Issue: Compliance/30-day rule; Ruling Date: August 9, 2004; Ruling #2004-586; Agency: Department of Health; Outcome: grievance is timely, in part.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Health
Ruling Number 2004-586
August 9, 2004

The grievant has requested a compliance ruling in his December 8, 2003 grievance with the Department of Health. 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 discussed below, this grievance is ruled timely, in part.

FACTS

The grievant is employed as a Graphics Designer. Starting in 1996, the grievant entered into an informal agreement with his agency to perform his job duties from his home, using his own state-of-the-art equipment.[1] On August 14, 2001, a new agreement was signed under the provisions of the state's newly established telecommuting policy.[2] Under the Commonwealth's Telecommuting Policy, agencies have no responsibility for the cost, repair, or service of employee equipment.[3] Consequently, all reimbursements to the grievant for equipment usage ceased under the new telecommuting agreement.[4] The agreement contained a specified termination date of June 30, 2002.

In July 2003, the grievant became aware of the agency headquarters' planned relocation to new office space. The grievant contends that he decided that the planned relocation provided him with an opportune time to raise his work situation to upper management. On July 8, 2003, the grievant forwarded a letter to the unit director requesting that the agency "restore appropriate work space and equipment to me for the performance of my job."

After receiving no response to his letter for several months, on October 15, 2003, he forwarded a second letter to the unit director raising concern that the agency's move

[1] The grievant was reimbursed in the amount of $3.59 per usage hour of equipment for departmental products.
[2] DHRM Policy 1.61, *Telecommuting*, was effective on February 14, 2000, and most recently revised on May 1, 2003. The DHRM policy mandates that "Work agreements are required for Telecommuting."
[3] *See* DHRM Policy 1.61, *Equipment and Materials*, pages 2 and 3 of 6.
[4] The grievant estimates that since August 14, 2001, he has provided services in the amount of $8,500 without reimbursement.

was more imminent but he had not been informed of any support plans for his services. Again, not receiving a response to either of his letters, the grievant requested an office appointment with the unit director, which was scheduled for November 25, 2003. On November 20, the grievant called to confirm his appointment and was informed that it had been cancelled. The grievant claims that the agency has misapplied policy by requiring that he continue to telecommute without a formal work agreement and by refusing to reimburse him for equipment or related expenses.

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, the grievance is not in compliance with the grievance procedure, and may be administratively closed.

The agency asserts that the "trigger" date for the 30-day rule was August 14, 2001, the date that the grievant signed the telecommuting agreement. In contrast, the grievant argues that it was the cancellation of the scheduled meeting on November 20, 2004, denying him the opportunity to be heard, which constituted the date of the event for his grievance.

The grievant entered into a new telecommuting agreement (a discrete act) on August 14, 2001, which clearly stated that the agency no longer had responsibility for operating costs or reimbursement for the use of his personal equipment. If he intended to challenge the terms of the August 14th agreement, he was bound to initiate his grievance by September 13, thirty days later, which he failed to do. Accordingly, the grievant's challenge on the issue of reimbursement *under the August 14th agreement* is ruled untimely. However, because the August 14th agreement expired on June 30, 2002,[6] the issue of timeliness is not yet fully resolved.

The grievant also claims that the agency misapplied policy by requiring that he telecommute without a formal work agreement subsequent to June 30, 2002. In determining the timeliness of the grievant's claim that the agency has failed to provide him with a new agreement, 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

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

[6] The June 30th agreement contained a provision that it could be extended upon agreement of the parties. While the first-step respondent asserts that the agreement is still in effect, the grievant obviously disagrees. Because there is no clear evidence of a meeting of the minds regarding the August 14th agreement, for purposes of this compliance ruling only, this Department cannot unequivocally conclude that the agreement is still valid.

simply a periodic implementation of an adverse decision previously made."[7] 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. [8]

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."[9] 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.[10] 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 that the agency misapplied the state's Telecommuting Policy involves a series of discrete, individual alleged wrongs, i.e., the claimed absence of a telecommuting work agreement since June 30, 2002. Every day that passes without a valid telecommuting agreement being agreed upon, a new statute of limitations period (a new 30-calendar day period) begins to run. Because the grievant initiated his grievance within 30 calendar days of the absence of any telecommuting agreement, this Department finds that the grievance was timely initiated with respect to that claim.

CONCLUSION

For the reasons discussed above, this Department has determined that the issue of the absence of a telecommuting agreement since June 30, 2002 was filed within the required 30-calendar day period and is therefore timely. By copy of this ruling, the grievant and the agency are advised that the grievant has five workdays from receipt of

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[7] 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).

[8] "When a plaintiff alleges a systematic violation, each individual act of discrimination occurring within the limitation period may form the basis of an actionable claim, even if the discriminatory policy was initiated outside the limitation period." Lyons v. England, 307 F. 3d 1092, 1107, n.7, (9th Cir. 2002).

[9] 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).

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

this ruling to advance or conclude his grievance. This Department's rulings on matters of compliance are final and nonappealable.[11]

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Claudia T. Farr
Director

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June M. Foy
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[11] Va. Code § 2.2-1001 (5).