker conflict and retaliation claims, only three of the alleged incidents occurred within 30 calendar days of the initiation of his grievance on April 30, 2003: (1) the denial of his request to attend a general instructor class; (2) the transfer of an inmate who had allegedly supplied the grievant with information; and (3) the failure of the grievant's supervisor to arrange a meeting between the grievant and the Regional Director.⁸ Thus, these three incidents may be used to support both the supervisory/co-worker conflict and retaliation claims, which may proceed through the grievance process. However, the other events cited by the grievant (the denials of his requests to attend the Therapeutic Community class and firearms trainings, his receipt of an unfair letter of reprimand, and the denial of his request to remove the letter of reprimand) were not timely filed and may be considered as background evidence only, and not as separate claims for which relief may be granted.⁹

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

⁶ *Just cause* is defined as a reason sufficiently compelling to excuse not taking a required action in the grievance procedure. *Grievance Procedure Manual* § 9, page 24.

⁷ See *Grievance Procedure Manual* § 2.4, page 7.

⁸ During the investigation for this ruling, the grievant informed the investigating consultant that his supervisor eventually arranged this meeting.

⁹ Compare *National Railroad Passenger Corporation v. Morgan*, 122 S.Ct. 2061, 2072-2073 (2002) (holding that with Title VII discrimination and retaliation claims, each discrete incident of discrimination and each retaliatory adverse employment action (such as termination, failure to promote, denial of transfer, refusal to

Misapplication or Unfair Application of Policy and Favoritism

The grievant asserts that the Superintendent constantly misapplies policies and procedures and shows favoritism to other employees and inmates. To support these claims, the grievant cites several alleged actions taken by his supervisor. However, only two of the events occurred within 30 calendar days of the date the grievance was initiated: (1) the return of an inmate to the general population (who allegedly had supplied to the grievant the names of employees and inmates who had falsified state documents concerning him) and (2) the supervisor's luncheons with other employees and four inmates. However, as the grievant informed the investigating consultant, the other events cited in support of his claim did not occur within the 30 calendar day period preceding his grievance. Thus, those events may be considered as background evidence only, and not as separate claims for which relief may be granted.

II. Whether the May 27th Grievance Duplicates the May 9th Grievance

In his May 9, 2003 grievance, the grievant challenges management's decision to eliminate him from the selection process after the first round of interviews. The May 27, 2003 grievance challenges management's selection of the successful candidate. In both, the grievant alleges that he was not selected for the supervisory security position because of retaliation for prior grievance activity and/or racial discrimination. When examined, these grievances challenge the same management action (the failure of management to select him for the position) and raise the same issues (retaliation and/or racial discrimination). Therefore, the May 27th grievance is duplicative of the May 9th grievance and is out of compliance with the grievance process.

The parties should note that these rulings on compliance have no bearing on the substantive merits of the April 30th grievance or its qualification for hearing.

CONCLUSION

The parties are advised that as discussed above, certain of the grievant's claims in his April 30th grievance of supervisory/co-worker conflict, retaliation, misapplication or unfair application of policy and favoritism are timely and may proceed through the

hire, suspensions, and denial of training) constitute a separate actionable unlawful employment practice and "are not actionable if time barred, even when they are related to acts alleged in timely filed charges"). Therefore, the employee must initiate a claim challenging discrete acts within the appropriate time period. However, prior discrete discriminatory acts can be used as background evidence in support of a timely claim. *See id.* at 2072. Significantly, allegations of discrete acts of discrimination or retaliation are viewed differently than claims that an employee was subjected to a discriminatory hostile work environment. In such case, the incidents comprising a hostile work environment are considered part of one unlawful employment practice. Thus, the employer may be liable for all acts that are part of the single claim, and for the charge to be timely, the employee need only file a charge within the statutory period of any act that is part of the hostile work environment. *See id.* at 2075.

grievance process as claims for which relief may be granted. By copy of this ruling, the grievant and the agency are advised that the grievant has five workdays from receipt of this letter to either conclude the April 30th grievance or advance it to the next resolution step. However, the May 27th grievance should be marked as concluded due to noncompliance and no further action is required. This Department's rulings on matters of compliance are final and nonappealable.¹⁰

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¹⁰ See Va. Code § 2.2-1001(5).