

Issue: Reconsideration Ruling of Director; Original issue Compliance/30-day rule;  
Ruling Date: November 19, 2003; Ruling #2003-126R; Agency: Virginia Department of  
Transportation; Outcome: EDR re-affirms original ruling (keywords = human resource  
management advice, non-selection)



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*  
**RECONSIDERATION RULING OF DIRECTOR**

In the matter of Department of Transportation  
Reconsideration of Ruling #2003-126R  
November 19, 2003

The grievant has requested that this Department (the Department of Employment Dispute Resolution or EDR) reconsider its July 31, 2003 Ruling #2003-126. For the reasons discussed below, this Department affirms its earlier decision and concludes that the grievance is untimely and may be administratively closed.

FACTS

The grievant is employed as a Transportation Contract Administrator. In November 2002, the grievant applied for a position as Transportation Assistant Resident Engineer (ARE). The grievant was interviewed on December 5, 2002, and on March 19, 2003. On April 22, 2003, he was notified that he was not the successful candidate. At that time, the grievant expressed no concern to management about his non-selection or about its adherence to policy.

On May 6, 2003, the grievant verbally requested Human Resources to provide a copy of his interview summary so he could identify possible weaknesses in his qualifications and performance. The grievant contends that he received no response to this initial request or subsequent ones on May 20 and June 5, 2003. Finally on June 6, 2002, he met with a human resources representative and was allowed to review interview summaries from both the first and second interviews. Based upon his review, the grievant concluded that the outcome of the selection action was predetermined. On June 17, 2003, the grievant initiated the present grievance asserting that the selection process was capricious and arbitrary. The agency responded that the grievance was untimely.

This Department held that the event that forms the basis of the grievance was the grievant's non-selection for the ARE position. Because 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,<sup>1</sup> EDR

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

ruled that the grievance was untimely.<sup>2</sup> Moreover, this Department concluded that there was not just cause for the delay.<sup>3</sup>

### DISCUSSION

Reconsideration requests are granted at the discretion of this Department. The grievant has raised several objections to the July 31<sup>st</sup> ruling. All of the challenges essentially focus on the grievant's alleged detrimental reliance on misrepresentations by the agency's human resource officer.

The facts in this case indicate that the agency's human resources officer indeed made an erroneous statement regarding the ability of an employee to initiate a grievance challenging management's selection of an employee to fill a job vacancy. On August 13, 2003, an agency Human Resources Manager sent the grievant an e-mail stating that selections are "not grievable." Although this erroneous information was relayed after the issuance of the July 31<sup>st</sup> ruling, the grievant asserts that the e-mail was simply a reiteration of past similar statements. This Department will assume for purposes of this ruling only that the grievant is correct in his assertion.

While the apparent misstatements of the agency's representative are cause for concern, this Department has long held employees accountable for knowing the rules regarding the grievance procedure. In this case the grievant concedes that he had copy of the *Grievance Procedure Manual* during the time period in question. The *Grievance Procedure Manual* provides that grievances relating to the "hiring, promotion, transfer, assignment, and retention of employees" can proceed to hearing "if (i) the grievance claims, and (ii) the facts, taken as a whole, raise a sufficient question as to whether the action was improperly tainted by discrimination, retaliation, misapplication of policy, arbitrary performance evaluation or discipline."<sup>4</sup> Thus, the *Grievance Procedure Manual*

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<sup>2</sup> The grievant first learned that he was not selected for the position of supervisor on April 22, 2003; therefore, he should have initiated his grievance within thirty days of April 22. The grievant did not initiate his grievance until June 17, 2003, which was untimely.

<sup>3</sup> The grievant argued that only after he was allowed to review the documents relating to his non-selection could he deduce that the selection was improper. In other words, it was not until he reviewed the requested documents that he knew or should have known of any impropriety in the selection process. This Department noted, however, that the actual event that formed the basis of the grievance was his non-selection, which he learned of more than thirty days prior to the initiation of his grievance. The decision explained that while the 30-day rule may have required the grievant to initiate his grievance before receiving the requested documents, there was nothing that precluded him from requesting an extension to the 30-day deadline in order to gather pertinent information and documentation.<sup>3</sup> The ruling further explained that the grievance procedure's requirement that parties to a grievance share with the opposing party relevant documents does not apply until *after* a grievance has been initiated. *See* Va. Code § 2.2-3003(E) and *Grievance Procedure Manual*, § 8.2, page 21, both of which state that absent just cause, all documents relating to the actions grieved shall be made available, upon request from a party to a grievance, by the opposing party.

<sup>4</sup> *Grievance Procedure Manual*, § 4.1(c), page 11.

clearly indicates that the core issue raised in this grievance (misapplication of hiring policy) not only can be grieved, but can proceed to hearing if supported by evidence.<sup>5</sup>

In this case, the grievant received information from the Human Resources Manager that contradicted the *Grievance Procedure Manual*. As stated, while this Department finds the misrepresentation by the agency's human resources department troubling, this Department concludes that the *Grievance Procedure Manual* reasonably notifies an employee that he may initiate a grievance challenging a job selection. Further, the grievant could have contacted this Department via the toll-free AdviceLine referenced in the *Manual* for clarification regarding any discrepancy between the advice given by the agency's human resources manager and the terms of the *Manual*. He did not, but instead elected to rely on the guidance of the agency Human Resources Manager. Accordingly, given the specific facts of this particular case, this Department affirms its earlier ruling concerning this matter.<sup>6</sup>

#### CONCLUSION

For the reasons discussed above, this Department has determined that this grievance was not filed within the 30-calendar day period and is therefore untimely. By copy of this ruling, the grievant and the agency are advised that the agency may administratively close this grievance. This Department's rulings on matters of compliance are final and nonappealable.<sup>7</sup>

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Claudia T. Farr  
Director

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<sup>5</sup> An employee can initiate a grievance on any employment-related matter so long as the employee has access to the grievance procedure and the grievance complies with the grievance initiation rules. See *Grievance Procedure Manual*, §§ 2.3 and 2.4, pages 5-7. While any such issue can be grieved through the management steps, only certain issues can proceed to a grievance hearing. *Grievance Procedure Manual*, § 4, pages 10-12.

<sup>6</sup> In this case, the grievant had been provided a copy of the *Grievance Procedure Manual* by the agency, consistent with its obligation under Va. Code § 2.2-3003(B)(2) to "familiarize employees with their grievance rights and promote the services of the Department of Employment Dispute Resolution." Accordingly, EDR believes that there is no reason in this case to abandon the longstanding principles that "it is incumbent upon each employee to know her rights and obligations under the grievance procedure," and that "lack of knowledge about the grievance procedure and its requirements, however, does not constitute just cause for failure to initiate a grievance in a timely manner."

<sup>7</sup> Va. Code § 2.2-1001 (5).