

Issue: Compliance – Grievance Procedure (30-Day Rule); Ruling Date: April 14, 2009; Ruling #2009-2262; Agency: Department of Social Services; Outcome: Grievant In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling Number 2009-2262
April 14, 2009

The grievant has requested a compliance ruling in his March 6, 2009 grievance with the Department of Social Services (VDSS or 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. For the reasons discussed below, the grievance is timely.

FACTS

The grievant initiated his grievance to challenge his annual performance evaluation, which he first received during an October 24, 2008 meeting with his immediate supervisor. The grievant's supervisor states that at the October 24th meeting, she gave the grievant his performance evaluation, briefly explained her assessment and invited him to meet with her at a later point if he wanted to discuss any of the information contained in the performance evaluation.¹ Also during that meeting, the grievant informed his immediate supervisor that he did not agree with her assessment of his performance.

On November 7, 2008, the grievant emailed his immediate supervisor a response to his performance evaluation, which was discussed later in a November 19, 2008² meeting with his immediate supervisor and the reviewer. Again at that meeting, the grievant expressed to his supervisor and reviewer his disagreement with his evaluation. At the conclusion of the meeting, the grievant's immediate supervisor told the grievant that she would "think about [changing his performance evaluation]."

¹ The 2008 performance evaluation rates the grievant an overall "Contributor" with a rating of "Below Contributor" in two elements of the evaluation.

² The grievant's supervisor claims that this meeting occurred on November 19, 2008, while the grievant claims that this meeting occurred on November 20, 2008. Because the date of this meeting is of no import in the determination of whether the grievant timely challenged his performance evaluation, this ruling will assume that the meeting occurred on November 19, 2008.

On or about February 9, 2009,³ the grievant's immediate supervisor informed the grievant that his performance evaluation would not be changed.⁴ Thereafter, the grievant initiated his March 6, 2009 grievance challenging the performance evaluation as "unsubstantiated."

On March 11, 2009, 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 has appealed his supervisor's determination regarding timeliness 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.⁵ 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.⁶

In grievances challenging annual performance evaluations, the 30-day period generally begins with the date that the employee receives his written evaluation. However, where the employee has initiated a timely appeal of his evaluation under agency policy, that appeal essentially renders the initial evaluation a preliminary rather than 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.⁷

The applicable policies in this case are Department of Human Resource Management (DHRM) Policy 1.40 and the VDSS Salary Administration Plan (SAP). DHRM Policy 1.40 states, "[i]f an employee disagrees with an evaluation and cannot resolve the disagreement with the supervisor, the employee may appeal to the reviewer for another review of the evaluation."⁸ Likewise, the VDSS SAP provides, "If an employee disagrees with parts VI,

³ Neither the grievant nor his supervisor could identify the exact date that the grievant was told his performance evaluation would not be changed. The grievant states that it was either February 9th or February 11th. During this Department's investigation, the grievant's supervisor stated that while she was unsure of the exact date, she does not dispute the date that the grievant says he was told his performance evaluation would not change. As such, and because whether the grievant was informed that his performance evaluation would not be changed occurred on February 9th or February 11th is of no import for purposes of the 30 calendar day rule, this Department will assume that the grievant was informed on February 9, 2009 that his performance evaluation would not be changed.

⁴ According to the grievant's supervisor, the performance evaluation was not discussed for several months for various reasons. For example, both parties were out of the office several times in the months following the November meeting and the grievant was working on a project and his supervisor's focus was to make sure that project was completed before they discussed the performance evaluation further.

⁵ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.

⁶ *Grievance Procedure Manual* § 2.4.

⁷ See EDR Ruling No. 2004-920.

⁸ DHRM Policy 1.40, *Performance Planning and Evaluation*.

VII, and VIII⁹ of the EWP and cannot resolve disagreements with their supervisor, the employee may appeal to the reviewer for another review of these parts of the EWP.”¹⁰ Both state and agency policies provide that appeals to the reviewer must be made in writing within 10 workdays of the initial performance meeting.¹¹

Here, the grievant’s initial performance meeting occurred on October 24, 2008. Thus his November 7, 2008 email (which was followed by a November 19, 2008 meeting with his supervisor and reviewer to discuss his evaluation), was timely submitted within 10 workdays of October 24. At the November 19 meeting, the grievant identified for his supervisor and the reviewer those areas of the evaluation he felt were inaccurate. According to the parties, the disagreement regarding the performance evaluation was not resolved at the meeting but rather, the grievant’s supervisor stated, presumably with the reviewer’s approval, that she would “think about” whether a change to the evaluation was appropriate.

Based on the foregoing, this Department concludes that the grievant’s November 7 email, which was followed by a November 19 meeting, rendered the evaluation he received on October 24, 2008, as preliminary rather than final.¹² Accordingly, because the agency failed to take action on the grievant’s appeal of his performance evaluation until February 9, 2009, when the grievant was notified that his evaluation would not be changed, the 30-day period to challenge the agency’s final action through the grievance procedure began on February 9 and ended on March 11, 2009. Because the grievant initiated his grievance on March 6, 2009, his grievance is timely.

CONCLUSION

For the reasons discussed above, this Department has determined that this grievance was timely filed 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.¹³

Claudia T. Farr
Director

⁹ Parts VI, VII and VIII are the relevant rating sections of the employee performance evaluation. Part VI is the “Performance Evaluation” section, Part VII is the “Employee Development Results” section and Part VIII is the “Overall Results Assessment and Rating Earned.” VDSS SAP at 47-49.

¹⁰ VDSS SAP (effective September 25, 2000) at 23.

¹¹ DHRM Policy 1.40 and VDSS SAP at 23.

¹² EDR Ruling No. 2007-1512; EDR Ruling No. 2004-920.

¹³ See Va. Code § 2.2-1001(5), 2.2-3003(G).