

Issue: Compliance – Grievance Procedure (30-Day Rule); Ruling Date: December 28, 2011; Ruling No. 2012-3193; Agency: Department of Behavioral Health and Developmental Services; Outcome: Grievant Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Behavioral Health and Development Services
Ruling Number 2012-3193
December 28, 2011

The grievant has requested a compliance ruling regarding her November 18, 2011 grievance with the Department of Behavioral Health and Developmental Services (the "DBHDS" or the "agency"). The agency asserts that the grievant did not initiate her November 18th grievance within the 30-calendar day time period required by the grievance procedure. For the reasons set forth below, the grievance is untimely and may be administratively closed.

FACTS

On October 17, 2011, the grievant returned from her vacation to find a formal disciplinary Written Notice in her chair. When she inquired of Human Resources ("HR") about when the grievance procedure's 30-day time period would begin, she was correctly informed that the "30 days would start on the 18th since the day you receive the notice doesn't count." The grievant asserts that she "misunderstood" this response and thought that she had until November 18th to grieve the Written Notice.

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 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.² However, like a statute of limitations period, this Department allows the

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

² 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.")

time period within which to initiate a grievance to be waived or extended under certain circumstances.³ 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;⁴ 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.⁵ 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. 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.⁶ The grievant received the Group II Written Notice on October 17, 2011, and thus should have initiated her grievance within 30 days of that date, i.e., no later than November 16, 2011. The grievant did not initiate the grievance until November 18, 2011, which was 32 days after the Written Notice was issued and, thus, untimely. The only remaining issue is whether there was just cause for the delay.

In explaining the late initiation of her grievance, the grievant candidly admits that she simply erred in thinking that she had until November 18th to file her grievance. While it is indeed unfortunate that she held the mistaken assumption that she had until November 18th to file a grievance, mistake alone does not constitute just cause for a failure to timely initiate a grievance. The information provided by HR about when the filing period began was correct and unambiguous. Thus, this Department simply cannot conclude that the grievant has demonstrated just cause for her delay.⁷

³ 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)).

⁴ See *Grievance Procedure Manual* § 2.4 and § 8.4.

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

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

⁷ In addition, the grievant had pointed out that her husband had been hospitalized from November 9th through November 14th. While this undoubtedly created a stressful circumstance for the grievant, it appears unrelated to the unfortunate underlying cause of the delay: simple mistake.

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.⁸

Claudia T. Farr
Director

⁸ See Va. Code § 2.2-1001(5); Va. Code § 2.2-3003(G).