

Issue: Compliance – Grievance Procedure (30-Day Rule); Ruling Date: July 7, 2010;
Ruling #2010-2668; Agency: Department of Corrections; Outcome: Grievant Not In
Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2010-2668
July 7, 2010

The grievant has requested a ruling on whether her May 7, 2010 grievance with the Department of Corrections (the agency) is in compliance with the grievance procedure. The agency asserts that the grievance does not comply with the grievance procedure because it was not initiated timely. For the reasons set forth below, this Department determines that the grievance is untimely and may be administratively closed.

FACTS

In this case, the grievant previously held a counselor position at one of the agency's facilities that was being closed. In lieu of layoff, the grievant was offered placement. The grievant appears to have been offered three options: one of two different counselor positions at Facility S, or a grievance coordinator position at Facility G. The grievance coordinator position is in a lower pay band. However, the grievant selected the grievance coordinator position as her choice and was placed in that position effective October 21, 2009. In discussing her options with human resources prior to her placement, the grievant states that a member of the agency's human resources staff informed her that she would still have recall rights to a counselor position if she took the grievance coordinator position at Facility G. The agency denies that such a statement was made.

Some time later, the grievant submitted a request for a lateral transfer into an open counselor position consistent with her belief that she was on the recall list. However, on or about April 9, 2010, the grievant became aware that she was not on the recall list. Thereafter, the grievant submitted this grievance on May 7, 2010 to challenge the agency's failure to place her on the recall list. As relief, she seeks to be added to the recall list. The agency has asserted that the grievant did not initiate her grievance timely. The agency also states that the grievant was not entitled to recall rights to a counselor position because she had declined placement to an open counselor position during pre-layoff placement. The grievant now appeals the agency's timeliness 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.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. The grievant bears the burden of showing that her grievance was timely initiated.²

This grievance concerns the grievant's allegation that the agency improperly failed to place her on the recall list at the time of her placement into another position at the agency in lieu of layoff. In most cases, an employee should challenge such an alleged failure within 30 calendar days of placement, as the date of placement is the time an agency should place an employee on the recall list if that was the proper result under policy. However, in this case, the grievant alleges that a member of the agency's human resources staff informed her that she would have recall rights upon accepting the grievance coordinator position. If this occurred, it would understandably extend the grievant's time to submit a grievance because, due to such a statement from human resources staff, there would be no reasonable cause for the grievant to investigate further whether she was actually placed on the recall list. Upon discovering later that she was not on the recall list, the grievant would be timely to initiate a grievance within 30 calendar days of discovering that information. As such, this case rises and falls on whether the grievant was told by human resources that she would have recall rights.

Both the grievant and the member of human resources who allegedly told the grievant she would have recall rights were interviewed as part of this Department's investigation for this ruling. Both individuals presented equally credible, though conflicting, information. The grievant maintains that she was informed she would have recall rights by accepting the grievance coordinator position. The member of human resources states that she did not so inform the grievant and believes she may have said that the grievant would not have recall rights if she took one of the positions, but she was not sure. In light of this conflicting but equally credible testimony, we must look to who bears the burden of proof. The grievant has the burden to show that it is more likely than not her grievance was timely initiated.³ We find that she has not carried that burden; specifically, she has not shown that it is more likely than not that the agency told her she would have recall rights.

Therefore, the grievant should have initiated her grievance within 30 calendar days of the effective date of her placement (October 21, 2009), i.e., no later than November 20, 2009. Because the grievant did not initiate her grievance until May 7, 2010, the challenge to the failure

¹ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.

² *Grievance Procedure Manual* § 2.4.

³ *See id.*

to be placed on the recall list is untimely.⁴ Further, this Department finds no just cause for the delay consistent with the analysis above.

CONCLUSION

For the reasons set forth above, this Department concludes that the May 7, 2010 grievance was not timely initiated and there is no evidence of just cause for the delay. The parties are advised that the grievance should be marked as concluded due to noncompliance and no further action is required. This Department's rulings on matters of compliance are final and nonappealable.⁵

Claudia T. Farr
Director

⁴ The analysis in this case might be different if there was a clear violation of the applicable policy, i.e., that the grievant should have without a doubt been on the recall list. If that had been the case, the agency could have had a continuing duty to so place her, thus possibly extending the 30-day window for initiating a grievance. However, in this case, the grievant was initially offered her choice of placement into three separate positions, two of which were in her former role as a counselor. While the grievant argues that she did not "turn down" the counselor positions by accepting the grievance coordinator position, it is difficult to argue that picking one option over another does not also decline the other option. An employee who declines pre-layoff placement in such a manner would not appear to be considered eligible for recall rights to that position. See DHRM Policy 1.30, *Layoff* (declining placement or recall into position in previous role ends severance benefits and recall rights).

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