

Issue: Compliance/Grievance Procedure/30-day rule; Ruling Date: January 10, 2007; Ruling #2007-1512; Agency: Department of Health; Outcome: grievance in compliance



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Health  
Ruling Number 2007-1512  
January 10, 2007

The grievant has requested a compliance ruling in his November 17, 2006 grievance with the Department of Health (the agency). The agency asserts that the grievant did not initiate his grievance within the 30 calendar-day time period required by the grievance procedure.<sup>1</sup> For the reasons discussed below, the grievance is timely.

FACTS

The grievant initiated his grievance to challenge his annual performance evaluation. The grievant allegedly received his performance evaluation on October 18, 2006 in a meeting with his immediate supervisor. On October 23, 2006, the grievant sent a memo to his immediate supervisor and his reviewer questioning his evaluation. In addition, the grievant states that he delivered the Grievance Form A to the office of the District Director on Friday, November 17, 2006, and left it with her secretary because the District Director was not in her office. Notes by the District Director indicate that she did not receive the grievance until Monday, November 20, 2006. The District Director reportedly contacted the grievant by phone on Monday, November 20, 2006, and, according to the grievant, informed him that he needed to initiate the grievance with his immediate supervisor.

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<sup>1</sup> The agency has also asserted that the grievant requested a compliance ruling from EDR more than five workdays after receiving the first-step respondent's letter indicating that the grievance was untimely. However, the agency has not notified the grievant in writing of this alleged procedural violation, as required by the grievance procedure, which makes such an argument premature. *See Grievance Procedure Manual* § 6.3. Moreover, the grievant has now corrected any noncompliance by notifying the agency of his intention to appeal and eventually requesting a ruling from this Department, thus rendering his purported noncompliance moot. Further, the grievant initially appealed the first-step respondent's nontimeliness decision within five workdays to the second-step respondent, who upheld that decision and returned the grievance package to the grievant. The grievant then appealed to EDR within five workdays after receiving the second-step response. Accordingly, there is no basis for this Department to find a substantial violation of the grievance procedure that would warrant ruling the grievant's request for a compliance ruling to be untimely. This determination is consistent with EDR's past decisions in comparable situations, *see, e.g.*, EDR Ruling No. 2002-175, and follows EDR's strong preference to have grievances challenging management actions decided on their merits, rather than on procedural technicalities. *E.g.*, EDR Ruling No. 2007-1450.

By letter dated November 29, 2006, the grievant's immediate supervisor advised the grievant that the agency was administratively closing the grievance for noncompliance, on the ground that the grievance was untimely. The grievant appealed to the second step respondent who also determined that the grievance was untimely on December 7, 2006. The grievant then appealed the agency's determination of untimeliness to this Department.

### DISCUSSION

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.<sup>2</sup> 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.<sup>3</sup>

Moreover, though grievances are normally initiated with the grievant's immediate supervisor,<sup>4</sup> 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.<sup>5</sup> In addition, this Department has held that when an employee has initiated a timely appeal of his performance evaluation under agency policy, that appeal essentially renders the initial evaluation a preliminary rather than a final decision. Thus, when an employee timely appeals his evaluation under agency policy, the 30-day period to initiate a grievance is extended until the agency has taken final action on the appeal.<sup>6</sup>

In this case, the grievant is challenging his October 18, 2006 performance evaluation and implicitly as well the agency's failure to change that evaluation as requested in his October 23, 2006 memorandum. Thus, at the very least, the grievant had thirty calendar days following his October 23 memorandum, or until November 22, 2006, to file a grievance.<sup>7</sup>

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<sup>2</sup> Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.

<sup>3</sup> *Grievance Procedure Manual* § 2.4.

<sup>4</sup> *See id.*

<sup>5</sup> *E.g.*, EDR Ruling No. 2006-1373; EDR Ruling Nos. 2006-1256, 2006-1257; EDR Ruling No. 2006-1114; EDR Ruling No. 2004-645; EDR Ruling No. 2001-230.

<sup>6</sup> EDR Ruling No. 2004-920. Accordingly, if an agency fails to take action on the grievant's appeal, the 30-day period to challenge the agency's final action may be stayed indefinitely, until such time as the agency chooses to act. However, in cases such as this, where there is no indication that the agency action would be forthcoming, an employee may initiate a timely grievance to challenge the performance evaluation without waiting indefinitely for the agency's action. Alternatively, the employee may grieve independently an agency's failure to follow its policies with respect to the appeal process.

<sup>7</sup> Although the grievant's October 23 memo does not use the word "appeal," it appears implicitly to seek review of his performance evaluation, as he provided additional explanation for certain items that appeared in the evaluation. Moreover, the grievant appears to have followed agency procedure for appealing performance evaluations. Such appeals should be made in writing to the reviewer within 10 workdays of receiving the initial performance evaluation. *See* Virginia Department of Health, Office of Human Resources Policies and Procedures Manual, HR Policy 1.40, "Performance Management," p. 5. The grievant's memo is dated five days after he received his evaluation, and was copied to the reviewer. Even if the agency had provided an immediate response to his October 23, 2006 memo, that would have begun anew the 30-day clock to initiate a grievance.

The grievant asserts that he submitted his grievance to the District Director's office on November 17, 2006; the agency asserts that the grievance was submitted to the District Director on November 20, 2006. As indicated above, the fact that the grievant initiated his grievance with the District Director, rather than the first-step respondent (as contemplated by the grievance procedure), is immaterial. Moreover, the factual dispute regarding the two submittal dates is also immaterial: even if the grievant had submitted his grievance to the District Director on November 20, 2006, as the agency claims, that date is within 30 calendar days of his October 23, 2006 memo. As such, this Department rules that the grievance was timely and may proceed.

### CONCLUSION

For the reasons discussed above, this Department has determined that this grievance was filed timely within the 30-calendar-day period. By copy of this ruling, the parties are advised that within five workdays of the receipt of this ruling, the first-step respondent must respond to the grievance. This Department's rulings on matters of compliance are final and nonappealable.<sup>8</sup>

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Claudia T. Farr  
Director

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<sup>8</sup> Va. Code § 2.2-1001(5).