

Issue: Compliance – Grievance Procedure (30-Day Rule); Ruling Date:
November 2, 2007; Ruling #2008-1830; Agency: Board of Accountancy;
Outcome: Grievant in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Board of Accountancy
Ruling No. 2008-1830
November 2, 2007

The grievant seeks a compliance ruling in his September 13, 2007 grievance initiated with the Board of Accountancy (BOA or the agency). The agency administratively closed the grievance on September 19, 2007. For the reasons set forth below, this Department concludes that the agency improperly closed the September 13, 2007 grievance.

FACTS

The grievant is employed as an Administrative and Program Specialist III with BOA. On May 15, 2007 and again on June 6, 2007, the grievant was counseled on his alleged poor performance. During the June 6th meeting regarding his alleged poor performance, the grievant's supervisor allegedly suggested that the grievant contact the Employee Assistance Program in order to work on his "on-going personal issues" and offered him the opportunity to take a leave of absence from work if he so needed. The grievant subsequently determined that he would take the suggested leave of absence from work. Prior to his taking leave, the agency gave the grievant an Interim Evaluation Form as well as a Group II Written Notice for poor performance on July 6, 2007.

Upon his return to work on August 17, 2007, the grievant was given a letter stating that he was being placed on paid administrative leave due to the agency's discovery on July 19, 2007 that state records were missing from the agency office "without prior authorization or written authorization." The grievant was advised that disciplinary action was being contemplated and that he had until August 24, 2007 to provide a response to the allegations against him. The grievant provided a written response to the allegations on August 23, 2007.

On September 13, 2007, the grievant initiated the instant grievance challenging his placement on administrative leave for an indefinite period of time as arbitrary and

capricious, an unfair and/or misapplication of policy, and discriminatory on the basis of disability.¹ The grievant also lists his “arbitrary performance evaluation” as an issue. By letter dated September 19, 2007, the agency head administratively closed the September 13th grievance stating:

This letter will serve to advise you that the attached Grievance that you faxed to me on September 13th is being returned to you. This action is based on the opinion that your Grievance is not in compliance with the Grievance Procedure and is being administratively closed. This decision is based on the following. On August 17th, 2007, you were placed on paid pre-disciplinary leave. During this leave, you were given the opportunity to respond to the allegations contained in the letter that you received on August 17th. You did respond to that letter on August 23th [sic]. Since that time, we have been reviewing your response, and are in the process of deciding if disciplinary actions will be taken. Since that time you have not been issued any disciplinary action resulting in loss of pay or position. In you [sic] Grievance, you also reference issues relating to the violation of the Standards of Conduct issued on July 6, 2007. If you disagreed with this action, according to the Grievance Procedure, you must file a Grievance challenging this action within 30 calendar days of the action being taken.

As a result, the grievant seeks a compliance ruling from this Department.

DISCUSSION

Grievant's Placement on Administrative Leave

There are no limits on what issues may be grieved, at least through the management resolution steps, so long as the grievance is filed within 30 calendar days of the event being grieved; arises in the agency in which the employee works; pertains directly and personally to the employee's own employment; is not used to harass or disrupt agency business; has not been pursued through another state process; and, finally, does not challenge the same management action challenged by another grievance.²

The issues raised by the grievant with respect to his being placed on indefinite administrative leave pending possible disciplinary action clearly pertain directly and personally to his employment. Moreover, the grievant timely challenged his placement on administrative leave; the action being grieved arose within his employing agency; and there is no evidence that the September 13th grievance challenges the same action challenged by another grievance or was initiated to harass or disrupt agency business. The issues surrounding his administrative leave are therefore unquestionably grievable.

¹ According to his grievance, the grievant has been diagnosed with major depressive disorder.

² *Grievance Procedure Manual* § 2.4.

We note that in determining whether claims may be *grieved* (as opposed to whether claims may be *qualified for a hearing*), an agency should look to the issues presented by the grievance, not to whether the actions grieved constitute an adverse employment action (or materially adverse action for retaliation claims).³ Whether the action(s) constitute an adverse employment action or materially adverse employment action is irrelevant, through the management steps and agency head qualification determination, to the *grievability* of the issues raised. Accordingly, this Department finds that the agency's conclusion that the grievant's claims regarding his paid pre-disciplinary leave are not grievable is erroneous under the grievance procedure.

July 6, 2007 Written Notice

The agency also asserts that the grievant's challenge to the Group II Written Notice he received on July 6, 2007 is untimely. In response, the grievant asserts that he is not challenging the Group II Written Notice, but rather is merely referencing it in his September 13th grievance "to illustrate the ongoing matter of his performance for which the Administrative Leave was partly predicated upon." The grievant goes on to state that he would "reserve the right to request a decision on the grievability of the Written Notice since is it [sic] apparent that [the grievant] was not medically capable or cognizant of his need to file a grievance at this time." In his grievance the grievant seeks as relief "[r]escission of the Written Notice (July 2007) from my work record." Accordingly, despite his assertion to the contrary, it appears that the grievant is challenging the July 6, 2007 Written Notice in his September 13th grievance and as such, this Department will address the agency's assertion that the grievant's challenge to the July 6, 2007 Written Notice is untimely.

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.⁴ When an employee initiates a grievance beyond the 30-calendar day period without just cause,⁵ the grievance is not in compliance with the grievance procedure, and may be administratively closed.

In this case, one event being grieved is the agency's issuance of a Group II Written Notice to the grievant. This Department has long held that in a grievance challenging a disciplinary action, the 30 calendar day timeframe begins on the date that management presents or delivers the Written Notice to the employee.⁶ The grievant received the Group II Notice on July 6, 2007 and thus should have initiated his grievance challenging this disciplinary action within 30 days of July 6th. The grievant did not initiate his grievance challenging the Group II Written Notice until September 13th, which

³ See *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006).

⁴ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.

⁵ "Just cause" is defined as a "reason sufficiently compelling to excuse not taking a required action in the grievance process." *Grievance Procedure Manual* § 9.

⁶ See EDR Ruling Nos. 2000-003; 2000-082; 2002-001; 2002-118; 2003-147, 2005-986, and 2006-1114.

was untimely. Thus, the only remaining issue is whether there was just cause for the delay.

The grievant asserts he was unable to timely file a grievance challenging the Group II Written Notice because he suffers from a physical and/or mental impairment that prevented him from doing so. Under the grievance procedure, an illness or impairment does not automatically constitute just cause for failure to meet procedural requirements. To the contrary, in most cases it will not. Illness may constitute just cause for delay only where there is evidence indicating that the physical or mental impairment was so debilitating that compliance with the grievance procedure was virtually impossible.⁷ For instance, this Department has held that while stress and ‘feeling blue’ are not enough for just cause,⁸ severe depression, requiring clinical treatment, such as this case, could warrant a just cause finding.⁹ However, to establish illness as just cause for not meeting the grievance procedure’s time requirement, the grievant should in virtually all cases be required to provide supporting evidence from a health care provider.

The grievant has presented evidence from a health care provider indicating that he was unable to pursue his grievance rights within the 30 calendar day time period following his receipt of the Written Notice and as such, the grievant has just cause for his untimeliness.¹⁰ However, this Department will presume that the grievant was capable of pursuing his grievance rights on August 17, 2007, the day he returned to work.¹¹ As such, the grievant had 30 calendar days from August 17th, or by September 16th, in which to challenge the July 6, 2007 Written Notice. The grievant challenged the Written Notice in his September 13, 2007 grievance which was timely given the just cause for his delay.¹²

CONCLUSION

Based on the foregoing, the grievant and the agency are advised that the grievant has **10 workdays from the date of this ruling** to advance his grievance to the first resolution step, at which point the agency must address all issues raised in the September

⁷ Cf. Va. Code § 63.2-1603 (2004) which defines “incapacitated person” as “any adult who is impaired by reason of mental illness, mental retardation, physical illness or disability, advanced age or other causes *to the extent that the adult lacks sufficient understanding or capacity to make, communicate or carry out responsible decisions concerning his or her well-being.*” (Emphasis added). See also Va. Code § 8.01-229 (2001) (providing that the time period for filing a civil action may be tolled where the plaintiff suffers from an incapacitating disability); Dickerson v. Henderson, 2001 U.S. Dist. LEXIS 5560 (S.D. Ind. 2001)(mental illness tolls a statute of limitations if it prevents the sufferer from managing his affairs and understanding his legal rights and acting upon them).

⁸ See EDR Ruling # 2001-110.

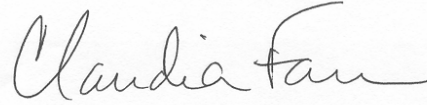
⁹ See EDR Ruling # 2001-073.

¹⁰ The grievant was undergoing treatment from June 12, 2007 through August 15, 2007.

¹¹ See EDR Ruling #2004-762.

¹² For the reasons set forth above, the grievant’s challenge, set forth in the instant grievance, to the interim evaluation also issued on July 6, 2007, is timely as well.

13th grievance. This Department's rulings on matters of compliance are final and nonappealable.¹³

A handwritten signature in cursive script that reads "Claudia Farr". The signature is written in black ink on a light-colored background.

Claudia T. Farr
Director

¹³ Va. Code § 2.2-1001(5).