Issue: Compliance – Grievance Procedure: 30-Day Rule; Ruling Date: July 6, 2007; EDR Ruling #2007-1708; Agency: Department of Social Services; Outcome: Grievant Not In Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Social Services
No. 2007-1708
July 6, 2007

The grievant has requested a compliance ruling related to her May 15, 2007 grievance with the Department of Social Services (DSS or agency). The agency asserts that the grievant is out of compliance with the grievance procedure because the subject of her grievance, a pay dispute issue that arose in November of 2005, occurred more that 30 calendar days from when she initiated her grievance on May 15, 2007.

FACTS

The grievant is employed with the agency as an IT Project Manager. The grievant asserts that she did not receive pay to which she was entitled from September 2005 to February 2006. The grievant asserts that in February of 2006 the agency agreed to adjust her salary and pay her $1,900 in back pay, which would be retroactive to 2005. The grievant asserts that despite the back pay provided in February, her salary was not adjusted to the “proper semi-monthly amount” until July of 2006, “creating an additional loss of pay for several more months.” The grievant asserts that she was unaware of an alleged payroll adjustment in her July 14, 2006 paycheck because she uses direct deposit and no one informed her of the adjustments. The grievant asserts that she was unaware of still outstanding pay issues relating to the September 2005-February 2006 period until she filed her taxes in mid April 2007.

On May 15, 2007, the grievant initiated a grievance challenging “alleged incorrect payroll corrections.” The agency responded on May 22, 2007, by closing the grievance, asserting that the issues grieved occurred more than 30 days prior to the initiation of her grievance.

DISCUSSION

Timeliness of the Grievance

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 forms 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.

Here, the grievant is challenging incorrect payroll actions. These actions all appear to have occurred in 2005 and/or 2006. Accordingly the grievant should have challenged them within 30-calendar days of when the actions occurred back in 2005 and/or 2006. The grievant did not challenge these actions until May of 2007 which makes her grievance untimely. Thus, the only remaining issue is whether there was just cause for the delay.

According to grievant, she was unaware of the ongoing problems with her pay until she prepared her taxes in mid April of this year. However, this Department cannot conclude that the grievant was precluded from discerning whether she was being properly paid until she received her W-2 forms. The grievant receives a semi-monthly paycheck and, accordingly, shortages with her pay should have been readily apparent. To the extent that the grievant asserts that pay adjustments were to be provided in the form of something other than a bi-monthly paycheck, she certainly knew that she had not received any such a payment. Her argument that she was unaware of the improper pay because she uses direct deposit is of no avail. Employees have a duty to review their paychecks for inaccuracies especially when they are expecting an adjustment. Accordingly, we find no just cause to excuse the grievant's delay in initiating her grievance.[2]

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

[2] In the past, this Department viewed pay claims differently from other types of claims. The basis for treating such claims differently was based largely on Title VII case law, under which courts had previously reasoned that "a claim of discriminatory pay . . . involves a series of discrete, individual wrongs rather than a single and indivisible course of wrongful action." Thus, courts had concluded that every payday that an employee receives less compensation than an alleged similarly-situated employee constituted a separate accrual, or "trigger date," for statute of limitations purposes, and that with the issuance of each paycheck that is alleged to be improperly lower than that of a similarly-situated employee, a new statute of limitations period began to run. Based primarily on these Title VII court decisions, this Department adopted for the grievance procedure a rule that each paycheck starts a new 30 calendar day grievance filing deadline (the paycheck accrual rule). Moreover, this Department generally used the paycheck accrual rule in all pay cases, including those <u>not</u> based on Title VII claims. New developments in Title VII law, however, have given us occasion to reexamine our across-the-board adoption of the paycheck accrual rule. It is now appropriate to modify that rule as set forth below.

On May 29, 2007, the U.S. Supreme Court held in the case of Ledbetter v. Goodyear Tire and Rubber Co., Inc., 2007 U.S. LEXIS 6295, that under Title VII, a new violation <u>does not</u> occur, and a new charging period <u>does not</u> commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. While EDR is not bound by this decision, particularly in a non-Title VII case like this one, it makes little sense to treat all pay claims differently from other types of claims, particularly, in a case such as this, where the grievant has known of the pay issue being grieved well beyond 30 calendar days prior to the initiation of the grievance. EDR does not allow employees who allege discriminatory management acts other than pay actions to use the effects of those actions to restart the clock for filing a grievance. Therefore, as a general rule, there is little reason to

CONCLUSION

For the reasons discussed above, this Department has determined that this grievance was not filed within the 30-calendar day period and is therefore untimely. By copy of this ruling, the grievant and the agency are advised that the agency may administratively close this grievance. This Department's rulings on matters of compliance are final and nonappealable.[3]

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Claudia T. Farr
Director

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continue to use the paycheck accrual rule in grievances involving pay, and particularly in a case where the employee has long since been aware of the alleged pay violation.

[3] Va. Code § 2.2-1001 (5).