

Issue: Qualification/Access to the Grievance Procedure; Ruling Date: March 1, 2002; Ruling #2001-204; Agency: Department of State Police; Outcome: not qualified



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of State Police/ No. 2001-204  
March 1, 2002

The grievant has requested a ruling on whether his August 27, 2001 grievance with the Virginia State Police (VSP) qualifies for a hearing. VSP failed to qualify the grievance claiming that the grievant did not have access to the grievance procedure because he had voluntarily resigned his position and thus was not a state employee at the time the grievance was filed.<sup>1</sup> The grievant claims that because employees who are terminated have access to the grievance procedure to challenge their terminations, he should have access (even though he resigned) to challenge the withholding of vacation pay to which he is entitled. For the reasons set forth below, the grievance is not qualified for hearing.

FACTS

The grievant was employed as a Senior Trooper with VSP until he resigned on April 30, 2001. On January 10, 2001, he had been placed on suspension without pay pending a criminal investigation. While suspended, the grievant used his annual leave so that he could continue to be paid. On February 26, the court found insufficient evidence to support the charges, and dismissed them. Once the criminal charges against him were dismissed, VSP advised the grievant that his suspension would continue pending an internal investigation by VSP into the alleged incidents surrounding the criminal charges, and that a decision would be made concerning his employment status. On March 7, after two months of suspension, the agency placed the grievant on paid administrative leave, while the investigation continued. The grievant later heard from a Major in the Department that his supervisor had recommended that he be terminated.

Rather than face termination, the grievant resigned from VSP, under the terms of a May 8, 2001 Separation Agreement with VSP. The Agreement stated,

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<sup>1</sup> The grievance procedure is available only to non-probationary classified state employees who are employed at the time that the grievance is initiated, unless the grievant is challenging a termination or involuntary separation. *Grievance Procedure Manual* § 2.3(2) and (3).

among other things, that (1) the grievant's resignation would be effective April 30, 2001, (2) VSP would not take any actions against him, and (3) he would receive all benefits due to him upon resignation.<sup>2</sup> The grievant's letter of resignation was contingent upon the agency's signing of the May 8 Separation Agreement. VSP made a payment to the grievant that included leave balances for overtime, compensatory leave, and sick leave. The grievant alleges that he is also owed 284 hours of annual leave in the amount of \$5396.

On July 25, the grievant requested in writing that he be paid for those annual leave hours. VSP responded on August 7, claiming that the grievant had used all of his annual leave while on suspension. Furthermore, it claims that he does not have access to the grievance procedure because he was not a state employee at the time the grievance was filed, and because the grievance does not involve termination or involuntary separation.<sup>3</sup> The grievant acknowledges that he used his annual leave while on suspension, but contends that, because the criminal charges against him were dismissed, state policy requires the agency to reimburse him the annual leave he used during his unpaid suspension pending the criminal charges.

### DISCUSSION

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.<sup>4</sup> Employees who voluntarily resign may not have access to the grievance procedure, depending on the surrounding circumstances, such as the nature of their claim or when the grievance is filed. For example, this Department has long held that any grievance initiated by an employee *prior* to the effective date of a voluntary resignation may, at the employee's option, continue through the grievance process, assuming it otherwise complied with the 30-day calendar rule. On the other hand, this Department has also long held that once an employee's voluntary resignation becomes effective, he may not file a grievance.

In this case, the grievant resigned from VSP, effective April 30, 2001, under the terms and conditions of the Separation Agreement. He initiated this grievance on August 27, 2001.<sup>5</sup> The grievant asserts that, although he initiated his

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<sup>2</sup> Separation Agreement, dated May 8, 2001, between the grievant and VSP.

<sup>3</sup> In the original letter denying access to the grievance procedure, the Human Resources office incorrectly stated that the grievance did not involve termination or involuntary *suspension*. The grievant responded that this case does involve an involuntary suspension. However, as indicated in a follow-up letter, dated November 1, 2001, this was a typographical error, and it should have read that it did not involve an involuntary *separation*.

<sup>4</sup> Va. Code § 2.2-3001(A).

<sup>5</sup> The grievance procedure requires that an employee initiate his grievance within 30 calendar days of the date the employee knew or should have known of the event that forms the basis of the claim. *Grievance Procedure Manual* § 2.4, page 6. Although the grievant resigned on April 30,

grievance after his resignation, he should have access to the grievance procedure. He notes that grievances are “filed all the time as the result of employees’ terminations” so he, too, should have access.<sup>6</sup> However, the grievance procedure expressly states that those who voluntarily separate (resign) do not have access, whereas employees who challenge termination or *involuntary* separation may utilize the grievance procedure.<sup>7</sup>

Here, there is no evidence that the grievant’s resignation was, in any way, involuntary. The determination of whether a resignation is voluntary is based on an employee’s ability to exercise a free and informed choice in making a decision to resign. The grievant states that he resigned because he no longer wanted to work for his supervisor and because he did not want to retain an attorney for financial reasons. He was afraid that his supervisor would retaliate against him based on the outcome of his criminal investigation, and he had heard that he may be terminated rather than reinstated following his suspension. He further stated that he would have accepted a transfer but did not think that the Department would agree to relocate him. The grievant’s decision indicates that he deliberately considered and elected to resign from his position rather than challenge any retaliation or termination. Thus, the grievant had the choice to await termination or retaliation and then contest it through the grievance procedure, but the grievant declined to do so. The fact that the grievant may have perceived his choice as between comparably unpleasant alternatives (resignation or termination) does not of itself establish that a resignation was induced by duress or coercion.<sup>8</sup> Therefore, we cannot conclude that the grievant’s resignation was anything other than voluntary. Accordingly, the grievant does not have access to the grievance procedure, since he was no longer an employee of the Commonwealth at the time he initiated his grievance.

Although this Department rules that the grievant does not have access to the grievance procedure under existing rule and precedent, it does not make the determination that the grievant is not entitled to the reinstatement of his annual leave. Indeed, it appears that policy would require the agency to restore the annual leave taken by the grievant to cover his unpaid suspension from work. Under the *Standards of Conduct* and VSP internal policy, a suspension without pay may be imposed pending (i) an investigation by the employee’s agency, (ii) an investigation by VSP or other law enforcement agencies, or (iii) court action.<sup>9</sup>

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he was not denied reimbursement of his annual leave until August 7. Therefore, it is worth noting that this grievance was filed within 30 calendar days of the date he knew or should have known of the event forming the basis of his claim.

<sup>6</sup> Letter dated October 29, 2001, to this Department’s Director from the grievant’s attorney.

<sup>7</sup> *Grievance Procedure Manual* § 2.3, page 5. Involuntary separation is defined as “separation which is not of free will; resignation obtained through misrepresentations, deception, duress, coercion, or time pressure.” *Grievance Procedure Manual* “Definitions,” page 23.

<sup>8</sup> *Id.*

<sup>9</sup> DHRM Policy 1.60(VIII)(B)(1); VSP Gen. Order 19 “Standards of Conduct,” No. 20.

If the investigation is an agency investigation, the period of suspension without pay is limited to ten workdays.<sup>10</sup> If, however, the investigation is by a law enforcement agency or pending court action, the ten day suspension without pay limit does not apply where the investigation involves alleged criminal misconduct or misconduct of such a nature that retaining the employee in his position could constitute negligence of the agency's duty to the public and other state employees.<sup>11</sup> When the investigation by a law enforcement agency or a court action is concluded, the agency may choose to impose disciplinary action.<sup>12</sup> Importantly, however, if the agency does not discipline the employee, "the employee must be reinstated with full back pay."<sup>13</sup>

In this case, the agency never imposed discipline on the grievant, and instead, accepted his resignation. Moreover, under the May 8 Separation Agreement, VSP agreed that "no action shall be taken by Department [sic] on said charges in consequence of [the grievant's] resignation, which said resignation is the basis for this bargain that the Department not take any administrative or other actions against [the grievant]."<sup>14</sup>

Thus, because criminal charges were dropped, and because the agency chose not to impose discipline on the grievant, it appears that under the Standards of Conduct the period of suspension should have been limited to ten workdays for the internal investigation.<sup>15</sup> Although the agency alleges that the grievant used all of his annual leave while on suspension, and that the grievant's separation agreement from VSP did not provide for the reinstatement and payment of his annual leave balance, the Separation Agreement *did* provide for the pay-out "of all benefits he would otherwise be entitled to receive by way of resignation, irrespective of any pending charges."<sup>16</sup>

In sum, it appears that the grievant may be entitled to the reinstatement of his annual leave. However, this Department finds that this issue cannot be challenged through the grievance procedure under existing rules and precedent, which provide that the grievance procedure is available only to non-probationary employees of the Commonwealth who are "employed by the Commonwealth at the time the grievance is initiated."<sup>17</sup>

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<sup>10</sup> DHRM Policy 1.60(VIII)(B)(5); VSP Gen. Order 19 "Standards of Conduct," No. 20(b)(1).

<sup>11</sup> DHRM Policy 1.60(VIII)(B)(6); VSP Gen. Order 19, "Standards of Conduct," No. 20(b)(1).

<sup>12</sup> DHRM Policy 1.60(VIII)(B)(6); VSP Gen. Order 19, "Standards of Conduct," No. 20(b)(2).

<sup>13</sup> VSP Gen. Order 19, "Standard of Conduct," No. 20(b)(2).

<sup>14</sup> Separation Agreement, dated May 8, 2001, between the grievant and VSP.

<sup>15</sup> The *Standards of Conduct* states that "if the agency does not make a decision regarding disciplinary action within ten workdays, the employee shall be permitted to return to work pending completion of the agency investigation." DHRM Policy 1.60(VIII)(B)(5).

<sup>16</sup> Separation Agreement, dated May 8, 2001, between the grievant and VSP.

<sup>17</sup> *Grievance Procedure* § 2.3, page 5.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, he should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should find access and qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that he does not wish to proceed.

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