

Issue: Compliance/30-day rule; Ruling Date: February 13, 2004; Ruling #2003-508;
Agency: Department of Motor Vehicles; Outcome: grievance is ruled to be timely



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Motor Vehicles/ No. 2003-508
February 13, 2004

The grievant has requested a compliance ruling in his November 24, 2003 grievance with the Department of Motor Vehicles (DMV). The agency asserts that the grievant did not initiate his grievance within the 30-calendar day time period required by the grievance procedure. For the reasons set forth below, this grievance is ruled to be timely filed.

FACTS

The grievant is a Senior Special Agent with DMV. On January 25, 2002, the grievant moved from a Supervisor position in the Fairfax District to a "statewide" position in the Roanoke District.¹ As a result of his relocation, the grievant lost the Northern Virginia pay area differential that applied to him in the Fairfax Office.²

On August 18, 2003, the grievant first learned that four Special Agents in the Staunton District were receiving the Northern pay differential. Also on August 18, the grievant sent an email to DMV management stating his intention to file a grievance within 30 calendar days challenging the alleged inconsistent practice of the agency to allow some employees to retain the Northern Virginia pay differential while removing it from other employees, including the grievant.

The grievant claims that, just prior to the 30-day deadline for filing his grievance, he learned that the pay differential had been removed from the Staunton District Agents and did not file a grievance, believing that his claims had been resolved. However, on October 9, 2003, the grievant learned that DMV had requested clarification from DHRM about the pay differential policy. Then, on November 4, 2003, the grievant claims he

¹ The grievant's area continued to cover the Fairfax District.

² Under the Department of Human Resource Management (DHRM) Policy 3.05, *Compensation*, "differentials are authorized by DHRM to provide payments as base pay adjustments to make salaries more competitive with the market." DHRM Policy 3.05, page 18. Pay differentials may be based on geographic locations, such as the Northern Virginia pay differential. *Id.* DHRM policy further states that "when an employee moves from one position to another, any differential that might apply to the former position is removed if it does not apply to the new position." *Id.*

learned, conclusively, that the Staunton Agents were permitted to retain their Northern Virginia pay differentials. He filed this grievance on November 24, 2003 claiming that the agency unfairly applied state compensation policy and requesting a 24.9% increase of his current salary, retroactive to January 25, 2002.

At the second management resolution step, DMV administratively closed the grievance, claiming that the grievant “knew or should have known” of the agency’s alleged wrongdoings on August 18, 2003. The agency cited to the grievant’s August 18 email as evidence that the grievant was aware of his procedural requirements on that date. The grievant claims that, because he thought the differentials had been removed, he was not aware that the Staunton Agents were receiving the pay differential until November 4 and therefore, timely filed his grievance.

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.³ 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.

The agency asserts that the accrual or “trigger” date for the 30-day rule was August 18, 2003, the date the grievant first learned that other employees from outside Northern Virginia were receiving the Northern Virginia Pay Differential. The grievant argues that he did not learn that those employees retained the salary differential until November 4, 2003. Assuming that the grievant first became aware of the pay disparities on August 18, it could appear that the grievant was bound to initiate his grievance by September 17, thirty calendar days later, which he failed to do. However, this Department recognizes that courts treat disparate compensation claims differently than other types of claims in terms of *when* the claim accrues.

For example, in analogous discriminatory pay cases, courts have reasoned that “a claim of discriminatory pay . . . involves a series of discrete, individual wrongs rather than a single and indivisible course of wrongful action.”⁴ Thus, courts have concluded that every payday that an employee receives less compensation than an alleged similarly-situated employee constitutes a separate accrual, or “trigger date,” for statute of limitations purposes.⁵ Accordingly, courts have ruled that with the issuance of each paycheck that is alleged to be improperly lower than that of a similarly-situated employee, a new statute of limitations period begins to run.

³ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4(1), page 6.

⁴ *Pollis v. New School for Soc. Research*, 132 F.3d 115, 119 (2nd Cir. 1997); *accord Cardenas v. Massey*, 269 F.3d 251, 257 (3rd Cir. 2001); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 347 (4th Cir. 1994); *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996); *Calloway v. Partners Nat’l Health Plans*, 986 F.2d 446, 448-49 (11th Cir. 1993).

⁵ *Brinkley-Obu v. Hughes Training Inc.*, 36 F.3d 336, 350 (4th Cir. 1994).

The courts' analysis regarding the statute of limitations in discrimination-based unequal pay claims is appropriate here with the grievant's policy-based unequal pay claim; the grievant's claim of improper disparate pay involves a series of discrete, individual alleged wrongs, i.e. the issuance of each bi-monthly paycheck, after which a new statute of limitations (a new 30 calendar day period) begins to run. Because the grievant initiated his grievance within 30 calendar days of receiving an allegedly disparate paycheck, this Department finds that the grievance was timely initiated. However, if qualified for hearing, any relief from a hearing officer could extend no further back than the thirty calendar day period prior to the filing of this grievance.⁶

CONCLUSION

For the reasons discussed above, this Department has determined that this grievance was filed within the 30-calendar day period and this therefore timely. By copy of this ruling, the grievant and the agency are advised that the grievant has five workdays from receipt of this ruling to advance or conclude his grievance. This Department's rulings on matters of compliance are final and nonappealable.⁷ Further, this ruling only recognizes that this grievance was timely filed, and in no way reflects the substantive merits of the grievant's claim.

Claudia T. Farr
Director

Leigh A. Brabrand
EDR Consultant

⁶ In discrimination-based Equal Pay Act claims where each paycheck is viewed as a separate wrong, courts have held that back pay relief is available only for the designated two-year statute of limitations period immediately preceding the filing of such a claim. *See Brinkley-Obu v. Hughes Training Inc.*, 36 F.3d at 351. In the context of a grievance, the designated statute of limitations period for filing is thirty calendar days. *See Va. Code § 2.2-3003(C)*. Thus, by analogy, this Department has long ruled that in continuing violation claims that any relief under the grievance procedure, including any back pay, extends no further back than the thirty day period prior to the filing of the grievance.

⁷ Va. Code § 2.2-1001(5).