

Issues: Compliance – Grievance Procedure (30-Day Rule and Other Issue); Ruling Date: July 7, 2008; Ruling #2008-1984; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Grievant In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF THE DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
and Substance Abuse Services
Ruling No. 2008-1984
July 7, 2008

The grievant has requested a ruling on whether his February 14, 2008 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency) is in compliance with the grievance procedure. The agency asserts that the grievant did not meet the rules for initiating a grievance. For the reasons set forth below, this Department determines that the grievance complies with the grievance procedure and may proceed to the extent described below.

FACTS

The primary issue raised by the February 14, 2008 grievance is “retaliation.” The grievant asserts that many things have occurred to him during a period of over two years, including assignment to third shift on two separate occasions, having his state service truck taken away, being forced to take a drug test, having to use annual time for doctor appointments because of a failure to reimburse his sick leave in relation to a workers’ compensation matter, being forced to winterize cabins upon his return to work from an injury, and having a workplace violence complaint filed against him. Nothing in the grievant’s documentation indicates that any of these events occurred within the 30 calendar-day period directly preceding the initiation of the grievance on February 14, 2008. However, the grievant also cites to one activity that did occur in that 30 calendar-day period. On January 15, 2008, the agency is alleged to have received a check regarding the grievant’s workers’ compensation claim. The grievant asserts that the agency was to process the payment and credit the grievant’s leave as a result of the receipt of this check. The grievant alleges that the agency has failed to take such action, at least as of February 14, 2008. The grievant appears to be asserting that all these actions were in retaliation for prior grievance activity. The grievant has filed grievances in December 2005,¹ January 2006,² and December 2007.³

¹ The December 2005 grievance challenged a Written Notice.

² In that grievance, the grievant alleged that he had been assigned to work third shift following the initiation of the December 2005 grievance.

³ In the December 2007 grievance, he primarily challenges the timeliness and manner in which the agency has handled his leave time in relation to the processing of his workers’ compensation claim.

As part of the February 14, 2008 grievance, the grievant also raises a noncompliance matter from the December 2007 grievance. He alleges that the agency was late in providing the agency head's decision at the qualification for hearing stage in the December 2007 grievance.

The agency has asserted that the February 14, 2008 grievance is noncompliant with section 2.4 of the *Grievance Procedure Manual* and closed the grievance. Specifically, the agency asserts that the grievance was untimely, duplicates other grievances, raises claims pursued through another state process, and "serves no purpose other than to harass management." The grievant now requests a compliance ruling on these issues.

DISCUSSION

Duplication

The grievance procedure provides that a grievance must not challenge the same management action challenged by another grievance.⁴ In the February 14, 2008 grievance, one of the management actions challenged is the agency's alleged delay and failure to process the grievant's leave reimbursement following the receipt of a recent check (January 15, 2008) from a third-party administrator. This act has not been grieved in a prior grievance. Although the same types of actions were challenged in the grievant's December 2007 grievance, the agency's action or inaction regarding the January 15, 2008 check could not have been a part of that grievance because it occurred after the December 2007 grievance was initiated. However, to the extent the grievant is again challenging the payment of lost time "since August 2007," such claims would appear to duplicate those from his December 2007 grievance and need not be addressed as part of this grievance. The claims related to the January 15, 2008 check would still be new claims and are not duplicative of a prior grievance.

The agency also asserts that the grievant previously initiated a grievance in January 2006 alleging retaliation for filing his December 2005 grievance. However, the only act of retaliation alleged by the January 2006 grievance was the grievant's assignment to third shift, which is one of the incidents cited by the grievant in his February 14, 2008 grievance. A claim regarding the assignment to third shift in January 2006 would be duplicative as to that specific act.⁵ However, the entire retaliation claim raised in the February 14, 2008 grievance would not be duplicative, as many events cited by the grievant occurred after January 2006.

Timeliness

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action

⁴ *Grievance Procedure Manual* § 2.4.

⁵ A specific claim related to that January 2006 assignment to third shift would be untimely, as well. The assignment could still be used as background evidence, however. *See infra*. In addition, the grievant also indicates that he was assigned to third shift "again" at some point, i.e., after January 2006. That claimed assignment to third shift would not duplicate the claim from his January 2006 grievance.

that is the basis of the grievance.⁶ 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.

The agency asserts that the grievant failed to adhere to this 30 calendar-day rule in that the “grievance issues span a period of more than two years.” It appears that most of the instances of retaliation alleged by the grievant occurred more than 30 days prior to the initiation of the grievance. As such, the grievance is untimely to challenge and receive relief regarding those specific acts. However, the allegations can still be considered as background evidence for the grievant’s timely claim of retaliation.⁷ Indeed, the grievant has cited at least one incident that has occurred in the past 30 calendar days: the agency’s alleged failure to process and/or credit the grievant’s leave regarding a payment allegedly received January 15, 2008. Consequently, the grievant’s retaliation claim with regard to this payment is clearly timely.

Furthermore, the grievance can be fairly read as raising a claim of ongoing retaliation, i.e., retaliatory harassment or retaliatory hostile work environment. Such a claim of harassment is raised in a timely manner if some agency action alleged to be part of the harassing conduct occurred within the 30 calendar days preceding the initiation of the grievance.⁸ Again, the grievant cites to the agency’s alleged action and/or inaction regarding the payment the agency allegedly received January 15, 2008. Therefore, the grievant’s allegations are timely to raise such a retaliatory harassment claim.⁹ Based on the foregoing, the February 14, 2008 grievance was timely initiated.

Pursued Through Another State Process

To satisfy section 2.4 of the *Grievance Procedure Manual*, a grievance also must “[n]ot have been pursued through another state process.”¹⁰ The agency asserts that the grievant’s claims for lost time have been pursued through the Commonwealth’s workers’ compensation process and should not be allowed to proceed. Although the agency has provided no support for its statement that the grievant has filed such a claim regarding lost time and/or leave with the Virginia Workers’ Compensation Commission (“Commission”), much of the arguments related to the grievant’s workers’ compensation claim appear to be more properly raised with the Commission. However, there is at least a portion of the grievant’s lost time and/or leave allegations that would be the proper subject of a grievance. For instance, the Workers’

⁶ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.

⁷ E.g., EDR Ruling No. 2003-098 & 2003-112.

⁸ See Nat’l R.R. Pass. Corp. v. Morgan, 536 U.S. 101, 115-18 (2002) (holding same in a Title VII hostile work environment harassment case); see also Graham v. Gonzales, No. 03-1951, 2005 U.S. Dist. LEXIS 36014, at *23-25 (D.D.C. Sept. 30, 2005) (applying *Morgan* to claim of retaliatory hostile work environment/harassment); Shorter v. Memphis Light, Gas & Water Co., 252 F. Supp. 2d 611, 629 n.4 (W.D. Tenn. 2003) (same).

⁹ It should be noted that the question in this compliance ruling at the initiation stage is not whether the alleged inaction regarding the January 15, 2008 check was part of an alleged ongoing course of retaliation, or whether the other alleged agency actions were as well. Rather, at this stage, the question is only whether the grievant’s claims, as stated, meet the requirements of section 2.4 of the *Grievance Procedure Manual*.

¹⁰ *Grievance Procedure Manual* § 2.4.

Compensation Commission is without jurisdiction to restore or reinstate an employee's leave.¹¹ Therefore, at this early stage, it cannot be said that the grievant's allegations of lost time and/or leave were or even could be pursued through another state process in their entirety. Consequently, there is no basis for a claim of initiation noncompliance on these grounds. Moreover, the grievant's claims regarding retaliation, the primary focus of the February 2008 grievance, have not been pursued elsewhere.

Harass or Impede the Efficient Operations of Government

The grievance procedure also provides that a grievance cannot "be used to harass or otherwise impede the efficient operations of government."¹² This prohibition is primarily intended to allow an agency to challenge issues such as the number, timing, or frivolous nature of grievances, and the related burden to the agency.¹³ The agency has asserted two grounds in support of its argument. First, the agency states that this grievance is duplicative of the December 2007 grievance and, therefore, "serves no purpose other than to harass management." As indicated above, at least one claim in this grievance for which relief may be granted is not duplicative. Consequently, the agency's argument is misplaced. The agency also asserts that this grievance "apparently seeks to interfere with the smooth operations of the [department in which the grievant works] by challenging and slowing their ability to determine the methods, means and personnel by which work activities are undertaken." This argument is equally unfounded. The mere filing of a grievance does not prevent an agency or its employees from carrying out their governmental functions and operations. This Department cannot conclude that the grievant used the grievance procedure to impede the efficient operations of the agency. We find no evidence of an improper intent in this case.

Noncompliance

In the February 14, 2008 grievance, the grievant has also asserted that the agency was allegedly noncompliant with the grievance procedure in its handling of the grievant's December 2007 grievance. Initiating a new grievance is not the proper means to raise such a noncompliance matter. Rather, issues of noncompliance are generally raised pursuant to Section 6 of the *Grievance Procedure Manual* as part of the related grievance. The noncompliance matter asserted by the grievant is not a proper subject for a new grievance and need not be addressed as part of the February 14, 2008 grievance.¹⁴

¹¹ E.g., *Epps v. Inova Fair Oaks Hosp.*, VWC File No. 213-55-21 (Mar. 23, 2007), 2007 VA Wrk. Comp. LEXIS 219, at *14-15.

¹² *Grievance Procedure Manual* § 2.4.

¹³ See EDR Ruling No. 2002-224.

¹⁴ Furthermore, the grievant's point about the agency's delay in providing the agency head's qualification determination is moot. The agency head has already issued his decision and, as such, there would be no basis to order that the agency comply with the grievance procedure. Although the agency head's decision should have been issued within five workdays of receipt of the grievance package, see *Grievance Procedure Manual* § 4.2, the grievant should have raised the matter during the period of delay to force the agency into compliance. See *Grievance Procedure Manual* §§ 6.1, 6.3.

CONCLUSION

For the reasons discussed above, this Department has determined that the grievance initiated on February 14, 2008 is compliant with Section 2.4 of the *Grievance Procedure Manual* and must be permitted to proceed consistent with the provisions of this Ruling.¹⁵ The grievance must be returned to the first step-respondent, who must respond to the grievance within five workdays of receipt of this ruling. This Department's rulings on matters of compliance are final and nonappealable.¹⁶

Claudia T. Farr
Director

¹⁵ As indicated above, there are certain issues raised in the February 14, 2008 grievance that need not be addressed: 1) the noncompliance matter, and 2) claims raised in the December 2007 grievance related to the payment of lost time "since August 2007" (but not as to any such claims occurring after December 12, 2007).

¹⁶ Va. Code § 2.2-1001(5), 2.2-3003(G).