

Issue: Access to the Grievance Procedure; Ruling Date: October 21, 2013; Ruling No. 2014-3733; Agency: Virginia Department of Transportation; Outcome: Access Granted.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

ACCESS RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2014-3733
October 21, 2013

On or about October 4, 2013, the grievant initiated a dismissal grievance with the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM). Because the grievant applied and was approved for retirement benefits prior to initiating his grievance, the grievant's former employer, the Virginia Department of Transportation (the agency), challenges whether he has access to the grievance procedure to initiate this grievance. For the reasons set forth below, EDR concludes that the grievant has access to the grievance procedure to challenge his termination.

FACTS

On September 5, 2013, the grievant was issued a Written Notice of disciplinary action, accompanied by a letter terminating his employment with the agency effective immediately. On September 20, 2013, the grievant completed and mailed an Application for Service Retirement to the Virginia Retirement System (VRS). His application was approved, effective October 1, 2013. On October 4, 2013, the grievant initiated a dismissal grievance with EDR, essentially asserting that he was forced to retire and would not have done so but for the September 5 termination.

DISCUSSION

The General Assembly has provided that "[u]nless exempted by law, all nonprobationary state employees shall be covered by the grievance procedure."¹ Upon the effective date of a voluntary resignation from state service, a person is no longer a state employee. Thus, to have access to the grievance procedure, the employee "[m]ust not have voluntarily concluded his/her employment with the Commonwealth prior to initiating the grievance."² EDR has long held that once an employee's voluntary resignation becomes effective, he or she is not covered by the grievance procedure and accordingly may not initiate a grievance.³


¹ Va. Code § 2.2-3001(A).

² *Grievance Procedure Manual* § 2.3.

³ *E.g.*, EDR Ruling No. 2005-1043.

However, in this instance, the grievant's separation from employment occurred on September 5, 2013, as a direct result of formal discipline issued to him, evidenced by the Written Notice accompanying his letter of termination. This type of separation falls squarely within the definition of a "dismissal," specifically, a termination due to formal discipline or unsatisfactory job performance.⁴ The fact that the grievant subsequently filed an application for retirement benefits does not render his separation from employment on September 5, 2013 voluntary. Thus, there is no basis to find the employee does not have access to the grievance procedure to challenge his disciplinary termination. This grievance must be allowed to proceed.

The agency must submit a Form B to request the appointment of a hearing officer for the October 4, 2013 grievance. Once the Form B and assorted documentation is received, a hearing officer will be appointed in a forthcoming letter. EDR's rulings on access and compliance are final and nonappealable.⁵



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⁴ Va. Code § 2.2-3003(A); *Grievance Procedure Manual* § 2.5.

⁵ Va. Code § 2.2-1202.1(5).