

Issue: Compliance – Grievance Procedure (30-Day Rule); Ruling Date: March 3, 2010;
Ruling #2010-2526; Agency: Department of Corrections; Outcome: Grievant In
Compliance.



COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF THE DIRECTOR

In the matter of Department of Corrections
Ruling No. 2010-2526
March 3, 2010

The grievant has requested a ruling on whether his grievance with the Department of Corrections (DOC or the agency) is in compliance with the grievance procedure. The agency asserts that the grievance was not timely initiated. For the reasons set forth below, this Department determines that the grievance must be allowed to proceed.

FACTS

On September 15, 2009, the grievant met with a supervisor who instructed him that he would need to alter his lunch hour and to obtain a doctor's written release to return to work each time he took sick leave, for any amount of time. According to the grievant, the supervisor indicated that these actions were being taken as a result of his earlier grievance in June 2009 claiming age discrimination. The grievant states that the supervisor told him that he had until the end of the day to decide whether he wanted to withdraw his June 2009 grievance, which the grievant declined to do. The grievant asserts that the supervisor's directives were in retaliation for his June 2009 age discrimination grievance.

The grievant first submitted a complaint about the supervisor's alleged retaliatory directives to the Office of Equal Employment Services (OEES) at the Department of Human Resource Management (DHRM) on September 21, 2009. By letter dated September 23, 2009, the OEES notified the grievant that it would not accept his complaint because he had an active grievance regarding the same allegations.¹ The grievant attempted to explain that his September 21, 2009 complaint to the OEES challenged a different issue from the June 2009 grievance. Ultimately, however, the grievant withdrew his June 2009 grievance so that the OEES would accept his complaint. After he withdrew that grievance, the grievant was told on or around October 22, 2009, by an OEES employee, that the OEES could not accept his complaint because the June 2009 grievance had progressed too far. The grievant again requested the OEES to accept his complaint in a letter to the head of the OEES dated October 23, 2009. Having received no response, the grievant sent a similar letter to the DHRM Director on December 1, 2009. The grievant states he received no response.

¹ An employee may not pursue both an OEES complaint and a grievance on the same matter. See *Grievance Procedure Manual* § 1.3.

The grievant now seeks to submit a grievance challenging his supervisor's September 15, 2009 directives as retaliatory. He submitted the grievance on or about January 26, 2010. The DOC notified the grievant that the grievance was untimely. The grievant now appeals that determination to this Department.

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.² This Department has long held that 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 events that form the basis of the grievance concern a supervisor's conduct on or around September 15, 2009. Thus, the 30 calendar day period ended October 15, 2009. The Grievance Form A was not submitted to the agency until January 26, 2010, which was well after the events in September and, thus, untimely. The only remaining issue is whether there was just cause for the delay.

The grievant argues that the late submission of his grievance should be excused because of his prior attempts to submit his complaint of retaliation with the OEES. Based on materials submitted by the grievant, it appears that he received some kind of assurances from the OEES shortly before the expiration of the 30-day period that the OEES would accept his complaint. However, after the 30-day period expired, the grievant was then told that the OEES would not take his complaint. Such a situation would appear to constitute just cause for a grievant's delay, at least as far as October 22, 2009, when he was informed that the OEES would not be taking the case. At that point, however, the grievant was in a difficult position. The 30-day period for filing a grievance had passed and the grievant still felt that the OEES should accept his complaint. The grievant reasonably concluded he could not attempt to submit a grievance at that time if he ever wanted the OEES to accept his complaint on the same issue. As such, he attempted to have management at the OEES and, later, DHRM address the problems, but states he received no response.

This Department views this unique situation as constituting just cause for the grievant's delay in filing this grievance. The grievant exhausted all potential avenues of appeal to have the OEES address his complaint. He could not have initiated a grievance if he still wanted the OEES to accept the complaint, thus it is understandable why he did not initiate his January 26, 2010 grievance earlier. Indeed, as the *Grievance Procedure Manual* provides, "[a]n employee may not pursue both an OEES complaint and a grievance on the same matter."³ The grievant attempted to exercise his right to submit a valid and timely complaint to the OEES consistent with this provision. When it became clear that the OEES would not take his case, the grievant filed this grievance late, but just cause existed for his delay.

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

³ *Grievance Procedure Manual* § 1.3.

CONCLUSION

For the reasons set forth above, this Department concludes that the grievance must be allowed to proceed because just cause exists for the delay. The grievant must return the grievance paperwork to the agency to begin the grievance process anew. Within five workdays of receipt, the appropriate first step-respondent must respond to this grievance. This Department's rulings on matters of compliance are final and nonappealable.⁴

Claudia T. Farr
Director

⁴ See Va. Code § 2.2-1001(5).