

Issue: Compliance/30 day rule; Ruling Date: August 31, 2005; Ruling #2006-1114;
Agency: Department of Alcoholic Beverage Control; Outcome: grievance is timely



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

In the matter of Department of Alcoholic Beverage Control
Ruling Number 2006-1114
August 31, 2005

The grievant through her representative has requested a compliance ruling regarding her August 15, 2005 grievance with the Department of Alcoholic Beverage Control (ABC or agency). The agency asserts that the grievant did not initiate her grievance within the 30 calendar time period required by the grievance procedure. For the reasons discussed below, this grievance is timely.

FACTS

The grievant was formerly employed as a Special Agent. On July 18, 2005, the grievant was presented a Group III Written Notice with termination. On August 17, 2005, the grievant sent to the agency, via Federal Express Priority Overnight, a copy of her Grievance Form A.

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. Further, the initiation date of a mailed grievance is the postmark or mail date.² In addition, this Department has consistently held that a grievance initiated in a timely manner but with the wrong management representative will not bar a grievance for noncompliance.³

In this case, the event that forms the basis of the grievance is the grievant's receipt of the Group III Written Notice. The grievant acknowledged receipt of the Written Notice on July 18, 2005; therefore, she should have initiated her grievance within 30 days of that date, or no later than August 17, 2005. As stated above, the grievant sent her Grievance

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

² *Grievance Procedure Manual*, § 2.4.

³ EDR Rulings 99-007; 99-011; 99-171; 2000-008; 2001-195; 2001-230; 2004-645.

Form A to the agency, via Federal Express Priority Overnight, on August 17, 2005.⁴ The agency contends that the grievance was not timely initiated because, although the grievance procedure states that a grievance placed in the U.S. Mail on the 30th day is timely, the grievant used Federal Express which provides no postmark.

The agency is correct that Grievance Procedure Manual states that “for purposes of establishing when a mailed grievance was initiated, the postmarked date is considered the initiation date.”⁵ However, this provision was not intended to preclude employees from using a well-established delivery service such as Federal Express (FedEx) to initiate a grievance. To so hold would, as one court observed, elevate “form over substance.”⁶ Thus, a timely ‘postmark’ from FedEx will suffice as evidence of a timely grievance initiation.⁷

CONCLUSION

⁴ The grievant provided a photocopy of the tracking history of her grievance that showed that the package was placed in the custody of FedEx on August 17, 2005. EDR was able to confirm the validity of the tracking history by entering the tracking number on the FedEx package tracking website.

⁵ *Grievance Procedure Manual*, § 2.4.

⁶ The United States District Court for the Eastern District of Pennsylvania decided a case under somewhat similar circumstances. In *Kreider Dairy Farms, Inc. v. Glickman*, 1998 U.S. Dist. LEXIS 12331 (E.D. Pa., filed August 10, 1998) (Cahn, C.J.), vacated on other grounds 1999 U.S. App. LEXIS 20663, 190 F.3d 113 (3d Cir., filed August 27, 1999), an appeal from an administrative determination was sent via Federal Express on the last day of the appeal period. The appeal, however, did not arrive until the following day and was rejected as untimely. The applicable regulations, found at 7 C.F.R. § 900.69(d), provided that documents shall be deemed to have been filed when postmarked or received. The regulations did not define “postmark.” The court concluded that the rejection elevated “form over substance,” noting that:

The purpose of the postmark requirement is to ensure that there is reliable evidence of the date a party sends a document to the hearing clerk before the document will be deemed filed on such date. By ruling that the only way a party can satisfy the postmark requirement is to send a document to the hearing clerk via the U.S. Postal Service, the [Judicial Officer] construes the postmark requirement too narrowly. Although Federal Express (also known as “FedEx”) is not affiliated with the U.S. Postal Service, it is nevertheless a well-known delivery service, and there is no reason to doubt the reliability of a Federal Express label, especially one generated and affixed by Federal Express employees, insofar as it establishes the date a party gives an item to Federal Express for delivery.

Kreider, 1998 U.S. Dist. LEXIS 12331 at 16 (footnotes omitted).

See also, IRS Notice 97-26 in which the IRS lists several delivery companies through which taxpayers can avail themselves of the “timely mailing/timely filing” rule. Among the services that Notice 97-26 lists is Federal Express (FedEx) Priority Overnight. The other companies listed are DHL and United Parcel Service (UPS).

⁷ EDR expresses no opinion on whether use of delivery services *other than* FedEx, DHL, or UPS satisfies the postmark requirement. A timely ‘postmark’ from these 3 services, however, will suffice to establish timely grievance initiation. A grievant is responsible for securing and maintaining evidence from the delivery service that the *Grievance Form A* was placed into the custody of the delivery service company by the 30th day.

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.⁸

Claudia T. Farr
Director

William G. Anderson, Jr.
EDR Consultant, Sr.

⁸ Va. Code § 2.2-1001 (5).