

Issue: Compliance – Grievance Procedure (30-Day Rule); Ruling Date: October 5, 2011; Ruling No. 2011-3016; Agency: Virginia Department of Transportation; Outcome: Grievant Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Virginia Department of Transportation
Ruling Number 2011-3016
October 5, 2011

The grievant has requested a compliance ruling regarding his May 4, 2011 with the Virginia Department of Transportation (VDOT or the agency). The agency asserts that the grievant did not initiate his grievance within the 30 calendar day time period required by the grievance procedure. For the reasons set forth below, this Department cannot conclude that the grievant had just cause for his failure to timely initiate his grievance. Accordingly, the agency properly closed the May 4, 2011 grievance.

FACTS

The grievant was an Operator II with VDOT. In January of 2011, the grievant received a Notice of Improvement Needed (NIN) form related to attendance issues. On or about March 24, 2011, the grievant was sent a letter informing him that he had not reported to work since March 3, 2011 and had exhausted all sick leave. The letter went on to inform the grievant that his absence from work was unauthorized from March 10th forward as he had not followed leave policy provisions. The letter concluded by informing the grievant that he must return to work by no later than March 28th or face discharge for unauthorized absence.

According to the agency, the grievant did not report to work on the 28th, but the agency nevertheless called the grievant and offered to accept documentation from his physician up until the close of business on March 30th for consideration regarding the unauthorized leave. The agency asserts, having received nothing further from the grievant's physician, that the grievant's employment was terminated on March 31, 2011.

On or about May 4, 2011, the grievant initiated a grievance challenging both the NIN and his job loss. Through his wife, the grievant asserts that he was essentially unable to protect and utilize his grievance rights due to mental/psychological impairment.

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.

In this case, the events that form the basis of the grievance are the agency's issuance to the grievant of the NIN and a Written Notice with termination of employment. 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 same would be true of the NIN—the 30-day timeframe commences with delivery.

Here, the NIN was issued in January of 2011. Accordingly, the May 4, 2011 grievance was initiated well beyond 30 calendar days of the issuance of the NIN and is thus untimely. The agency has presented documentation indicating that the Written Notice was presented to the grievant on April 2, 2011. Likewise, the May 4, 2011 grievance was initiated beyond 30 calendar days of the issuance of the Written Notice and therefore is untimely. Thus, the only remaining issue is whether there was “just cause” for the delay.

The grievant asserts that he was unable to timely file his grievance because of a psychological 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.³ 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.⁴ This evidence is best obtained through a health care provider's written determination.

At the request of this Department, the grievant returned a form provided by this Department which is designed to assist with determining whether during the 30 calendar day period following the event that forms the basis of the grievance, the grievant had the capacity to utilize the grievance process. The form seeks information regarding, among other things, whether the employee had the capacity to (1) understand the grievance procedure, (2) appreciate and reason with the information that applies to his/her situation, and (3) communicate clearly. The form is to be completed by the grievant's physician or licensed psychologist.

In this case, the grievant returned a form filled out by a nurse practitioner who, in answer to the ultimate question: “Did the grievant have the capacity to initiate a grievance during the above time period,” checked the box: “Insufficient Information to Determine.” The Nurse Practitioner further added the following comment: “[The

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

² See EDR Ruling No. 2005-986; EDR Ruling No. 2003-147; EDR Ruling No. 2002-118; EDR Ruling No. 2002-001; EDR Ruling No. 2000-082; EDR Ruling No. 2000-003.

³ See EDR Ruling No. 2006-1201; EDR Ruling No. 2003-154 and 2003-155.

⁴ *Id.*; see also EDR Ruling No. 2005-1040.

grievant] was initially evaluated here on 4/4/11. His anxiety & associated symptoms may have influenced his ability to initiate a grievance.”

Here, according to the nurse practitioner who filled out the certification form, the grievant was suffering from anxiety, and that anxiety and associated symptoms may have impacted his ability to timely utilize the grievance process. However, the key is that the certification form merely states that his condition “may have influenced” his ability. It is the grievant’s burden to show “just cause” for the delay in initiating the grievance, with “just cause” being “a reason sufficiently compelling to excuse not taking a required action in the grievance process.”⁵ Here, the form completed by the grievant’s nurse practitioner falls far short of stating that he lacked the capacity to use the grievance process. She states merely that it may have influenced his ability to use the process even if it did influence his ability, that’s not the standard – standard is capacity. In other words, it is not enough to show that using the grievance process would have been difficult. Rather, the grievant must show that he or she was not capable of using the processing during the filing period. Based on the nurse practitioner’s representation, the grievant has not met his burden of showing by a preponderance of evidence (that is, that it is more likely than not) that “just cause” existed for the delay in initiating the May 4th grievance.

CONCLUSION

Based on the foregoing, the grievant and the agency are advised that the grievant has not presented sufficient evidence that his circumstances prevented him from timely using the grievance process. Accordingly, the agency may administratively close the May 4, 2011 grievance. This Department’s rulings on matters of compliance are final and nonappealable.⁶

Claudia T. Farr
Director

⁵ *Grievance Procedure Manual* § 9.

⁶ *See* Va. Code § 2.2-1001(5); § 2.2-3003(G).