

Issue: Access and Compliance/30-day rule; Access because of long term disability;
Ruling Date: October 6, 2003; Ruling #2003-070; Agency: Department of Corrections;
Outcome: grievance timely with respect to challenge of movement into long term
disability; grievant has access regarding movement into LTD



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS AND COMPLIANCE RULINGS OF DIRECTOR

In the matter of Department of Corrections/ No. 2003-070
October 6, 2003

The grievant has requested rulings in her March 11, 2003 grievance¹ with the Virginia Department of Corrections (DOC or the agency). The agency administratively closed the grievance, claiming that the grievant (1) did not have access to the grievance procedure and (2) failed to initiate her grievance within the required 30-calendar day period.² For the reasons discussed below, we find that the grievant had access to the grievance procedure at the time she initiated her grievance, but only as to the issue of whether the agency improperly moved her into long term disability rather than placing her into another position. Furthermore, the grievance was timely filed with respect to this issue.

FACTS

The grievant was employed as a Postal Assistant at a DOC facility. She previously had been employed with the facility in another position, but when that position was abolished, management transferred her to the postal department in early 2002. Because of a disability, the grievant was provided accommodation by the agency to assist her in the performance of the essential functions of her job.³

In December 2002, the grievant presented management with medical documentation stating she could no longer perform tasks requiring prolonged bending and twisting. On December 11, 2002, the agency informed the grievant that management was unable to reasonably accommodate this request in any manner that would permit her to continue in this position. At that time, they also advised the grievant that she would be carried on short term disability as approved by CORE for a period up to 180 calendar

¹ The grievance was dated March 10, 2003, but was received by management on March 11, 2003.

² Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4 page 6.

³ The agency modified a vehicle for the grievant's use and arranged with the local post office to limit the weight of the mailbags.

days, and when short term disability expired, CORE would determine whether she met the requirements for long term disability.

The grievant states that she inquired about a position in the medical department of the facility on October 29, 2002, but was advised that the position was already filled. Furthermore, she believes that the facility filled two positions in January and February of 2003 for which she may have been qualified. On February 11, 2003, the grievant was placed on long term disability.

The grievant initiated her grievance on March 11, 2003, asserting that the agency knowingly put her in an unsuitable position in the postal department, which required lifting and aggravated her existing disability. Additionally, she claims management failed to offer her an alternative job when other positions became available, and instead transferred her into long term disability. The agency maintains that the grievant did not have access to the grievance procedure at the time of the initiation of the grievance because she had been placed on long term disability and, even if she did have access, the grievance was not timely filed.

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.⁴ The *Grievance Procedure Manual* 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).”⁵

It is undisputed that the grievant’s position is covered by the Virginia Personnel Act. However, the agency asserts that the grievant does not meet the other two access requirements because she became “inactive” when she was placed on long term disability on February 11, 2003 and, thus, was not an “employee” of the Commonwealth when she initiated her grievance on March 11, 2003.

The grievant’s status at the time of the initiation of her grievance was *inactive*.⁶ However, this *inactive* status (which occurred when the grievant moved from short term

⁴ Va. Code § 2.2-3001(A) and *Grievance Procedure Manual* § 2.3(1) and (2), page 5.

⁵ *Grievance Procedure Manual* § 2.3(1), (2) and (3), pg. 5.

⁶ See VSDP FAQ’s For VSDP Coordinators and Human Resource Departments, pg. 5, effective date 3/19/02 (“[w]hen an employee is in LTD, he/she is considered an inactive employee of the state”).

to long term disability) is tantamount to *separation* from state service.⁷ Significantly, one of the issues presented in the grievance is that, rather than placing her in another position, management moved her into long-term disability and separated her from state service.⁸ According to the grievance procedure rules, a grievant may challenge an alleged involuntary separation as long as such challenge is in compliance with the grievance process. Thus, this claim may proceed, if found to be in compliance. However, the grievant does not have access to the grievance procedure to challenge her February 2002 reassignment to the postal department because she was not employed by the Commonwealth at the time of the initiation of her grievance and the issue challenged is not her involuntary separation.

Compliance with the Grievance Process

The *Grievance Procedure Manual* lists six requirements for the initiation of a grievance by an employee with access.⁹ The agency challenges the grievant's compliance with the first requirement, specifically, that an employee must initiate a written grievance within 30 calendar days of the date she knew or should have known of the event or action that is the basis of the grievance.¹⁰ Additionally, when an employee initiates a grievance beyond the 30 calendar day period without just cause,¹¹ the grievance may be administratively closed.

The grievant alleges that after her transfer to the postal department, other positions became available at the facility that would have been more suitable in light of her working restrictions, but that management failed to offer her these other opportunities and thus improperly placed her in long term disability. The agency claims that her grievance is not timely because it notified her on December 11, 2002 that based on information she had provided, they had no options to offer that would allow her to

⁷ The Department of Human Resources Management (DHRM), the agency charged with implementation and interpretation of the Commonwealth's personnel policies, has determined that because an employee on LTD is not guaranteed reinstatement to her former position, DHRM considers that employee "separated" from state service upon being *placed* on LTD.

⁸ The grievant does not couch her grievance in terms of the wrongfulness of her placement into long-term disability or her separation from state employment. However, it is clear that one of the primary issues raised in her grievance was that the agency did not place her into positions which she purportedly could perform, which ultimately *led* to her movement into long term disability and resulted in her separation from state employment. Furthermore, according to the Virginia Sickness and Disability Program (VSDP) handbook, the VSDP's ultimate goal "is to return you to gainful employment when you are medically able." VSDP Handbook 2002, "Objective of Program," page 4. The VSDP Handbook further states that the "VSDP encourages agencies to provide reasonable accommodations for disabled employees as long as it does not create an undue hardship for the agency [and] . . . will work with you and your licensed treating professional to coordinate your return to employment." VSDP Handbook 2002, "Long-Term Disability," page 11. Here, the grievant is essentially asserting that the agency has failed to fulfill its duty to accommodate her by placing her into a position for which she was able to perform the essential functions.

⁹ See *Grievance Procedure Manual* § 2.4, *Initiating a Grievance*, pages 6-7.

¹⁰ *Grievance Procedure Manual* § 2.4(1), page 6; Va. Code § 2.2-3003(C).

¹¹ *Just cause* is defined as a reason sufficiently compelling to excuse not taking a required action in the grievance procedure. *Grievance Procedure Manual* § 9, page 24.

perform the essential functions of her job. Thus, the agency contends that the grievant should have initiated her grievance within 30 days of the December 11th notification.

While it is accurate that the grievant was informed on December 11th of the agency's intention to move her from short to long term disability, the *event* forming the basis of the grievance is the actual movement of the grievant from short to long term disability, not the notice that such a move would likely occur. The grievant was moved into long term disability on February 11, 2003. Thus, she had 30 days from that date to initiate a grievance challenging her placement to long term disability status. Because she initiated her grievance on March 11, 2002, the grievance is timely with respect to her challenge of her movement into long-term disability/involuntary separation.

However, the grievant's claims that the agency had improperly filled positions and failed to offer them to her (in late October 2002 and perhaps in early 2003 as well) are not timely filed. None of these alleged openings occurred within 30 calendar days of the initiation of her grievance on March 11, 2003.¹² Thus, the sole question remaining is whether there was just cause for the grievant's delay in challenging management's alleged actions.

As evidence of just cause for her delay, the grievant cites her belief that she had to wait until the expiration of short term disability to file the grievance because she could still be placed in another position before movement into long term disability. Also, the grievant notes that she waited until March 11th to file a grievance because she relied upon her rehabilitation counselor to assist her with potential placement options, and the counselor was out of town until March 10th. However, awaiting additional openings and eventual placement by management does not constitute just cause for the grievant's failure to timely challenge known management actions. In this case, the grievant was aware that certain openings existed for which she deemed herself qualified, and she believed (whether correctly or incorrectly) that management wrongly failed to offer her those positions. Therefore, she had 30 calendar days from management's failure to place her in each of the cited positions to challenge such actions. Accordingly, these issues are not timely filed and cannot be advanced as separate claims for which relief may be granted.

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. For example, it is possible that the grievant's assertions concerning management's actions (or lack thereof) with respect to her placement in another position could be found to be erroneous if she decides to proceed with the grievance process. However, the grievance procedure permits any grievance to proceed through the management resolution steps if the grievant has access to the process and the grievance is in compliance. Therefore, this Department avoids engaging in fact-finding on the merits of the grievance before the

¹² During the investigation for this ruling, the grievant advised the investigating consultant that she was not aware of any positions for which she would have been qualified that were available within 30 calendar days of the initiation of her grievance.

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agency and the grievant have had the opportunity to review the grievance during the management resolutions steps.

CONCLUSION AND APPEAL RIGHTS

The grievant had access to the grievance procedure, but only with respect to the issue of whether the agency improperly moved her into long term disability rather than placing her into another position. Additionally, this issue was timely filed. The grievant has five workdays from her receipt of this ruling to either advance or conclude her grievance concerning this issue. However, grievant's claims that the agency allegedly filled positions and failed to offer them to her (in late October 2002 and perhaps in early 2003 as well) are not timely filed, and cannot proceed as separate claims for which relief may be granted. The facts surrounding these claims may be reviewed as background evidence only. This Department's rulings on matters of compliance are final and nonappealable.¹³

Furthermore, this Department has determined that the grievant does not have access to the grievance procedure to challenge her reassignment to the postal department in February of 2002, although the facts surrounding the reassignment may be reviewed as background evidence only. For more information regarding actions the grievant may take as a result of this determination, the grievant should refer to the enclosed sheet. If the grievant should wish to appeal this determination to circuit court, she should notify her Human Resources Office, in writing, within five workdays of receipt of this ruling.

Claudia T. Farr
Director

Susan L. Curtis
EDR Consultant

¹³ See Va. Code § 2.2-1001(5).