

Issue: Compliance/30-day time period on counseling memorandum, challenge to change in position title and duties; Ruling Date: January 11, 2005; Ruling #2004-887; Agency: State Board of Elections; Outcome: grievant is untimely on counseling memo, timely on challenge to change in position title and duties.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Virginia State Board of Elections
Ruling Number 2004-887
January 11, 2005

The grievant has requested a compliance ruling in her September 7, 2004 grievance with the Virginia State Board of Elections (SBE 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. In addition, the grievant alleges that the agency is out of compliance with the grievance procedure because the second step-respondent (1) never scheduled a face-to-face meeting; (2) did not return all of the grievant's attachments to the September 7, 2004 grievance; and (3) did not inform the grievant of her procedural options.

FACTS

Prior to her termination on September 29, 2004, the grievant was employed as a Voting Equipment Program Support Technician with SBE. On July 23, 2004, the grievant was given a counseling memorandum for her alleged "lack of judgment," "failure to understand," and "lack of respect for the management of this agency." Subsequently, on August 31, 2004, the grievant was allegedly told that she was no longer needed in her current position because there was another employee performing essentially the same functions and that as a result, the grievant's position title and duties would be changed.

On September 7, 2004, the grievant initiated a grievance claiming discrimination, harassment and retaliation. Information supporting the grievant's claims was detailed in pages attached to the Form A. According to the grievant, there were four pages attached to the Form A when she initiated the grievance. The first three pages detail the events surrounding the issuance of the July 23, 2004 counseling memorandum, while the alleged fourth page challenges the grievant's change in duties and position arising from the August 31, 2004 notification from management.

The agency administratively closed the September 7, 2004 grievance for failure to initiate within 30-calendar days of the issuance of the counseling memorandum. In its closure notification, the agency makes no mention of the grievant's challenge to the August 31, 2004 discussion and change in duties or position, but closes the grievance for failure to initiate it within 30 calendar days of the July 23rd counseling memorandum. The grievant alleges that

the fourth page of the grievance attachments was given to the first step-respondent, returned to the grievant with the first step-respondent's response, and was presented to the second step-respondent, but was missing when the second step-respondent returned the grievance packet to the grievant with the notice of closure of the grievance. Both the first and second step-respondents deny seeing a fourth page challenging the events of August 31st attached to the September 7th grievance.

The factual issue of the number of pages that were attached to the September 7, 2004 grievance Form A¹ is key to determining the events that form the basis of the September 7, 2004 grievance, and whether that grievance was timely filed. This Department's investigation into whether there was a fourth page attached to the September 7th grievance challenging the events of August 31st revealed the following information: on September 7th, the grievant created two documents on her work computer. The first document is entitled "9-7-04 grievance attachment1" (Attachment 1) and the second is entitled "9-7-04 grievance attachment2" (Attachment 2). Attachment 1 is composed of the first three pages attached to the September 7, 2004 grievance, pages which detail the July 23, 2004 counseling memo. Attachment 2 is the disputed fourth page which details the events of August 31st. Further, computer records show that Attachment 2 was last printed on September 7, 2004.

Based upon the foregoing facts, this Department concludes that the grievant has presented sufficient evidence that the September 7th grievance as initiated included the challenge to the August 31st incident. This is not at all to say that the agency acted improperly or otherwise intentionally removed the fourth page of the attachments; only that based on the evidence, it appears more likely than not that the fourth page had been, at some point, attached to the September 7th grievance.

DISCUSSION

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date she knew or should have known of the event or action that is the basis of the grievance.² 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. Further, when a grievance is administratively closed for failure to comply with the 30-calendar day requirement, the employee bears the burden of establishing that the grievance was timely initiated.³

Alleged Noncompliance of Grievant

¹ During this Department's investigation, the agency was asked to send a copy of grievance Form A with all attachments to EDR. In response, the agency sent grievance Form A with three attached pages and the notice that the agency was administratively closing the grievance for failure to comply with the 30-calendar day requirement.

² Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4(1).

³ *Id.*

The grievant had 30-calendar days, or by August 22, 2004, to challenge the July 23, 2004 counseling memo. The grievant waited until September 7, 2004 to initiate a grievance opposing the July 23rd counseling memo. Further, there is no evidence of “just cause” for the grievant’s delay.⁴ As such, the grievant’s challenge to the July 23, 2004 counseling memo is untimely as a separate claim for which specific relief could be granted. However, the July 23, 2004 counseling memo could be offered as background evidence in support of the claims of discrimination, harassment and retaliation in this grievance and others.⁵

The grievant’s challenge to the events of August 31st was timely and as such, the September 7th may proceed through the management resolution steps on the issue of whether the grievant’s change in position title and duties was discriminatory, retaliatory and/or constitutes harassment. Because the first step-respondent admittedly only addressed the issue of the July 23rd counseling memo in her response, the grievance shall be returned to the first step-respondent for processing and a response to the grievant’s claim of discrimination, retaliation and/or harassment in regard to the events of August 31st.⁶

Alleged Noncompliance of SBE

The grievant contends that the agency is out of compliance with the grievance procedure because the second-step respondent failed to (1) schedule a face-to-face meeting; (2) return all the attachments to her September 7, 2004 grievance; and (3) inform the grievant of her procedural options.

As a general rule, at the second resolution step, a face-to-face fact-finding meeting must be held.⁷ Further, when the agency administratively closes a grievance for failure to comply with the grievance procedure initiation requirements, management must “notify the

⁴ To support the validity of her challenge to the July 23, 2004 counseling memo, the grievant claims that the counseling memo signifies the beginning of the negative documentation in her personnel files, and that the September 7th grievance covers a time period from July 23rd to August 31, 2004. A grievance that challenges a discrete act that occurred within the 30 calendar days preceding the initiation of the grievance cannot be used to challenge instances of alleged management misconduct that occurred earlier than that 30 calendar day period.

⁵ On September 1, 2004, the grievant was issued a Group I Written Notice for “[u]nauthorized time away from the work area” and “disruptive behavior.” On the same day, the grievant was also issued a Group II Written Notice for “[f]ailure to follow a supervisor’s instructions” and “[f]ailure to perform assigned work.” The grievant challenged both Written Notices by initiating a grievance on September 2, 2004 grievance. Like the September 7, 2004 grievance, the September 2nd grievance alleges discrimination, harassment and retaliation.

⁶ This Department is compelled to note, however, that to efficiently and expeditiously resolve any or all pending grievances, the parties may mutually agree to consolidate those pending grievances so that they advance through the management resolution phase of the hearing process together. For example, if there is a grievance currently pending at the second management resolution step, the parties may mutually agree to consolidate that grievance with the September 7, 2004 grievance and advance the two through the remaining management resolution steps simultaneously. To consolidate the grievances, the parties would need to agree in writing that they wish to consolidate the grievances, specifically naming in the agreement which grievances they desire to consolidate. Such consolidation by the parties of grievances that have not been qualified for hearing requires no approval from this Department. However, consolidation of multiple grievances for hearing requires EDR’s approval. Prior to the appointment of a hearing officer, either party may request that grievances be consolidated for a single hearing. *See Grievance Procedure Manual* § 8.5.

⁷ *See Grievance Procedure Manual* § 3.2.

employee, using the 'Form A,' that the grievance will be administratively closed due to noncompliance."⁸ Moreover, the agency must "notify the employee on the 'Form A' that the employee has a right to request a compliance ruling from the EDR Director to overturn the closing of the grievance."⁹

If, as in this case, the second step respondent concludes that the grievance fails to comply with the requirements for initiation of a grievance, the second step-respondent is under no obligation to conduct the fact-finding meeting. Further, on the grievant's Form A, the second step-respondent's response states, "[s]ee attachment for response. Please be advised you have the right to request a compliance ruling from the Director of the Department of Employment Dispute Resolution." Moreover, as indicated above, there is insufficient evidence that the agency intentionally failed to include all the attachments when returning the Form A to the grievant. As such, this Department concludes that the agency complied with the grievance procedure at the second management resolution step.

CONCLUSION

This Department concludes that the July 23, 2004 counseling memo was untimely challenged and as such, the September 7, 2004 grievance was appropriately closed with regard to that issue. The issue of the grievant's August 31, 2004 change in position title and duties was timely challenged in the September 7, 2004 grievance and may proceed through the management resolution steps. Accordingly, within 5 workdays of receipt of this ruling, the grievant must notify the agency that she wishes to either conclude her September 7, 2004 grievance or advance it to the first resolution step. This ruling does not make a determination about the merits of the September 7, 2004 grievance, only that the August 31, 2004 events were appropriately and timely grieved and thus, in compliance with the grievance procedure. Finally, this Department concludes that the agency has complied with the grievance procedure requirements at the second management resolution step. This Department's rulings on matters of compliance are final and nonappealable.¹⁰

Claudia T. Farr
Director

Jennifer S.C. Alger
EDR Consultant

⁸ *Grievance Procedure Manual* § 2.4.

⁹ *Id.*

¹⁰ Va. Code § 2.2-3003(G).

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