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COMPLIANCE RULING

In the matter of the Virginia State Police
Ruling Number 2023-5529
March 22, 2023

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management regarding a timeliness issue in his February 13, 2023 grievance with the Virginia State Police (the “agency”).

FACTS

On February 13, 2023, the grievant submitted a grievance to address whether he was eligible for and should have received a salary increase for work or residency in the Northern Virginia pay area. Agency employees who are eligible generally receive a 24.95% increase to their salaries. The grievant asserts he should have received this increase while on temporary assignment in the Northern Virginia pay area from October 25, 2021 to April 22, 2022. Due to recent changes in how the agency defines the Northern Virginia pay area, the grievant also asserts that a portion of his current assignment became included in the Northern Virginia pay area effective January 1, 2023. The grievance has proceeded to the second resolution step at this time. The second-step respondent has asserted that over ten months passed between the end of the grievant’s temporary assignment on April 22, 2022 before the initiation of this grievance. However, the second-step respondent indicated that the grievance would not be administratively closed for noncompliance.¹ The grievant has sought this ruling to address this portion of the second-step response, in part, so that he is not deemed to have waived a challenge to the compliance issue. The grievant asserts that the agency’s failure to provide him a salary increase at the Northern Virginia pay area rate between October 25, 2021 and April 22, 2022 is an “ongoing issue” and a “pattern or practice.”

DISCUSSION

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he knew or should have known of the event or action that is the basis of the grievance.² 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

¹ The second-step response includes a substantive response to all the issues in the grievance. The second-step respondent does not appear to have declined to address any issue in the grievance due to alleged noncompliance.

² Va. Code § 2.2-3003(C); *Grievance Procedure Manual* §§ 2.2, 2.4.

administratively closed. However, a claim of workplace conduct that is ongoing is raised timely if some agency action alleged to be part of the ongoing conduct occurred within the 30 calendar days preceding the initiation of the grievance.³

In grievances raising salary disputes, EDR applies the “paycheck rule” where it is applicable in such cases.⁴ The “paycheck rule” provides that every payday for which an employee receives compensation reduced by the alleged impropriety constitutes a separate accrual, or “trigger date,” for timeliness purposes; thus, with the issuance of each paycheck that is alleged to be improper, a new 30-calendar-day period begins to run.⁵ Accordingly, a grievance that is alleging that an agency’s actions relating to compensation are inconsistent with state and/or agency policy or are otherwise improper in some way is timely to dispute such alleged improper compensation practices raised in the grievance for the thirty calendar days preceding the date on which it was initiated.⁶

Applying that reasoning to the facts of this case, a grievance initiated on February 13, 2023 is not timely to dispute the alleged improper compensation practices that ended on April 22, 2022.⁷ While EDR understands the grievant’s claims regarding the pay practices being an ongoing issue, we do not agree that such an analysis applies to the facts of this case. While EDR’s application of the “paycheck rule” generally allows an employee to raise compensation issues that are ongoing, the alleged salary issues (related to the temporary assignment) were no longer ongoing when the grievance was initiated. Furthermore, because more than 30 calendar days have elapsed since the grievant was on the temporary assignment ending on April 22, 2022, relief would not be available under the grievance procedure for those pay issues. Pursuant to the *Rules for Conducting Grievance Hearings*, a hearing officer may only order an agency to grant an increase in compensation if required by policy, and such an increase would “commenc[e] at the beginning of the 30 calendar day period preceding the initiation of the grievance.”⁸ In short, the hearing officer’s authority to correct compensation issues only extends back 30 calendar days prior to the initiation of the grievance – a time when the temporary assignment in this case had already ended.

CONCLUSION

For the reasons set forth above, EDR agrees with the statement of the second-step respondent regarding the timeliness of the grievant’s claims regarding his temporary assignment from October 25, 2021 to April 22, 2022. This ruling does not address the merits of the claims presented in the grievance and only decides the question of timeliness under the grievance procedure. As the last step that occurred in this grievance was the second step, the grievant will

³ See *Nat’l R.R. Pass. Corp. v. Morgan*, 536 U.S. 101, 115-18 (2002) (holding the same in a Title VII hostile work environment harassment case); see also *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 221-24 (4th Cir. 2016).

⁴ E.g., EDR Ruling No. 2016-4296; EDR Ruling No. 2013-3581; EDR Ruling No. 2010-2441.

⁵ See EDR Ruling No. 2010-2441 (and authorities cited therein).

⁶ This approach is consistent with available remedies in a case under Title VII, for example. See, e.g., *Kellogg v. Ball State Univ.*, 984 F.3d 525, 529 (7th Cir. 2021) (plaintiff could rely on an “initial discriminatory statement, even though it occurred outside the limitations period, to seek damages from any paychecks that she received within the statute of limitations window.”).

⁷ The second-step response only addresses the timeliness of this portion of the grievance and does not state that any other part of the grievance was untimely. As such, EDR is only called upon to address this portion of the grievance. Nevertheless, without addressing the issue with finality, EDR offers that there does not appear to be a basis to conclude the grievance in its entirety for initiation noncompliance, including timeliness.

⁸ *Rules for Conducting Grievance Hearings* § VI(C)(1).

have five workdays within receipt of this ruling to advance the grievance to the third step or to conclude the grievance.⁹

EDR's rulings on matters of compliance are final and nonappealable.¹⁰

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⁹ See *Grievance Procedure Manual* § 3.2.

¹⁰ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).