Issue: Compliance – Grievance Procedure (30-Day Rule); Ruling Date: October 16, 2009; Ruling #2010-2441; Agency: State Council of Higher Education for Virginia; Outcome: Grievant in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of State Council of Higher Education for Virginia
Ruling No. 2010-2441
October 16, 2009

The grievant has requested a compliance ruling related to her September 4, 2009 grievance with the State Council of Higher Education for Virginia (the agency). The agency asserts that the grievant failed to initiate her grievance in a timely manner. For the reasons set forth below, this grievance was initiated timely and must be allowed to proceed.

FACTS

In or around August 2008, the grievant took on numerous duties for the administration of a federal grant. As a result, the grievant was given a temporary pay increase. In March 2009, based on information provided to the agency by the Department of Human Resource Management (DHRM), the amount of the temporary pay increase was decreased. Discussions and disputes between the grievant and the agency about the temporary pay issue ensued. On September 4, 2009, the grievant initiated this grievance to challenge the agency's actions as discriminatory and as a misapplication or unfair application of policy. She seeks to adjust her salary to receive the remaining unpaid funds from the grant, which she argues the agency had previously agreed to pay her. The agency administratively closed the grievance at the first step because it alleges that the grievant was untimely in initiating her grievance.

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.[1] 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 the past, this Department viewed pay claims differently from other types of claims. The basis for treating such claims differently was based largely on Title VII case law, under which courts had previously reasoned that "a claim of discriminatory pay . . . involves a series of discrete, individual wrongs rather than a single and indivisible course of wrongful action."[2]

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[1] Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.
[2] *E.g.*, EDR Ruling No. 2005-991; EDR Ruling No. 2004-586.

Thus, courts had concluded that every payday that an employee receives less compensation than an alleged similarly-situated employee constituted a separate accrual, or "trigger date," for statute of limitations purposes, and that with the issuance of each paycheck that is alleged to be improperly lower, a new statute of limitations period began to run. Based primarily on these Title VII court decisions, this Department adopted for the grievance procedure a rule that each paycheck starts a new 30 calendar day grievance filing deadline (the paycheck accrual rule). Moreover, this Department generally used the paycheck accrual rule in all pay cases, including those <u>not</u> based on Title VII claims.

However, on May 29, 2007, the United States Supreme Court held in the case of *Ledbetter v. Goodyear Tire & Rubber Co., Inc*., 550 U.S. 618 (2007), that under Title VII, a new violation <u>does not</u> occur, and a new charging period <u>does not</u> commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination, such as the issuance of a paycheck.[3] While not bound by this decision, EDR decided to abandon adherence to the paycheck accrual rule.[4]

Earlier this year, Title VII law on this issue changed again with Congress' adoption of the Lily Ledbetter Fair Pay Act of 2009, which effectively negated the Supreme Court's holding in *Ledbetter*.[5] The Act amended Title VII, in short, to reinstate the paycheck accrual rule.[6] Therefore, given that this Department previously followed the paycheck accrual rule, as with many Title VII precedents and frameworks, and that rule has since been reinstituted into Title VII jurisprudence by Congress, it makes sense for this Department to re-adopt this standard for determining when pay claims accrue under the grievance procedure. Further, because it would make little sense to treat discriminatory pay claims, i.e., analogous Title VII claims, differently than non-discriminatory pay claims, EDR will apply the paycheck rule to all such grievances involving compensation, including this one.

Here, the grievant initiated her grievance when she was still performing work under the federal grant and receiving semi-monthly paychecks reduced due to the agency's allegedly improper compensation decisions. Because her grievance was filed within 30 calendar days of one such reduced paycheck, her grievance is timely to challenge the pay actions grieved. It should be noted that if this grievance is qualified for a hearing, and the hearing officer rules in favor of the grievant, the hearing officer would only be able to award an upward pay adjustment for the 30 calendar day period immediately preceding the initiation of the grievance.[7]

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[3] *See id.* at 622-40.
[4] *See, e.g.,* EDR Ruling No. 2007-1708; EDR Ruling No. 2007-1690.
[5] S. 181, 111th Cong. (2009).
[6] 42 U.S.C. § 2000e-5(e)(3)(A) (2009) ("For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, <u>including each time wages, benefits, or other compensation is paid</u>, resulting in whole or in part from such a decision or other practice.") (emphasis added).
[7] *Rules for Conducting Grievance Hearings* § VI(C)(1). Whether the grievant may have some other legal or equitable remedy available to her for this claim is not a subject for this ruling.

CONCLUSION

For the reasons discussed above, this Department has determined that this grievance was filed timely within the applicable 30 calendar-day period. By copy of this ruling, the parties are advised that within five workdays of the receipt of this ruling, the appropriate first step-respondent must respond to the grievance. This Department's rulings on matters of compliance are final and nonappealable.[8]

Claudia T. Farr
Director

[8] *See* Va. Code § 2.2-1001(5), 2.2-3003(G).