

Issue: Access/no access due to long-term disability placement; Compliance/ 30-day rule;  
Ruling Date: April 9, 2004; Ruling #2004-645; Agency: Department of Corrections;  
Outcome: Access/grievant had access; Compliance/ grievance timely filed, grievant in compliance



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**  
**ACCESS AND COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Corrections  
Ruling Number 2004-645  
April 9, 2004

The agency has requested a compliance ruling in a grievance initiated by the grievant on January 10, 2004. The agency asserts 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.<sup>1</sup> For the reasons discussed below, we find that the grievant had access to the grievance procedure at the time that she initiated her grievance. Additionally, the grievance was timely filed.

FACTS

The grievant was formerly employed as a Corrections Officer. On or about June 8, 2003, the grievant was placed on short term disability, where she remained for a 180 calendar day period. On December 1, 2003, the grievant was notified by letter that her short term disability would end on December 4 and that she would be placed on long term disability effective December 5, 2003.<sup>2</sup> The December 1<sup>st</sup> letter primarily outlined the grievant's options regarding the continuation of health insurance benefits and did not inform her that her job was not being held open. On December 30, 2003, the grievant discovered during the course of a conversation with the Human Resources Office that her job had not been held open and that her employment had been terminated.

The grievant asserts that on January 10, 2004, she dropped a copy of her grievance off at a mailbox at her former institution. She claims that when she received no response to her grievance, she mailed a copy to this Department. On February 2, 2004, EDR received the Grievance Form A challenging the movement into LTD, which indicated an initiation date of January 10, 2004. EDR, in turn, forwarded the grievance to the facility, where it was received on February 13, 2004.

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<sup>1</sup> Va. Code § 2.2-3003 (C); *Grievance Procedure Manual* § 2.4 page 6.

<sup>2</sup> The notification specifically informed the grievant of her right to elect to extend her health coverage. The grievant made her election on December 10, 2003, and returned her enrollment form to human resources.

The grievant contends that she was unfairly placed on long term disability while other employees with medical disabilities were given light duty. 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 Procedure*

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.<sup>3</sup> 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).”<sup>4</sup>

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 December 5, 2003 and, thus, was not an “employee” of the Commonwealth when she initiated her grievance on January 10, 2004.

The grievant’s status at the time of the initiation of her grievance was inactive.<sup>5</sup> This *inactive* status (which occurred when the grievant moved from short term to long term disability) is tantamount to *separation* from state service.<sup>6</sup> Significantly, the issue presented in the grievance is that, rather than placing her on light duty as it had others, management moved her into long-term disability and separated her from state service.<sup>7</sup> According to the grievance procedure rules, a grievant may challenge an alleged

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<sup>3</sup> Va. Code §2.2-3001 (A) and *Grievance Procedure Manual*, § 2.3(1) and (2), page 5.

<sup>4</sup> *Grievance Procedure Manual* § 2.3(1), (2) and (3), page 5.

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

<sup>6</sup> 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.

<sup>7</sup> 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 2004, “Objective of Program,” page 4. The VSDP Handbook further that the “Your employer is encouraged, under the program, to provide reasonable accommodation for disabled employees [and]...will work with you, your employer and your licensed treating professional to coordinate your return to employment.” VSDP Handbook 2004, “Return-to-Work Programs,” page 11.

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.

#### *Compliance with Grievance Process*

The grievance Procedure Manual lists six requirements for the initiation of a grievance by an employee with access.<sup>8</sup> 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.<sup>9</sup> The agency claims that her grievance is not timely because it notified her on December 1, 2003, that she was being placed on long term disability effective on December 5, 2003. Thus, the agency contends that the grievant should have initiated her grievance within 30 days of her transfer to long term disability on December 5, 2003.

#### *When Grievant Knew or Should have Known of Her Separation from State Employment*

In this case, the event that forms the basis of her grievance is the grievant's separation from employment, which occurred when she was moved into long term disability. However, while the grievant *may* have known, on or about December 5, 2003, that she had been moved into long term disability, she first learned that she had been separated from employment on December 30, 2003 during a conversation with human resources. At that time, she was first informed that she was no longer an employee and that her job was not being held.<sup>10</sup> Thus the grievant had 30 calendar days from December 30<sup>th</sup> to initiate her grievance.

#### *Date of Initiation of the Grievance*

As an initial point, this Department has consistently held that a grievance initiated in a timely manner but with the wrong management representative will not bar a grievance for noncompliance.<sup>11</sup> Under the facts of this case, we hold that EDR is

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<sup>8</sup> See *Grievance Procedure Manual* § 2.4, *Initiating a Grievance*, pages 6-7.

<sup>9</sup> *Grievance Procedure Manual* § 2.4(1), page 6; Va. Code § 2.2-3003(C).

<sup>10</sup> While the grievant was informed on December 1, 2003, that she had been placed on long term disability, she had no notice that she had been separated from employment. Agencies are encouraged to inform employees who are moved into long term disability whether their jobs are being held. See VSDP FAQ's for VSDP Coordinators and Human Resources Departments, page 5. In this case, the grievant was not given any information on the status of her position. Had the grievant been informed that her job was not being held open, arguably, the grievant would have had at least some notice that she no longer had an expectation of employment. Without this information, however, it would appear unfair to charge the grievant with knowledge that movement into long term disability is tantamount to separation. This is particularly true given that the agency charged with the promulgation and interpretation of state policy, the Department of Resource Management (DHRM), has only recently definitively opined that movement into long term disability constitutes separation from employment.

<sup>11</sup> EDR Rulings 99-007; 99-011; 99-171; 2000-008; 2001-195; 2001-230.

essentially the equivalent to the “wrong management representative.” Therefore, under these particular circumstances, a timely filed grievance with EDR will not bar the grievance for noncompliance. In addition, it is generally incumbent upon the grievant to initiate a grievance in a manner that would allow verification of the date of delivery – for example, by obtaining a date-stamp, postmark, or mailing receipt. However, when the facts are in question concerning compliance with the 30-day rule, and there is some other evidence to corroborate the employee’s position, it has long been the general policy of this Department to allow the employee to pursue the complaint through the grievance process.<sup>12</sup>

As stated above, this grievance needed to be initiated within 30 calendar days of December 30<sup>th</sup> in order to be timely. Accordingly, it would have to have been initiated by Thursday, January 29<sup>th</sup>. In this case, however, the exact date that the grievant mailed her grievance to this Department cannot be definitively determined. Once this Department received the grievance on February 2<sup>nd</sup>, the grievance was returned to the grievant with the instruction that it should be initiated with the second-step respondent (the Warden) at her former facility. The grievant forwarded the grievance to the agency as instructed and the agency apparently received the grievance on February 13, 2004. At some point during this process, the original envelope sent from the grievant to EDR was inadvertently lost or discarded, presumably at EDR’s office. Because the envelope bearing the postmark is no longer available to conclusively establish the mailing date, this Department will consider whether other evidence exists to corroborate the grievant’s assertion that it was mailed on the 29<sup>th</sup>.

Working back from the EDR date stamp showing that Monday, February 2<sup>nd</sup> was the date this Department received the grievance, it is reasonable to infer that the grievant mailed her grievance no later than Thursday, March 29<sup>th</sup>. If the grievance was mailed on Thursday the 29<sup>th</sup>, (while conceivably it could have been received by this office on the following day, January the 30<sup>th</sup>), it is plausible, that the letter arrived in Saturday’s or Monday’s mail.<sup>13</sup> Given the particular facts of this case, this Department concludes there is sufficient evidence to corroborate the grievant’s assertion that her grievance was mailed on a timely basis.<sup>14</sup>

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<sup>12</sup> EDR Ruling 2001-230

<sup>13</sup> EDR’s offices are closed on Saturday.

<sup>14</sup> This Department’s conclusion that the grievance is timely is consistent with the principles established in the Federal Rules of Civil Procedure and prior EDR Rulings. Under the Federal Rules of Civil Procedure, an additional three days are added to the pertinent prescribed timeframe when certain court papers are filed by U.S. Mail. *See* Federal Rule of Civil Procedure 6(e). *See also* EDR Ruling # 2001-211 which used the three-day rule to determine a party’s likely date of receipt of a mailed document. It should be noted that while this Department does not typically grant additional time when the last day of the 30-day grievance initiation period falls on a weekend, this Department cannot ignore the fact that mail is not opened at this office on Saturday or delivered on Sunday. Thus, while Sunday was actually the third day from Thursday (the 30<sup>th</sup> day), it is reasonable consider performance on the next business day, Monday, to be timely. *See* Golden Nugget Inc. v. Chesapeake Bay Fishing Co., 232 F. Supp. 2d 631 (E.D. Va. 2002) (The final day of the extended prescribed period, 3 days having been added for use of U.S. Mail, fell on a Sunday but the court extended the period to the next business day, Monday.)

CONCLUSION

For the reasons discussed above, this Department has determined that the grievant has access to the grievance procedure and has filed her grievance within the 30 calendar day period. By copy of this ruling, the grievant and the agency are advised that within five work days of the receipt of this ruling, the agency must schedule and conduct the second-step meeting. This Department's rulings on matters of compliance are final and nonappealable.<sup>15</sup>

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Claudia T. Farr  
Director

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June M. Foy  
EDR Consultant, Sr.

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<sup>15</sup> Va. Code § 2.2-1001 (5).