

Issue: Compliance – Grievance Procedure (30-day Rule); Ruling Date: April 22, 2011; Ruling No. 2011-2933; Agency: Department of Motor Vehicles; Outcome: Grievant in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Motor Vehicles
Ruling Number 2011-2933
April 22, 2011

The grievant has requested a ruling on whether her February 20, 2011 grievance with the Department of Motor Vehicles (the “agency”) is in compliance with the grievance procedure. The agency asserts that the grievant’s February 20, 2010 grievance does not comply with the grievance procedure because the grievance is untimely. For the reasons set forth below, the grievance is timely.

FACTS

The grievant was employed as a Customer Service Generalist. As a result of a serious health condition, the grievant filed a claim for Short Term Disability (STD). On November 23, 2010, the agency mailed a letter to the grievant’s address of record which explained that under the Virginia Sickness and Disability Program (VSDP), the grievant’s position was protected during the period of approved STD, but that if the grievant transitioned from STD into Long-Term Disability (LTD), she would be separated from employment. On December 14, 2010, the agency mailed a letter to the grievant’s address of record indicating that her STD benefits were ending on January 12, 2011, at which time her employment status with the agency would be changed to “reflect a separation from employment.”

The grievant asserts she did not receive the December 14th letter in the mail, and that she first learned about that letter and her separation from state employment when she visited her supervisor at the office on February 14, 2011. When the grievant tried to speak with her supervisor about returning to work, the grievant states her supervisor handed her a faxed copy of the December 14th letter from the agency’s human resource department. The grievant subsequently filed a grievance on February 20, 2011, contending that she had not been notified of her termination from state employment until February 14, 2011.

To support its position that the grievant knew that employees who are placed on LTD are separated from employment, the agency points to the grievant’s signed acknowledgement of receipt of the employee handbook, which contains information about the STD and LTD programs and related policies. The agency also relies on its November 23, 2010 and December 14, 2010 letters mailed to the grievant discussing STD, LTD and her employment status. The agency further argues that because the grievant indicated on her Grievance Form A that “the date

the grievance occurred” was December 14, 2010, her February 20th grievance was not timely filed.

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 employee bears the burden of establishing the date that the grievance was initiated, for example, by retaining the mailing receipt when the grievance is initiated by mail, or by obtaining an agency date-stamped copy of the grievance when it is initiated by hand delivery.² However, the agency bears the burden of establishing the date that the grievant knew or should have known of the event or action being grieved, often referred to as the “trigger date.” In cases involving separation from employment due to moving into LTD status, this Department has previously ruled that an agency meets this burden by showing that it provided the grievant with unambiguous notice that his or her employment has ended as a result of moving into LTD status.³

Here, the event that forms the basis of this grievance is the grievant’s termination from employment, which occurred on January 12, 2011 when her STD benefits ended and she moved into LTD.⁴ The agency asserts that the grievant was informed by its December 14, 2010 letter that her STD benefits would end on January 12, 2011, and that thereafter the grievant’s employment status would be changed to reflect “separation from employment.” The agency states the December 14th letter was sent to the grievant by regular mail to her address of record. However, the agency does not have documentation or other sufficient evidence of the grievant’s receipt of that letter.⁵ The grievant contends that she did not receive or know about the

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

² *Grievance Procedure Manual* § 2.4.

³ See, e.g., EDR Ruling Nos. 2006-1166 and 2006-1231. See also *Columbia Heights v. Griffith-Consumers*, 205 Va. 43, 47-8 (1964), in which the Supreme Court of Virginia recognizes that “[w]here the statute of limitations is pleaded as a defense, the party relying thereon has the burden of showing by a preponderance of the evidence that the cause of action arose more than the statutory period before the actions was instituted.”

⁴ This Department finds no merit to the agency’s apparent argument that the grievance was untimely because the grievant was aware, from her receipt of the employee handbook and the November 23, 2010 letter, that employees who are placed on LTD status are separated. General awareness that employees can be terminated under certain conditions such as placement on LTD status is simply not the same as receiving unambiguous notice from the employing agency that a termination was indeed effectuated. See EDR Ruling Nos. 2006-1166 and 2006-1231.

⁵ This case differs from EDR Ruling No. 2011-2739, 2011-2742, which presumed, for purposes of the five workday rule, that a grievant received an agency communication that had been sent via U.S. first class mail, properly addressed and stamped, even though it was unclear whether a certified mailing of the same communication had been received. In that case, however, unlike the instant case, there was no assertion by the grievant that she had not received the agency’s mailed communications. Further, the instant case deals with the 30 calendar day rule for filing a grievance, more precisely, the issue of when an employee on long term disability received unambiguous notice from the agency that her employment had ended. With the five workday rule, when either party is found to

December 14th letter until February 14, 2011, when she was first informed of her January 12, 2011 termination and first shown a copy of the December 14, 2010 letter.

We conclude that under the facts of this case, the agency has not met its burden of establishing that prior to February 14, 2011, the grievant received unambiguous notice that her employment had ended on January 12, 2011. Accordingly, we hold that the February 20, 2011 grievance is timely because it was filed within 30 calendar days of February 14, 2011, the date the grievant knew or should have known of her termination from state employment.⁶ The parties should note that this ruling addresses only the issue of when notice of termination was triggered for purposes of the 30 calendar day grievance filing deadline, and does not address the underlying merits of the grievance.

CONCLUSION

By copy of this ruling, the grievant and the agency are advised that the grievant has **five workdays from receipt of this ruling** to either conclude the grievance or inform the second-step respondent that she desires to continue with her grievance. If so notified, the second-step respondent shall schedule the second-step meeting within five workdays of the grievant's confirmation that she desires to advance her grievance. This Department's rulings on matters of compliance are final and nonappealable.⁷

Claudia T. Farr
Director

be out of compliance, this Department typically orders that party to correct the noncompliance within ten workdays of receipt of the EDR ruling. Accordingly, if a party corrects its noncompliance, that party will not be penalized by a decision against it on any qualifiable issue. *See* Va. Code § 2.2-3003(G). In contrast, when an employee is found to have initiated a grievance beyond the 30 calendar day period without just cause, the grievance is administratively closed and the grievant is permanently barred from advancing a grievance to challenge the same management action.

⁶ Further, the fact that the Grievance Form A lists the "date the grievance occurred" as December 14, 2010 does not make the grievance untimely. As read in its entirety as filed, the Grievance Form A is clearly a challenge to the grievant's January 12, 2011 loss of employment, not simply to the agency's issuance of its December 14, 2010 letter.

⁷ *See* Va. Code § 2.2-1001(5).