

Issue: Compliance/ 30-day rule; Ruling Date: June 2, 2004; Ruling #2003-473; Agency: Virginia Employment Commission; Outcome: grievance is ruled to be timely



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Virginia Employment Commission
Ruling Number 2003-473
June 2, 2004

The grievant has requested a compliance ruling in her November 12, 2003 grievance with the Virginia Employment Commission (VEC or the agency). The agency asserts that the grievant did not initiate her 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 an employment specialist with VEC. In her capacity as an employment specialist, the grievant typically manages a caseload of 10-12 cases at any given time. On September 23, 2003, the grievant's caseload rose to 14 cases and remained at this level until December of 2003 or January of 2004. The grievant challenged the alleged excessive caseload by initiating her November 12, 2003 grievance. On November 17, 2003, the first step-respondent administratively closed the November 12, 2003 grievance for failure to comply with the thirty calendar day requirement. The agency cites the grievant's acknowledgment in her November 12, 2003 grievance that her caseload first became unmanageable on September 23, 2003 as evidence that the grievance was untimely filed.

DISCUSSION

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the dates he knew or should have known of the event or action that is the basis of the grievance.¹ 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 September 23, 2003, the date the grievant first learned that her caseload was at an unmanageable level. Assuming that the grievant first became aware of her overwhelming

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

caseload on September 23rd, it could appear that the grievant was bound to initiate her grievance by October 23, 2003, thirty calendar days later, which she failed to do. However, the grievant argues that her caseload was unmanageable not only on September 23, 2003; but that she continued to receive cases after that date and that these additions extended the unmanageable caseload level into December 2003 or January 2004.

In determining whether the grievant initiated her November 12, 2003 grievance in a timely manner, this Department finds it helpful to consider, by analogy, how the courts analyze when a claim accrues in discrimination-based cases. For instance, in cases where an employer has denied an accommodation (e.g. based on religious beliefs or disability), courts have reasoned that “an employer performs a separate employment practice each time it takes adverse action against an employee, even if the action is simply a periodic implementation of an adverse decision previously made.”² In other words, each time the employee requests and is denied an accommodation, she has a new action upon which to base a claim for discrimination. It does not matter that she was first denied an accommodation beyond the statutory time period, as long as the employer committed a subsequent act (i.e. a further denial of an accommodation) within the statutory time period.

Additionally, in 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.”³ Thus, courts have concluded that every payday an employee receives less compensation than an alleged similarly situated employee, a separate accrual, or “trigger date” arises for statute of limitations purposes.⁴ 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.

Although the present case does not present an issue of discrimination, the courts’ analysis is nevertheless instructive by analogy. The grievant’s claim of an unmanageable caseload involves a series of discrete, individual alleged wrongs -- the issuance of each case that maintains the alleged unmanageable caseload, after which a new statute of limitations (a new 30 calendar day period) begins to run. Because the grievant initiated her grievance within 30 calendar days of receiving a case that continued the alleged unmanageable caseload, and because the caseload was allegedly unmanageable at the time the grievant initiated her grievance, this Department finds that the November 12, 2003 grievance was timely initiated. However, if qualified for hearing, any relief from a

² *Fol v. The City of New York and Dept. of Environmental Protection of the City of New York*, 2003 U.S. Dist. LEXIS 11671 (S.D. N.Y. 2003) *citing* *Elmenayer v. ABF Freight System, Inc.* 318 F.3d 130, 134; 2003 U.S. App. LEXIS 947 (2nd Cir. 2003).

³ *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).

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

hearing officer could extend no further back than the thirty-calendar day period immediately preceding the filing of this grievance.⁵

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 her grievance. This Department's rulings on matters of compliance are final and nonappealable.⁶ Further, this ruling only recognizes that this grievance was timely filed, and in no way reflects the substantive merits of the grievant's claim.

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⁵ 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, 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.

⁶ Va. Code § 2.2-1001(5).