

Issue: Compliance/30-day rule, performance evaluation; Ruling Date: January 12, 2005;  
Ruling #2004-920; Agency: Department of Social Services; Outcome: grievance is  
timely



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Social Services  
Ruling Number 2004-920  
January 12, 2005

The grievant has requested a compliance ruling regarding his November 4, 2004 grievance with the Department of Social Services (DSS or the agency). 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, we find that this grievance is timely.

FACTS

The grievant is employed by the agency as a Counselor 1. On September 23, 2004, the grievant received a performance evaluation rating his performance as "Below Contributor." The grievant signed his evaluation but indicated that he disagreed with the assessment of his performance and would be providing a rebuttal. In the space designated for the reviewer's comments, the reviewer noted on September 24, 2004 that the grievant had requested a meeting regarding his evaluation and that this meeting would be held within two weeks. The grievant states that meetings were held on October 5<sup>th</sup> and October 6<sup>th</sup>, and that at the conclusion of the second meeting, the reviewer indicated that she would consider his concerns. On or about October 26, 2004, the grievant received a revised performance evaluation in which a single change was made.<sup>1</sup> The grievant states that he expressed his displeasure with the revised evaluation to his supervisor but was informed that no additional changes would be made.

On November 4, 2004, the grievant initiated a grievance challenging his evaluation. Thereafter, on November 8, 2004, the first-step respondent advised the grievant that he did not have access to the grievance procedure because he had not initiated his grievance within 30 calendar days of the event forming the basis of the dispute. By letter dated November 30, 2004, the grievant requested a compliance ruling from this Department.

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<sup>1</sup> The parties disagree on the date that the grievant received his revised performance evaluation. The agency states that he received the evaluation on October 26, 2004, while the grievant claims that he received the evaluation on October 28, 2004. For the limited purpose of this ruling, we will assume the earlier date to be correct.

## 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.<sup>2</sup> In this case, the agency asserts that the event giving rise to the grievance is the original September 23, 2004 performance evaluation, while the grievant argues that the relevant event is the revised performance evaluation he received on October 26, 2004.

In grievances challenging annual performance evaluations, the 30-day period generally begins with the date that the employee receives his written evaluation. However, where the employee has initiated a timely appeal of his evaluation under agency policy, that appeal essentially renders the initial evaluation a preliminary rather than a final decision. Thus, when an employee timely appeals his evaluation under agency policy, the 30-day period to initiate a grievance is extended until the agency has taken final action on the appeal.<sup>3</sup>

This approach is consistent with that in other cases involving both preliminary and final agency action. For example, we have held that the 30-day period begins to run when a grievant is actually laid off, not when he is advised of the layoff decision.<sup>4</sup> Similarly, we have ruled that where a grievant has been advised that she will be moved to long-term disability, the 30-day period begins to run only when she is actually moved, not when she is advised that she will be moved.<sup>5</sup> To hold that an employee must file a grievance on the basis of preliminary agency action would only result in unnecessary grievances, because until agency action becomes final, there remains the possibility that the agency will reconsider its preliminary decision.

In this case, the grievant timely appealed his evaluation under the agency's policy, which requires that appeals be made within ten workdays of receipt of the evaluation.<sup>6</sup>

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

<sup>3</sup> Accordingly, if an agency fails to take action on the grievant's appeal, the 30-day period to challenge the agency's final action may be stayed indefinitely, until such time as the agency chooses to act. The employee may, however, grieve independently an agency's failure to follow its policies with respect to the appeal process. We acknowledge that this Department has held in at least one past ruling that where an agency fails to respond to an employee's appeal within the timeframes set forth under agency policy, the 30-day period for filing a grievance begins to run from the day the agency should have responded to the appeal. *See* Ruling No. 2000-010. Because the effect of this rule is to reward an agency for delay, while penalizing the employee for the agency's failure to act in a timely manner, we reject its continued application.

<sup>4</sup> *See* Ruling No. 2004-784.

<sup>5</sup> *See* Ruling No. 2003-070. *See also* Ruling No. 2002-001 (finding that where an agency reduced a Group II written notice to a Group I after the grievant presented evidence of mitigation, the 30-day period began to run when the Group I was issued).

<sup>6</sup> Department of Social Services Policy 1.6, "Performance Planning and Evaluation," V.D. We note that this policy requires that an appeal be made in writing. Although it is unclear from the record before us

The agency issued a final decision on the grievant's appeal on October 26, 2004, when the grievant's supervisor gave him a revised performance evaluation. The grievant therefore had 30 calendar days from October 26, 2004 to file his grievance. As the grievant initiated his grievance on November 4, 2004, his grievance was timely and may proceed.

#### CONCLUSION

For the reasons discussed above, this Department has determined that this grievance was filed within the 30 calendar day period. By copy of this ruling, the grievant and the agency are advised that within five workdays of the receipt of this ruling, the agency must schedule and conduct the second-step meeting. 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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whether the grievant's request for an appeal was verbal or written, this issue is not determinative because the agency accepted the grievant's request, as indicated by the reviewer's comments and the subsequent meetings and revised evaluation.

<sup>7</sup> Va. Code § 2.2-1001 (5).