

Issue: Compliance and Access/Multiple Grievances and access to the grievance procedure;
Ruling Date: March 24, 2003; Ruling #2003-006; Agency: Department of Mental Health,
Mental Retardation and Substance Abuse Services; Outcome: grievance in compliance, grievant
has access



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND ACCESS RULING OF THE DIRECTOR

In the matter of Department of Mental Health, Mental Retardation and
Substance Abuse Services Ruling No. 2003-006
March 24, 2003

The grievant has requested a ruling on whether he was compliant with and had access to the grievance procedure when he initiated his grievance on November 29, 2002. The Department of Mental Health, Mental Retardation and Substance Abuse Services (agency) claims that the grievant does not have access to the grievance procedure because (1) the grievant is grieving an action that took place subsequent to his termination and prior to his reinstatement; (2) the November 29, 2002 grievance duplicates another grievance challenging the same action or arising out of the same facts;¹ (3) the hearing officer's November 14, 2002 Notice of Dismissal provides that a September 13, 2002 grievance is resolved and is "not subject to further appeal"; and (4) pursuant to a November 8, 2002 written Settlement Agreement (the Agreement), the grievant agreed to "release the agency from any and all claims, demands, grievances, lawsuits, charges, complaints and actions of any kind arising out of or relating to the Written Notice, the termination, the resignation and/or [his] related grievance."

For the reasons set forth below, this Department concludes that the grievant had access to the grievance process when he initiated his November 29, 2002 grievance. Further, because the November 29, 2002 grievance is not duplicative of the September 13, 2002 grievance, it is in compliance with the grievance procedure.

FACTS

The grievant was issued a Group III Written Notice and terminated on August 15, 2002. On September 13, 2002, the grievant challenged his discipline and termination through the grievance process. On October 22, 2002, the agency replied to the Virginia Employment Commission's (VEC's) initial request for information regarding the grievant's termination and whether he was eligible for unemployment benefits.

The September 13 grievance was resolved by way of a November 8, 2002 Settlement Agreement. On November 14, 2002, the hearing officer was advised that a settlement of the issues had been reached, thus rendering a hearing unnecessary. Thereafter, the hearing officer issued an Order of Dismissal "with no possibility of further appeal," which referenced (but did not incorporate the terms of) the parties' settlement.

¹ Duplication of another grievance is actually a compliance issue, not an access issue as defined under § 2.3 of the *Grievance Procedure Manual*. See *Grievance Procedure Manual* § 2.4, page 7.

It is undisputed that the terms of the Settlement Agreement reinstated the grievant from on or about November 11, 2002 until December 2, 2002, and in consideration of specific actions to be taken by the agency, the grievant agreed to “release the agency from any and all claims, demands, grievances, lawsuits, charges, complaints and actions of any kind arising out of or relating to the Written Notice, the termination, the resignation and/or [his] related grievance.” Thereafter, on several occasions during his reinstated employment, the grievant requested the agency to correct or modify the information it had previously provided to the VEC regarding the grievant’s termination. The agency’s alleged failure to take the requested corrective action is the subject of the November 29, 2002 grievance. The grievance as filed also describes the agency as not honoring its obligations under the Settlement Agreement.

DISCUSSION

Access to the Grievance Process

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.² The *Grievance Procedure Manual* specifically states that an employee must meet all of the following criteria to have access to the grievance procedure: (1) [the employee] must not be exempt from the Virginia Personnel Act; (2) [the employee] “must have been a non-probationary employee of the Commonwealth at the time the event that formed the basis of the dispute occurred”; and (3) [the employee] “must have been employed by the Commonwealth at the time the grievance is initiated (unless the action grieved is a termination or involuntary separation).”³

Here, it is undisputed that the grievant’s position is covered by the Virginia Personnel Act. Further, although terminated from employment in August 2002, the November 8, 2002 Settlement Agreement reinstated the grievant from on or about November 11, 2002 until December 2, 2002, thus he was employed at the time he filed the November 29 grievance. Finally, the basis of the November 29 grievance (i.e., the agency’s alleged failure to honor the Settlement Agreement and to correct or modify statements it had made to the VEC regarding the grievant’s separation from state service) describes an alleged ongoing omission existing up to at least the date of the second grievance, November 29. Thus, the grievant was a non-probationary employee at some point during the alleged omission and alleged failure to honor the Settlement Agreement (the event forming the basis of the dispute). Accordingly, the grievant had access to the grievance procedure under the standards established in the *Grievance Procedure Manual*.

Compliance with the Grievance Process

The *Grievance Procedure Manual* lists six requirements for the initiation of a grievance by an employee with access.⁴ The agency challenges the grievant’s compliance with the sixth

² Va. Code § 2.2-3001(A) and *Grievance Procedure Manual* § 2.3(1) and (2), page 5.

³ *Grievance Procedure Manual* § 2.3(1), (2) and (3).

⁴ See *Grievance Procedure Manual* §2.4, *Initiating a Grievance*, pages 6-7.

requirement, specifically, that a grievance must not duplicate another grievance challenging the same action or arising out of the same facts. In this case, the November 29 grievance does not challenge the "same action" as the September 13 grievance. Rather, in seeking as relief "that the agreement of November 8 . . . be either honored or immediately nullified," the November 29 grievance presents a claim that the agency breached the November 8, 2002 Settlement Agreement by failing to correct or modify statements submitted to the VEC regarding the grievant's employment status. While the November 29 grievance clearly "arises out of" many of the same facts as the September 13 grievance, the November 8 Settlement Agreement is a significant new fact that distinguishes, for compliance purposes, the second grievance from the first. Although related, these two grievances are not duplicative. Thus, we cannot hold that the November 29 grievance is noncompliant with established procedure.

The parties should note that these rulings on access and compliance have no bearing on the substantive merits of this grievance or its qualification for hearing. Indeed, this Department has no authority to enforce the terms of a contract between an agency and an employee, and has long held that a breach of contract claim does not qualify for a grievance hearing, although relief could be sought in a court of law. Thus, while we are mindful of the agency's argument that the grievant had obligated himself under the Settlement Agreement not to file another grievance related to his August 2002 termination, we are also mindful of the grievant's contention that the agency did not honor its obligation under that same Agreement. Given the opposing charges regarding the parties' obligations under the Settlement Agreement, we cannot conclude, as a matter of access or compliance, that the Agreement is an absolute bar to filing a grievance and proceeding through the management steps and qualification phase.

CONCLUSION

The grievant had access to the grievance procedure and his November 29, 2002 grievance is in compliance with the grievance process. The grievant has five workdays from his receipt of this ruling to either advance or conclude his grievance. This Department's rulings on matters of compliance are final and nonappealable.⁵

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⁵ Va. Code § 2.2-1001(5).