

Issue: Compliance – Grievance Procedure (30-Day Rule); Ruling Date: January 28, 2008; Ruling #2008-1888; Agency: Department of Health Professions; Outcome: Grievant In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Health Professions
Ruling Number 2008-1888
January 28, 2008

The grievant has requested a compliance ruling regarding her November 19, 2007¹ grievance with the Department of Health Professions (DHP or the agency). The agency asserts that the grievant did not initiate her November 19th grievance within the 30-calendar day time period required by the grievance procedure. For the reasons set forth below, this Department concludes that the grievant had just cause for her failure to timely challenge her termination and as such, the agency improperly closed the November 19, 2007 grievance.

FACTS

Prior to her termination, the grievant was employed with DHP as an Assistant Accounting Director. On October 13, 2007, the grievant received a Group III Written Notice with termination² for “failure to follow established state and agency written

¹ The grievant signed, dated and mailed the grievance challenging her termination on November 19, 2007. According to the agency, it did not receive the grievant’s termination grievance until November 26, 2007, seven days after the grievance was mailed. Because the difference of one week is not outcome determinative in this case, this Department will assume that the grievance was initiated on the earlier of these two dates; i.e., November 19, 2007.

² This Department would like to note that the agency has apparently altered the official Written Notice form in this case. In particular, in “*Section V – Notice to employee*,” the agency has deleted important information on how an employee can contact this Department should the employee have questions regarding the grievance procedure and/or if she wishes to challenge her receipt of the Written Notice. See Written Notice Form 129-01-004 (Revised 07/10/07). The agency has altered the Written Notice form to state that the grievant should contact the agency’s human resource office for assistance in this regard. While such alterations did not affect the grievant’s rights in this case, the deletion of information on how a grievant can contact this Department could have significant consequences to the agency in future cases. For instance, should a grievant fail to challenge a written notice within the mandated 30 calendar days and later argue that the agency gave her information regarding the 30 calendar day requirement contrary to the grievance procedure, this Department would likely find that the grievant had just cause for failure to challenge the written notice within 30 calendar days because the grievant was never advised of her right to contact this Department with assistance and/or questions regarding the grievance filing requirements.

policy, unauthorized use and misuse of state property in the operation of a personal business, and abuse of state time.”³ The grievant subsequently challenged the disciplinary action by initiating a grievance on November 19, 2007. On December 3, 2007, the agency informed the grievant that her November 19th grievance was being administratively closed because of her failure to timely initiate her grievance. The grievant seeks a compliance ruling from this Department as to whether she timely initiated her November 19th grievance.

DISCUSSION

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.⁴ 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 event that forms the basis of the grievance is the agency’s issuance of a Group III Written Notice with termination 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.⁵ In this case, the grievant received the Group III Notice with termination on October 13, 2007 and thus should have initiated her grievance within 30 days of October 13th, or by November 12, 2007. The grievant did not initiate her grievance until November 19, 2007, which was untimely. Thus, the only remaining issue is whether there was just cause for the delay.

The grievant asserts she was unable to timely file her grievance because of a physical and/or mental impairment. This Department has long held that illness or impairment does not automatically constitute “just cause” for failure to meet procedural requirements. To the contrary, in most cases it will not.⁶ 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 This evidence is best obtained through a health care provider’s written determination.

Moreover, the Department of Human Resource Management (DHRM) has indicated to this Department that the Written Notice is an official state form and information contained in that form may not be deleted.

³ The issuance date of the written notice and the effective date of the grievant’s termination is October 12, 2007. However, according to agency records, the grievant did not receive the written notice until October 13, 2007.

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

⁵ See EDR Ruling No. 2005-986; EDR Ruling No. 2003-147; EDR Ruling No. 2002-118; EDR Ruling No. 2002-001; EDR Ruling No. 2000-082; EDR Ruling No. 2000-003.

⁶ See EDR Ruling No. 2006-1201; EDR Ruling No. 2003-154 and 2003-155.

⁷ *Id.*; see also EDR Ruling No. 2005-1040.

Here, the grievant has presented a letter from her health care provider indicating that the grievant's physical and/or mental impairment most likely contributed to her inability to pursue her grievance rights within the 30 calendar day time period following her receipt of the Written Notice. As such, this Department concludes that the grievant had just cause for failing to initiate her November 19, 2007 grievance within 30 calendar days.

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 her grievance to the second resolution step, at which point the agency must hold the second step meeting in accordance with the provisions set forth in the grievance procedure and address all issues raised in the November 19th grievance. This Department's rulings on matters of compliance are final and nonappealable.⁸

Claudia T. Farr
Director

⁸ Va. Code § 2.2-1001(5).