

Issue: Compliance – Grievance Procedure (30-Day Rule); Ruling Date: November 9, 2010; Ruling #2011-2782; Agency: Department of Behavioral Health and Developmental Services; Outcome: Grievant Not In Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**COMPLIANCE RULING OF THE DIRECTOR**

In the matter of Department of Behavioral Health and Developmental Services  
Ruling No. 2011-2782  
November 9, 2010

The grievant has requested a ruling on whether her September 13, 2010 grievance with the Department of Behavioral Health and Developmental Services (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 is untimely and may be administratively closed.

FACTS

On December August 3, 2010, the grievant was given a Group III Written Notice with termination. The grievant initiated a grievance challenging the disciplinary action on September 13, 2010. The agency asserts that the grievance was untimely. The grievant, through her legal counsel, has now sought a ruling from this Department to determine whether she was compliant with the grievance procedure.

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.<sup>1</sup> Because this provision describes a fixed period of time within which a grievance must be initiated in order for the grievant to pursue his or her rights, the time requirement is essentially tantamount to a statute of limitations.<sup>2</sup> However, like a statute of limitations period, this Department allows the time period within which to initiate a grievance to

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

<sup>2</sup> See e.g., *Lavery v. Automation Management Consultants, Inc.*, 234 Va. 145, 147-148 (Va. 1987) (“a true statute of limitations ‘reduces to a fixed interval the time between the accrual of the right and the commencement of the action. In short, a true statute of limitations prescribes a time period within which an action must be brought upon claims or rights to be enforced’.” quoting 51 Am. Jur.2d Limitations of Actions § 13 (1970). Moreover, “[a] statute of limitations is designed to compel the exercise of a right to sue within a reasonable time; to suppress fraudulent and stale claims; to prevent surprise; to guard against lost evidence; to keep facts from becoming obscure; and to prevent witnesses from disappearing.”)

be waived or extended under certain circumstances.<sup>3</sup> More specifically, a grievance may be initiated outside the 30 calendar day period if (1) the parties have agreed to extend or waive the 30 calendar day requirement;<sup>4</sup> or (2) the grievant can demonstrate just cause for failing to timely initiate the grievance. However, in order to constitute just cause, the reason for the delay in initiating the grievance must have been beyond the grievant's control.<sup>5</sup> 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 event that forms the basis of the grievance is the agency's issuance of the Written Notice with termination. 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.<sup>6</sup> The grievant received the Group III Written Notice on August 3, 2010, and, thus, should have initiated this grievance within 30 days, i.e., no later than September 2, 2010. The grievant did not initiate the grievance until September 13, 2010, which was forty-one days after the Written Notice was issued and, thus, untimely. The only remaining issue is whether there was just cause for the delay.

In support of her late initiation of her grievance, the grievant first asserts that during the month of August, she attempted to find legal representation, but was unable to do so until September 13, 2010. However, the grievance procedure is intended to be a process that does not require the assistance of legal counsel. While some employees may find that aid from a lawyer is helpful, it is not mandatory. Moreover, although not dispositive, analogous case law has concluded that failure to secure legal representation is not a basis upon which to extend or "toll" a statute of limitations period.<sup>7</sup> Accordingly, this Department finds the grievant's lack of representation does not constitute just cause for her failure to timely challenge her termination.

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<sup>3</sup> See e.g., *Grievance Procedure Manual* § 2.4 and § 8.4. See also e.g., *Harris v. Hutchinson*, 209 F.3d 325, 328-331 (4th Cir. Md. 2000) ("As a general matter, principles of equitable tolling may, in the proper circumstances, apply to excuse a plaintiff's failure to comply with the strict requirements of a statute of limitations.....[However] [a]s a discretionary doctrine that turns on the facts and circumstances of a particular case, equitable tolling does not lend itself to bright-line rules. The doctrine has been applied in two generally distinct kinds of situations. In the first, the plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant. In the second, extraordinary circumstances beyond plaintiffs' control made it impossible to file the claims on time. But any invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. We believe, therefore, that any resort to equity must be reserved for those rare instances where -- due to circumstances external to the party's own conduct -- it would be unconscionable to enforce the limitation period against the party and gross injustice would result." (internal citations omitted)).

<sup>4</sup> See *Grievance Procedure Manual* § 2.4 and § 8.4.

<sup>5</sup> See e.g., EDR Ruling #2008-1881 and EDR Ruling #2006-1184. See also *Harris*, 209 F.3d. at 330.

<sup>6</sup> E.g., EDR Ruling No. 2005-986; EDR Ruling No. 2003-147; EDR Ruling No. 2002-118.

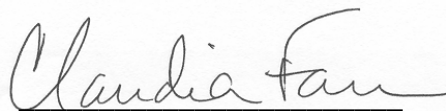
<sup>7</sup> See *Barrow v. New Orleans S.S. Ass'n*, 932 F.2d 473, 478 (5th Cir. 1991) (refusing to apply equitable tolling where the delay in filing was the result of a plaintiff's unfamiliarity with the legal process or his lack of legal representation).

In addition, the grievant argues that the agency wrongly failed to grant the grievant's request for an extension of time to file her grievance as no prejudice would result to the agency by granting such an extension. While the grievance process allows for an extension of the 30 calendar day time period, extensions must be by mutual agreement and the agency cannot be required to grant an extension by the mere fact that no prejudice would result thereby. Finally, the grievant asserts that the severe nature of the grieved act in this case, i.e., termination, warrants an extension of the 30 calendar day time period and to not allow an extension in this case would be "fundamentally unjust." The 30 calendar day requirement applies to all grievances regardless of the nature of the action grieved and as noted above, the only way to file a grievance outside of this time period is by demonstrating just cause or by mutual agreement of the parties to an extension of the time period, neither of which are present here.

Accordingly, while the 30 calendar day time period may be extended or waived, the right circumstances must be present to do so. More specifically, the grievant must demonstrate that circumstances beyond her control necessitated her late filing of her grievance. This Department cannot conclude that just cause existed for the grievant's failure to file the grievance within the requisite 30-day period. The grievant has alleged no grounds beyond her control that would justify the untimely initiation of this grievance. This Department, therefore, concludes that the grievant has failed to demonstrate just cause for her delay.

#### CONCLUSION

For the reasons set forth above, this Department concludes that the 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.<sup>8</sup>



Claudia T. Farr  
Director

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<sup>8</sup> See Va. Code § 2.2-1001(5); Va. Code § 2.2-3003(G).