

Issues: Qualification – Benefits (LWOP) and Discipline (counseling memo), Compliance – Grievance Procedure (30 Day Rule), and Consolidation of grievances for purpose of hearing; Ruling Date: April 8, 2009; Ruling #2009-2242, 2009-2268; Agency: Department of Corrections; Outcome: Qualified for Hearing, Grievant Not in Compliance, Consolidation Granted.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

**QUALIFICATION, COMPLIANCE AND
CONSOLIDATION RULING OF DIRECTOR**

In the matter of the Department of Corrections
Ruling Numbers 2009-2242, 2009-2268
April 8, 2009

The grievant has requested a ruling on whether her September 15, 2008 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. In addition, the agency asserts that the grievant is out of compliance with the grievance procedure because one of the issues raised in her September 15th grievance occurred more than 30 calendar days prior to her initiating the grievance. This Department concludes that with the exception of the challenge to placement on leave restriction, the September 15th grievance is qualified as set forth below and consolidated with the grievant's other pending grievances for a single hearing.

FACTS

On September 15, 2008, the grievant initiated a grievance challenging a September 11, 2008 counseling letter she received for failure to obtain prior approval for her absence from work on September 8, 2008 and the resulting placement on leave without pay (LWOP) for 8 hours (Grievance #1). In addition, the grievant alleges that her placement on "leave restriction" was wrongful; the agency has violated the Family Medical Leave Act (FMLA); and her due process rights have been violated. After the parties failed to resolve this grievance through the management steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and the grievant has appealed the agency head's decision to this Department. Additionally, the agency has alleged that the grievant's claim regarding her placement on leave restriction is untimely.

In addition to Grievance #1, the grievant also has three other pending grievances, which have been qualified by the agency head.¹ On October 3, 2008, the grievant

¹ EDR Ruling Nos. 2008-1937, 2008-1938, 2008-1939.

initiated a grievance (Grievance #2) to challenge a Group I Written Notice issued for failure to report to work as instructed and/or failure to secure approval for leave for her absence on September 26, 2008. In Grievance #2, the grievant alleges that the agency has misapplied policy, created a hostile work environment, and that she has been “singled out.” On December 18, 2008, the grievant initiated two additional grievances. The first of these two grievances (Grievance #3) challenges her receipt of a Group II Written Notice with suspension for failure to obtain prior approval for her absence on November 21, 2008 and for arriving at work 30 minutes late on November 13, 2008. In Grievance #3, the grievant alleges that the agency has misapplied policy, violated the FMLA, and engaged in discriminatory and retaliatory behavior. The next grievance, initiated on December 18, 2008 (Grievance #4), challenges the grievant’s receipt of a Group II Written Notice with suspension for failure to obtain prior approval for her absence from work on November 20, 2008. In Grievance #4, the grievant challenges the Group II Written Notice as discriminatory, retaliatory and in violation of the FMLA.

DISCUSSION

Compliance

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 that is the basis of the grievance.² 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 has alleged that the grievant’s challenge to her placement on leave restriction in Grievance 1 is out of compliance with the grievance procedure because her placement on leave restriction occurred more than 30 calendar days prior to her initiating her September 15, 2008 grievance. It appears the grievant was placed on leave restriction on July 25, 2008 and as such, should have challenged such placement no later than August 24, 2008. The grievant did not challenge the leave restriction until September 15, 2008 and as such, her challenge to this issue was untimely. The only remaining question is whether there was just cause for her delay.

The grievant asserts that she failed to initiate her grievance within 30 calendar days of being placed on leave restriction because she was suffering from frequent and severe asthma attacks during this time period. 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.³ 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.⁴ Here, the grievant has failed to provide such evidence. Despite the

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

³ See, e.g., EDR Ruling No. 2006-1201; EDR Ruling Nos. 2003-154, 155.

⁴ *Id.*; see also EDR Ruling No. 2005-1040.

grievant's frequent asthma attacks, she admits that she was working during the 30 calendar days following her placement on leave restriction. Furthermore, there is no evidence that the grievant was incapacitated to the point that she was unable to protect her grievance rights. As such, there is no basis to find that the grievant had just cause for delay as a result of her illness. This Department, therefore, concludes that Grievance #1 was untimely to challenge the July 25, 2008 placement on leave restriction.⁵ This Department's rulings on matters of compliance are final and nonappealable.⁶

Although Grievance #1 is untimely to challenge the issues concerning her placement on leave restriction, all other issues contained in Grievance #1 were timely and as such, will be addressed below.

Qualification – Grievance #1

Grievances that challenge a counseling memo and placement on LWOP, as Grievance #1 does here, are generally not qualified for hearing unless the grievant provides evidence raising a sufficient question as to whether management's action constituted an unfair or misapplication of policy, discrimination, retaliation or unwarranted discipline.⁷ However, in a case like this, where the grievant will be afforded a hearing to challenge the three Written Notices related to attendance and leave issues, it simply makes sense to send her grievance challenging the September 11, 2008 counseling memorandum and resulting LWOP for failing to obtain approval of leave to hearing as well.⁸ The four grievances all share common factual questions about the grievant's absences from work and alleged failure to obtain approval for such absences. Moreover, all three Written Notices mention the September 11, 2008 counseling memorandum as a circumstance taken into consideration in the issuance of those Written Notices. Finally, sending these related claims to a single hearing (*see* consolidation discussion below) will provide an opportunity for the fullest development of what may be interrelated facts and issues. We note, however, that this qualification ruling in no way determines that the September 11th counseling memorandum and resulting LWOP was a misapplication or unfair application of policy, or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

Consolidation

This Department has long held that it may consolidate grievances with or without a request from either party whenever more than one grievance is pending involving the

⁵ It must be noted, however, that though Grievance #1 is untimely to challenge her placement on leave restriction, that action may still be evidence of the alleged hostile work environment claim. However, a hearing officer will not be able to address and provide relief on the leave restriction substantively, only the alleged ongoing course of discrimination or harassment of which the leave restriction may or may not be a part. *See, e.g.*, EDR Ruling No. 2008-1984; EDR Ruling No. 2003-098 & 2003-112.

⁶ *See* Va. Code § 2.2-1001(5), 2.2-3003(G).

⁷ Grievance Procedure Manual, §4.1(b).

⁸ *See e.g.*, EDR Ruling No. 2009-2127, 2009-2129, 2009-2130; EDR Ruling #2008-1920, 2008-1993.

same parties, legal issues, and/or factual background.⁹ EDR strongly favors consolidation of grievances for hearing and will grant consolidation when grievances involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.¹⁰

This Department finds that consolidation of Grievance #1 with Grievances #2, #3, and #4 is appropriate. The grievances involve the same parties and likely many of the same witnesses. In addition, they share a related factual background, and common themes and claims. Finally, consolidation is not impracticable in this instance.

In the interests of efficiency, as the agency has already requested the appointment of a hearing officer in Grievances #2, #3, and #4, this Department shall assume that the grievant wishes to advance Grievance #1 to hearing and appoint a hearing officer to hear the consolidated grievances. If the grievant does not wish to pursue Grievance #1 to hearing, she should notify this Department within 5 days of the date of this ruling. Finally, assuming that the grievant does not indicate that she now wishes to conclude her grievance, the agency is directed to submit an updated Form B reflecting the qualification of all timely issues raised in Grievance #1.

This Department's rulings on compliance are final and nonappealable.¹¹

Claudia T. Farr
Director

⁹ *Grievance Procedure Manual* § 8.5.

¹⁰ *Id.*

¹¹ *See* Va. Code § 2.2-1001(5), 2.2-3003(G).