

Issue: Compliance/30 day rule; Qualification/decision has been stayed; Ruling Date: February 16, 2006; Ruling #2006-1170; Agency: Virginia Department of Health; Outcome: grievance in compliance in part.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

**COMPLIANCE AND QUALIFICATION
RULING OF THE DIRECTOR**

In the matter of Department of Health
No. 2006-1170
February 16, 2006

The grievant has requested a ruling on whether his June 2, 2005 grievance with the Department of Health (VDH or agency) qualifies for a hearing. The agency asserts that the grievant is out of compliance with the grievance procedure because his grievance was initiated after the 30-calendar-day filing period.

FACTS

The grievant is employed with the agency as a Psychologist Supervisor. On May 2, 2005, the agency issued the grievant a Group I Written Notice for alleged inadequate/unsatisfactory work performance. On June 2, 2005, the grievant initiated a grievance challenging the disciplinary action, as well as the agency's alleged failure to provide him with a copy of the Written Notice in a timely manner, alleged improper professional requirements, and alleged inappropriate transactions. The Grievance Form A states that the alleged conduct began in January 2005 and continued through the date of the grievance.

At the first resolution step, the agency advised the grievant that his grievance was not in compliance with the grievance procedure, as it was submitted more than 30 calendar days following his receipt of the written notice. The agency elected to allow the grievance to proceed through the management steps, but it informed the grievant that it reserved its right to deny him a hearing due to his noncompliance. After the parties failed to resolve the grievance during the management resolution steps, the grievant requested qualification of his grievance for hearing. The agency head denied the grievant's request, and he has appealed to this Department.

Subsequent to the grievant's appeal to this Department, he was apparently terminated from employment with the agency, effective January 14, 2006. On February 10, 2006, the grievant initiated a grievance challenging his termination, as well as performance evaluations and disciplinary actions. In his Form A for his February 10th grievance, the grievant alleges that he has been subjected to unwarranted, arbitrary and capricious termination, performance evaluations and disciplinary actions, "[u]nfair and/or misapplication of state and agency personnel policies, procedures, rules, and regulations," disability discrimination, retaliation for previous grievance activity, and "[i]nterference" with his "right to short and/or long term disability benefits."

DISCUSSION

Timeliness of the Grievance

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.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.

The agency asserts, and the grievant admits, that the grievant received the Written Notice being grieved in his June 2, 2005 grievance more than thirty days prior to the initiation of the grievance. The grievant claims that he delayed filing his grievance because he was waiting to receive a copy of the disciplinary action and he erroneously interpreted the grievance procedure to require grievance initiation within one month rather than 30 days. However, it is undisputed that the grievant became aware of the Written Notice on May 2, 2005, 31 days prior to the initiation of the grievance on June 2, 2005, as he reviewed and signed the disciplinary action on that date. Moreover, the grievant admits that following the meeting on May 2, 2005, he did not make any subsequent request for a copy of the Written Notice. Although we do not sanction the agency's apparent failure to provide the grievant with a copy of the disciplinary action on a timely basis, under the circumstances present, neither the agency's action nor the grievant's alleged misinterpretation of the grievance procedure constitutes just cause for failing to initiate the grievance in a timely manner. Accordingly, the grievant's claim that the Written Notice was unmerited under the Standards of Conduct is untimely.

The June 2nd grievance is not limited to claims regarding the propriety of the Written Notice, however. Rather, the grievant also identifies as grieved issues the alleged failure of the agency to provide requested documentation; "ongoing supervisor and management rejection [of] appropriate professional psychology activities, such that [the grievant is] required to engage in activities that are: contrary to practice guidelines and/or inconsistent with current ethical and licensure standards"; and "an ongoing bias in how professional/occupational and administrative issues have been applied. . ." We find that the grievant's claims regarding these other issues are timely, as they involve conduct the grievant alleges to have occurred on an ongoing basis, up to and including the date of the grievance. This Department's rulings on matters of compliance are final and nonappealable.²

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

² See Va. Code § 2.2-1001 (5).

Qualification

The primary basis for the agency's refusal to qualify the grievance was the grievant's alleged failure to abide by the 30-day grievance initiation rule.³ As discussed, the agency's reliance on untimeliness was misplaced with respect to several claims raised by the grievance.

Fairly read, the grievance appears to raise several timely claims of misapplication or unfair application of policy. In particular, the grievant asserts that he was required to engage in actions contrary to practice guidelines and/or inconsistent current ethical and licensure standards; that the agency engaged in inappropriate transactions; that he has improperly been denied personal and annual leave; that he has been required to work excessive hours, particularly when compared to other staff; and that he is treated less favorably than other employees.

While the grievant's June 2, 2005 and February 10, 2006 grievances challenge, at least in large part, different agency conduct, they nevertheless share certain common allegations and claims—in particular, that he has been required to perform his work in a manner that is inconsistent with his professional and legal obligations, and that he has been singled out for less favorable treatment by his supervisors. Therefore, in the interest of economy and efficiency, this Department will stay its qualification decision on the timely claims set forth in the grievant's June 2nd grievance until the grievant's February 10, 2006 grievance has been addressed through the management resolution steps. The agency is advised to notify this Department when the agency head has either qualified the February 10th grievance for hearing or the grievant has appealed a denial of qualification. In the event the February 10, 2006 grievance is resolved prior to the agency head's qualification determination, the agency should promptly notify this Department and a qualification decision will be issued on the June 2nd grievance.

Claudia T. Farr
Director

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³ Although the asserted basis for the denial of qualification was the grievant's alleged non-compliance with the 30-day rule, the agency head also noted that even if he "were to assume" that the grievance was in compliance, the grievant had "failed to provide sufficient support" for his allegations to warrant qualification for hearing.