

Issue: Compliance/30 day rule; other issue written notice for failure to follow supervisor's instructions; Ruling Date: August 3, 2005; Ruling #2005-1040; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: grievant not in compliance



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution
COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
and Substance Abuse Services
Ruling Number 2005-1040
August 3, 2005

The grievant has requested a compliance ruling regarding her May 6, 2005 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency). The agency asserts that the grievant did not initiate her May 6, 2005 grievance within the 30-calendar day time period required by the grievance procedure. For the reasons discussed below, this grievance may be closed for noncompliance.

FACTS

The grievant is employed as a Licensed Physical Therapy Aide. On December 15, 2004, the grievant was presented with a Group I Written Notice for unsatisfactory work performance and poor time management. The grievant challenged the Group I Notice by initiating a grievance on February 3, 2005. The grievance advanced through the management resolution steps and on April 12, 2005, the agency head qualified the grievance for hearing. A hearing occurred on May 12, 2005, and the hearing officer upheld the Group I in his May 23rd hearing decision.

While the February 3rd grievance was pending, on March 4, 2005, the grievant injured herself while working with a patient. On March 24, 2005 the grievant was presented with a Group II Notice for failure to follow her supervisor's instructions. On March 30, 2005, the grievant requested an extension to file a grievance challenging the Group II Notice, which the agency declined on April 5, 2005. On May 6, 2005, the grievant initiated a grievance challenging the Written Notice, the grievance that is the subject of this compliance ruling. On May 10, 2005, the agency informed the grievant that her grievance was being administratively closed because of her failure to timely initiate her grievance.

Because of her injuries the grievant did not return to work until June 13, 2005. The grievant asserts that she did not initiate the grievance because she was not able to due to the combination of the injury and prescribed pain medication. In addition, she asserts that she was not permitted on agency premises, a claim that the agency refutes.

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.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.

In this case, the event that forms the basis of the grievance is the agency's issuance of a Group II Written Notice to the grievant. This Department has long held that in a grievance challenging a disciplinary action, the 30 calendar day timeframe begins on the date that management presents or delivers the Written Notice to the employee.² The grievant received the Group II Notice on March 24, 2005 and thus should have initiated her grievance within 30 days of March 24th. The grievant did not initiate her grievance until May 6, 2005, which was untimely. Thus, the only remaining issue is whether there was just cause for the delay.

The grievant asserts she was unable to timely file her grievance because of a serious medical condition. This Department has long held, however, that illness alone does not automatically constitute "just cause." To substantiate "just cause," a grievant must provide evidence indicating that her physical or mental condition was so debilitating that she was unable to file a grievance during the time period in question.³ This evidence is best obtained through a health care provider's written determination.

Here, the grievant asserts that the combination of the injury and prescribed pain medication made it difficult for her to "think straight." Accordingly, the grievant was informed by this Department's investigating Consultant that documentation from the treating physician should be provided to corroborate her assertion that the injury and prescribed drugs essentially rendered her incapable of protecting her rights by utilizing the grievance process. Although the grievant asserts that she repeatedly attempted to seek such documentation, no such affirming statement from her treating physician was ever provided to this Department or, presumably, the grievant.⁴ Her physical therapist did provide documentation that confirmed that she had suffered "acute and multiple injuries sustained on the job" which left her "encumbered with [a] cervical and back

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

² See EDR Ruling Nos. 2000-003; 2000-082; 2002-001; 2002-118; 2003-147, and 2005-986.

³ See EDR Ruling #2001-110 and #2001-180. Thus, if illness merely reduces the amount of time in which a person has to initiate a grievance, the shortened time period does not automatically constitute just cause. Likewise, a diagnosis of stress or depression does not automatically constitute just cause for delay.

⁴ This Department assumes that if such documentation had been provided to the grievant, it would have been forwarded to this Department. The treating physician's office provided a note signed by the Administrator that simply stated that the grievant was "under care for a workers compensation related injury that occurred on March 4, 2005." The note indicated that she was unable to work her regular duties due to her injuries and had been referred for a MRI and a follow-up with an orthopedic surgeon.

brace as well as a sling for the [left shoulder].”⁵ The physical therapist adds that the grievant “was using regular prescriptive medications.”

For the purposes of 30-day compliance rulings, this Department generally takes at face value the representations by health care providers as to an employee’s ability (or inability) to act upon her legal rights.⁶ In this case, this Department concludes that there is little doubt that the grievant suffered a significant injury. However, based upon the documentation provided to this Department and factors set forth below, we cannot conclude that the grievant has provided sufficient evidence to establish that the injury suffered and prescribed medications rendered her incapable of protecting her grievance rights. First, the physical therapist did not state what sort of “regular prescriptive medications” the grievant was prescribed, how long she took them, and most importantly how these medications affected her ability to “think straight” and protect her grievance rights.⁷ More importantly, the agency has provided evidence that shows that the grievant continued to use the grievance procedure to challenge her December 15, 2004 Group I Written Notice during the timeframe at issue here (the 30 calendar day period following March 24, 2005, when the Group II Notice was issued).⁸ In other words, her continued advancement of the February 3rd grievance appears to contradict the grievant’s contention that she was unable to use grievance process during the time period in question.⁹

Based on the foregoing, this department cannot conclude that just cause existed for the grievant’s not filing her grievance within the 30-day period following her receipt of the Group II Notice. The grievant appeared able during the 30-day period following her receipt of the Group II Notice to communicate clearly with management regarding her grievance rights. Thus, unless management granted her an extension (which it did not), she was bound to initiate her challenge to the Group II Written Notice in a timely

⁵ June 22, 2005 letter addressed To Whom It May Concern from grievant’s physical therapist.

⁶ See EDR Ruling 2001-073.

⁷ Information as to the grievant’s ability to “think straight” would more appropriately be provided by an individual authorized by law to prescribe medications, in other words, a physician. The grievant provided a copy of an Income Protection Claim that showed that the grievant was suffering from elbow and shoulder pain, and was receiving physical therapy, painkillers and muscle relaxers. However, the Income Protection Claim does not address the impact of the pain medication and injury on the grievant’s ability to protect her grievance rights.

⁸ For example on March 24th (the day that the grievant received her Group II Notice) she also received her February 3rd Group I Grievance Form A back from the third-step respondent. The next day, Friday the 25th, the grievant requested an extension to respond to that grievance. On Monday the 28th, management responded that she would be granted an extension of at minimum a “few extra days” until April 4th to respond. On April 4, 2005, the grievant sought to have her February 3rd grievance qualified for hearing by the agency head, a request granted on April 12th. It should also be noted that on March 30th, the grievant exchanged e-mails with the human resource office regarding the February 3rd grievance (and the forms necessary to grieve the Group II Notice.)

⁹ While not dispositive, we also note that the grievant was apparently capable of initiating a workers’ compensation claim on March 15, 2005. In addition, the agency asserts that it had numerous interactions with the grievant after her injury regarding workers’ compensation, Family Medical Leave, and disability leave.

manner. Because she did not, her May 6, 2005 grievance may be administratively closed. This Department's rulings on matters of compliance are final and nonappealable.¹⁰

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Director

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¹⁰ Va. Code § 2.2-1001 (5).