

Issue: Compliance – Grievance Procedure (30-Day Rule); Ruling Date: March 14, 2011; Ruling No. 2011-2840; Agency: Department of Corrections; Outcome: Grievant In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2011-2840
March 14, 2011

The grievant has requested a compliance ruling regarding her November 16, 2010 grievance with the Department of Corrections (DOC or the agency). The agency asserts that the grievant did not initiate her November 16th grievance within the 30-calendar day time period required by the grievance procedure. For the reasons set forth below, this Department concludes that the grievant had just cause for her failure to timely challenge her termination and as such, the agency improperly closed the November 16, 2010 grievance.

FACTS

On August 22, 2010, the grievant was incarcerated and remained so until September 20, 2010. Because the grievant was absent from work for more than three days without permission, on September 2, 2010, the agency sent the grievant a certified letter informing her that she was considered to have abandoned her job and no longer employed by the agency.

The grievant challenged the agency's action by initiating a grievance on November 16, 2010. On November 19, 2010, the agency informed the grievant that her November 16th grievance was being administratively closed because of her failure to timely initiate her grievance. The grievant now seeks a compliance ruling from this Department as to whether she timely initiated her November 16th grievance.

DISCUSSION

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date 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.

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

In this case, the event that forms the basis of the grievance is the grievant's separation from employment which occurred on September 2, 2010. According to the agency, the post office attempted to deliver the September 2, 2010 letter three times notifying the grievant of her separation, but was unsuccessful. However, the agency asserts that the grievant was verbally notified of her separation on or about September 21, 2010 when the grievant called the agency upon her release from jail. Based on the totality of the circumstances in this case, and as explained in more detail below, the exact date of when she became aware of her separation is immaterial as the grievant has provided "just cause" for her failure to timely initiate her November 16, 2010 grievance.

The grievant asserts she was unable to timely file her grievance because of a physical and/or mental impairment. This Department has long held that illness or impairment does not automatically constitute "just cause" for failure to meet procedural requirements. To the contrary, in most cases it will not.² Illness may constitute just cause for delay only where there is evidence indicating that the physical or mental impairment was so debilitating that compliance with the grievance procedure was virtually impossible.³ This evidence is best obtained through a health care provider's written determination.

The grievant has provided this Department with a note from her psychiatrist indicating that the grievant was mentally impaired on August 22, 2010 (the same day that she was incarcerated), was under psychiatric care in a hospital for a week following her release from jail, and was still mentally impaired when he met with her on October 13, 2010. As such, at a minimum, it would appear that the grievant was mentally impaired from August 22, 2010 up until at least October 13, 2010, when she met with her psychiatrist. At her appointment on October 13, 2010, the grievant was prescribed medication for her mental impairment, but she was not seen again by her psychiatrist until December 8, 2010. The grievant's psychiatrist provided this Department with a note dated January 19, 2011 which states that the grievant is much more "stable" as a result of the medication. As such, we can assume that the grievant's mental capacity was of such a nature that she became capable of pursuing her grievance rights at some period in time after starting the medication prescribed by her physician on October 13, 2010. However, it is virtually impossible to determine the exact date that the grievant became capable of pursuing her grievance rights for purposes of calculating when the grievant's 30 calendar day clock began to run for filing a grievance to challenge her separation. Based on the unique facts and totality of the circumstances in this case, and in particular, the grievant's apparent significant mental impairment from the time of her separation through October 13, 2010 (and presumably for some period of time beyond), this Department concludes that the grievant had just cause (i.e., her mental impairment) for failing to initiate her November 16th grievance within 30 calendar days of her separation.

² See EDR Ruling No. 2006-1201; EDR Ruling No. 2003-154 and 2003-155.

³ *Id.*; see also EDR Ruling No. 2005-1040.

CONCLUSION

Based on the foregoing, the grievant and the agency are advised that the grievant has **10 workdays from the date of this ruling** to advance her grievance to the second resolution step. 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); § 2.2-3003(G).