

Issue: Compliance/grievance procedure/30-day rule; other grievance issue; Ruling Date: September 21, 2006; Ruling #2007-1429; 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 2007-1429
September 21, 2006

The grievant has requested a compliance ruling in her June 19, 2006 grievance filed with the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency).

FACTS

The grievant was employed with the agency as a registered nurse. On December 28, 2005, she was terminated from employment.¹ The grievant initiated a timely grievance challenging her termination, as well as several other issues.² After the parties failed to resolve the grievance during the management resolution steps, the grievance was partially qualified for hearing.³

On March 22, 2006, during the pre-hearing conference, the parties stipulated and the hearing officer found that removal under the initial December 28, 2005 Group II Written Notice was not supported by policy or precedent and was a misapplication of the Standards of Conduct and Policy, since it was supported by only the Group II itself and two active Group I Written Notices.⁴ To address the problem, on April 17, 2006, the agency issued a second Group II Written Notice, backdated with a December 28, 2005 Issuance Date, disciplining grievant not with removal or discharge, but with ten days suspension (without pay) from December 28, 2005 through January 10, 2006.⁵ The agency states that the grievant was reinstated in connection with the correction of the Group II and that her benefits were restored at that time.

¹ See EDR Ruling Nos. 2006-1370, 2006-1379 at 2.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 2-3. On the same day, the agency issued the Grievant a Group III Written Notice with termination. *Id.* at 3. On May 4, 2006, the grievant initiated a grievance challenging the April 17, 2006 Group III Notice. *Id.*

On May 10, 2006, a hearing was convened to address the December 28, 2005 and April 17, 2006 Group II Written Notices.⁶ In his written decision, the hearing officer held:

The disciplinary action of the agency is DENIED. The Group II Written Notice issued to the grievant on December 28, 2005 is DISMISSED. The first four items of RELIEF requested by the grievant shall be GRANTED with back pay from December 29, 2005 to April 17, 2006, offset by any interim earnings grievant may have received.⁷

On June 2, 2006, the agency requested the hearing officer to reconsider his decision.⁸ The hearing officer issued his reconsidered opinion on June 6, 2006, which concluded that the agency had presented no reason to alter his original decision other than to change two typographical date errors and to add notice to grievant's counsel concerning submission of a petition for attorney's fees.⁹

On June 12, 2006, the agency asked this Department to review the hearing officer's decision.¹⁰ On June 26, 2006, this Department issued its ruling, which upheld the hearing officer's decision to reinstate the grievant.¹¹ The agency has also apparently asked for an administrative review of the hearing officer's decision by the Department of Human Resource Management, and that ruling request is pending.

On June 19, 2006, the grievant initiated an expedited grievance challenging the agency's giving her "retro insurance" rather than paying her "for the insurance [she] was supposed to have." The agency administratively closed the grievance on June 27, 2006 on the grounds that it was duplicative of the "action heard under Grievance Case No. 8311" and was untimely, as the agency reinstated her benefits at the time the Group II was corrected in April 2006.

DISCUSSION

In her June 19, 2006 grievance, the grievant challenges the agency's alleged failure to pay her for the loss of her insurance during the time from her December 2005 removal to her April 2006 reinstatement. Because it is unclear from the grievance

⁶ Hearing Decision in Case No. 8311 ("Hearing Decision") at 1-2.

⁷ *Id.* at 11. As described in the Hearing Decision, the grievant requested the following relief: reinstatement; back pay (including holiday pay); reinstatement of benefits (insurance, leave, etc.); reinstatement to day shift; and "[b]ack payment of cost of medications which would have been covered by lost insurance." *Id.* at 7. With respect to this last item, the decision notes that "[t]he hearing officer opined at the pre hearing [sic] conference that this would constitute damages and is not available." *Id.*

⁸ EDR Ruling Nos. 2006-1370, 2006-1379 at 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 5-6.

whether the grievant is challenging the manner in which the agency reinstated her benefits in April 2006 or an alleged failure by the agency to implement the relief ordered by the hearing officer, we will address both issues below.¹²

Reinstatement of Benefits

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.¹³ 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 agency states the grievant's insurance was reinstated on April 17, 2006. As the grievant did not initiate her grievance until June 19, 2006, more than 30 calendar days after the events occurred, any claims regarding the April 17th reinstatement of benefits were untimely. Moreover, the grievant has not demonstrated just cause for her untimely initiation. Therefore, to the extent the June 19th grievance challenges the April 17th reinstatement of benefits, it is not in compliance with the grievance procedure and may be administratively closed.

Implementation of Hearing Decision

Under the grievance procedure, if a grievant believes that an agency has not properly implemented a hearing officer's orders for backpay and restoration of benefits, she may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final hearing decision.¹⁴ Because there is an independent procedure for implementation, a grievance may not be initiated for this purpose.

Accordingly, to the extent the June 19th grievance challenges an alleged failure of the agency to implement the hearing officer's decision, it is not in compliance with the grievance procedure and may be administratively closed. It should be noted, however, that neither the filing of the June 19th grievance nor this ruling prevents the grievant from pursuing an order for implementation from the appropriate circuit court.¹⁵

¹² On July 27, 2006, an EDR Consultant asked the grievant, via e-mail, to have her attorney contact the Consultant. After the Consultant failed to receive a call from the grievant's attorney, the Consultant sent a second e-mail to the grievant on August 10, 2006, advising the grievant that her attorney had not contacted EDR and asking the grievant to advise the Consultant of her receipt of the e-mail. As of the date of this ruling, neither the grievant nor her attorney has contacted the Consultant in response to her e-mails. On September 20, 2006, this Department received a letter from the grievant. This letter was directed to another EDR employee and did not clarify the basis of the grievant's ruling request.

¹³ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4(1).

¹⁴ Va. Code § 2.2-3006(D); *Grievance Procedure Manual* § 7.3(c).

¹⁵ Although this Ruling is decided on compliance grounds, we also note that the grievant may have lacked access to the grievance procedure at the time she initiated her June 19, 2006 grievance, as her last day of employment was April 17, 2006. To have access to the grievance procedure, a grievant must have been

CONCLUSION

For the reasons set forth above, we find that the June 19, 2006 grievance was not in compliance with the grievance procedure and may be administratively closed. This Department's rulings on matters of compliance are final and nonappealable.¹⁶

Claudia T. Farr
Director

employed by the Commonwealth at the time the grievance was initiated, unless the action being grieved is a termination or involuntary separation (in which case a grievant may initiate a grievance within 30 days of the termination or separation). *Grievance Procedure Manual* § 2.3.

¹⁶ Va. Code § 2.2-1001(5).