

Issue: Compliance – Grievance Procedure (30-Day Rule); Ruling Date: May 20, 2009; Ruling #2009-2309; Agency: Department of Corrections; Outcome: Grievant In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2009-2309
May 20, 2009

The grievant has requested a compliance ruling in her grievance, dated January 5, 2009, with the Department of Corrections (the agency). The agency asserts that the grievant did not initiate her 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 her grievance on or around January 8, 2009.¹ The grievant appears to be challenging issues related to her job performance generally, but also specifically her 2008 performance evaluation, which she appears to have received on November 12, 2008. Pursuant to Department of Human Resource Management (DHRM) Policy 1.40, *Performance Planning and Evaluation*, the grievant initiated an appeal of that evaluation on November 24, 2008.² Her immediate supervisor responded to the appeal by memorandum dated December 8, 2008, which the grievant states she received on December 11, 2008. The grievant further states that she has not received a response to her appeal from the reviewer. Subsequently, the grievant submitted this grievance. Although the grievance proceeded to the third resolution step, the agency, at that point, alleged that the grievance was untimely. The grievant now appeals that determination.

DISCUSSION

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.³ 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.

¹ The grievance is stamped as "received" on this date. However, the date indicated next to the grievant's signature is January 5, 2009. Because it appears that the grievance was initiated no later than January 8, 2009, it is not necessary to determine whether the grievance was actually initiated on either of these dates as it does not affect the outcome of this ruling. Therefore, for purposes of this ruling, it will be assumed the grievance was initiated on or around January 8, 2009.

² The appeal was provided to both the grievant's supervisor and the reviewer.

³ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.

Further, when an employee has initiated a timely appeal of a performance evaluation under state or agency policy,⁴ that appeal essentially renders the initial evaluation a preliminary rather than a final decision. Thus, when an employee timely appeals a performance evaluation under policy, the 30-day period to initiate a grievance is extended until the agency has taken final action on the appeal.⁵ Additionally, if an agency fails to take action on the grievant's appeal, the 30-day period to challenge the agency's final action may be stayed indefinitely, until such time as the agency chooses to act. However, in cases such as this, where there is no indication that the reviewer's action would be forthcoming, an employee may initiate a timely grievance to challenge the performance evaluation without waiting indefinitely for a response.⁶

In this case, the grievant is challenging her performance evaluation, which she received on November 12, 2008, and, implicitly as well, the agency's failure to change that evaluation as requested in her timely November 24, 2008 policy appeal.⁷ Thus, the grievant had thirty calendar days following the reviewer's response to her appeal to file her grievance. However, at the time she initiated the grievance, the grievant had apparently not received a response from the reviewer.⁸ Therefore, the 30-day window to initiate this grievance never closed because the grievant's appeal was still pending with the reviewer under policy.⁹ Upon receiving an unfavorable response from her immediate supervisor, it was reasonable for the grievant to move forward with this grievance. As such, when the grievant initiated her grievance on or around January 8, 2009, she was within the applicable 30 calendar-day period. Therefore, the grievance is timely and may proceed.

CONCLUSION

For the reasons discussed above, this Department has determined that this grievance was filed timely 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 third step-respondent¹⁰ must respond to the grievance. This Department's rulings on matters of compliance are final and nonappealable.¹¹

Claudia T. Farr
Director

⁴ E.g., DHRM Policy 1.40, *Performance Planning and Evaluation*.

⁵ EDR Ruling No. 2007-1512; EDR Ruling No. 2004-920.

⁶ *Id.* Alternatively, the employee may grieve independently an agency's failure to follow its policies with respect to the appeal process.

⁷ See DHRM Policy 1.40, *Performance Planning and Evaluation*.

⁸ There is nothing in the supervisor's December 8, 2008 response that would indicate it was on behalf of or in lieu of the reviewer's response, and, thus, nothing that would have put the grievant on notice that the reviewer had made a decision on the appeal.

⁹ See *id.* An appeal of a performance evaluation is directed to the reviewer, not the immediate supervisor, under the DHRM policy. *Id.*

¹⁰ It appears that the grievant's alleged noncompliance was first noted by the agency at the third step. Therefore, the grievance must be returned to that step.

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