Issue: Compliance – Grievance Procedure (30-Day Rule); Ruling Date: May 21, 2010; Ruling #2010-2640; Agency: Department of Behavioral Health and Developmental Services; Outcome: Grievant Not In Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

RECONSIDERED COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Behavioral Health and Developmental Services
Ruling Number 2010-2650
May 21, 2010

The grievant has requested that this Department reconsider EDR Ruling No. 2010-2626.

FACTS

On March 11, 2010, the grievant received a Group II Written Notice with termination for alleged inaccurate documentation of a medical event. The grievant challenged the disciplinary action by filing a grievance on April 12, 2010.[1] The agency subsequently administratively closed the grievance due to noncompliance by failing to initiate the grievance in a timely manner. The grievant appealed that determination. In EDR Ruling No. 2010-2626, this Department ruled that the grievant's April 12, 2010 grievance was untimely. The Ruling explained that this Department has long held that in a grievance challenging a disciplinary action, the 30 calendar-day timeframe begins on the date that management presents or delivers the Written Notice to the employee.[2] The grievant received the Group II Written Notice on March 11, 2010 and, thus, should have initiated this grievance within 30 calendar days, i.e., no later than April 10, 2010. The grievant did not initiate the grievance until April 12, 2010, which was 32 calendar days after the Written Notice was issued and, thus, untimely.[3]

Having found the grievance untimely, this Department examined whether "just cause" for the delay existed. EDR Ruling No. 2010-2626 explained that:

> The grievant asserts that on March 9, 2010, she had authorized a non-lawyer representative to serve as her advocate. The grievant further asserts

[1] According to the agency, although the Grievance Form A is dated April 9, 2010, it was not actually received by management until April 12, 2009. The grievant has not contested that the Grievance Form A was not presented to management until April 12th.
[2] *E.g.*, EDR Ruling No. 2005-986; EDR Ruling No. 2003-147; EDR Ruling No. 2002-118.
[3] This Department has consistently applied the 30-day rule strictly and has long held that the fact that the 30th day falls on a weekend does not extend the 30-day deadline for initiating a grievance. EDR Ruling Nos. 2006-1349, 1350; 2006-1201; 2003-118; and 99-204.

that on March 10, 2010, the grievant, apparently through her advocate, responded to a March 8, 2010 letter of intent to terminate her employment. The grievant asserts that the March 8, 2010 letter is "part and parcel of the March 11, 2010 grievance process" and that the March 10th response was timely and should have been followed by a meeting between the grievant, her advocate, and the agency prior to the issuance of the March 11, 2010 Written Notice. In sum, the grievant asserts that:

> The challenged action of the grievant filing a request for hearing/meeting within two days of the March 8, 2010 letter intent [sic] to terminate and prior to the issuance of the March 11, 2010 letter of termination, should be considered timely filed and the EDR should provide a hearing to the grievant and her advocate.

As an initial point, the grievant apparently had a meeting on March 10, 2010 with the agency to discuss the proposed termination of her employment.[4] (While the grievant's newly appointed advocate may not have been in attendance at that meeting, this Department is unaware of any provision of state policy that requires an agency to allow an advocate to be in attendance at what is essentially a pre-termination due process meeting.) More to the point, the act that the grievant appears to be challenging is the actual termination of her employment, which occurred on March 11, 2010, when the agency presented her with the Written Notice. The grievant did not initiate her grievance until more than 30-days had lapsed from receiving the Written Notice. Sending the agency a notice that she had retained an advocate did not constitute initiating a grievance nor did it extend the time that she had to file her grievance. The grievant's advocate's request for a second meeting did not constitute initiation of the grievance nor did it extend the timeframe for filing the grievance. Any failure by the agency to provide the grievant with a second meeting did not violate any policy requirement nor did it extend the grievance filing deadline. The Grievance Procedure Manual plainly instructs that "[a]n employee must initiate a grievance on a fully completed 'Form A,'"[5] which did not occur until 32 days after her termination. The rationale proffered by the grievant and her advocate simply does not constitute just cause for the untimely initiation of this grievance.

The grievant now asserts that EDR Ruling No. 2010-2626 failed to address whether the agency was required to respond to the grievant's representative's March 10, 2010 request for a second meeting. The grievant also objects to having received notice of noncompliance from the Facility Director rather than the second step respondent.

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[4] The grievant's newly appointed advocate appears to have requested a second meeting and it appears this is the meeting that he claims should have occurred prior to her termination.

[5] *Grievance Procedure Manual* § 2.4.

DISCUSSION

While EDR Ruling No. 2010-2626 did not expressly rule on whether the agency had any obligation to respond to the grievant's request for a second meeting, it answered the central question of whether the request for the meeting alleviated the grievant of her obligation to file her grievance within 30 calendar days of the receipt of the written notice. The ruling explained that:

> The grievant's advocate's request for a second meeting did not constitute initiation of the grievance nor did it extend the timeframe for filing the grievance. Any failure by the agency to provide the grievant with a second meeting did not violate any policy requirement nor did it extend the grievance filing deadline.

Nothing in the grievant's current ruling request changes the above holding. The agency, having provided the grievant with a due process meeting on March 10, 2010, was under no obligation to meet with her again nor was it under any obligation to respond to the grievant's advocate's demand for another meeting. Any failure by the agency to reply to the request for a second meeting changes nothing in terms of extending the grievance filing deadline. With the agency having no further obligation to meet with the grievant, any such meeting and even the attempt to set up the meeting essentially constitute "informal discussion" under the grievance procedure. Section 2.2 of the *Grievance Procedure Manual* explains that "[e]ven when [informal] discussions are ongoing, however, the written grievance must be initiated within 30 calendar days of the date that the employee knew, or should have known, of the event that formed the basis of the dispute." The grievant was presented the Written Notice on March 11, 2010 and was thus required to initiate the grievance by April 10, 2010. Accordingly, the grievance was untimely and any failure by the agency to respond to the request for a second meeting did not constitute just cause for the untimely filing.

The grievant also objects that the Facility Director, rather than the designated second step respondent, informed her of her noncompliance with the grievance process. The grievant is correct that the Facility Director (the agency's designated third step respondent) would not normally serve as the sole management respondent in an expedited grievance. Typically, with a timely filed grievance, that function is performed by the second step respondent who presides over the face-to-face fact-finding meeting then offers the sole substantive response from management to the grievance. However, because the grievance was untimely, the grievance never advanced. The agency administratively closed it. Moreover, the grievance process does not preclude the third step respondent from informing the grievant that her grievance is untimely and will not be processed. The *Grievance Procedure Manual* simply states that "management" must notify an employee when a grievance is being closed on the basis of non-compliance and inform the employee of the opportunity to appeal that

determination to this Department.[6] The grievant has exercised that appeal option twice and none of the reasons advanced serve as grounds to excuse the delay in filing the grievance.[7]

This Department's rulings on matters of compliance are final and nonappealable.[8] Further requests for reconsideration will not be addressed.

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Claudia T. Farr
Director

[6] *Id.*

[7] The case cited by the grievant, "Honer" [sic], was overturned by the General Assembly through a statutory change. Furthermore, the modified statutory provision (Va. Code 2.2-3003 (D) is inapplicable to this case because it deals with management's response to a "timely" grievance.
The grievant raised a final argument in her request for reconsideration regarding the substance of the grievance. That objection, which relates to the weight of evidence against the grievant, need not be addressed because the grievance is untimely.

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