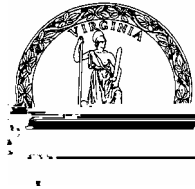


Issue: Access ruling/grievance issue/voluntary resignation; Ruling Date: April 13, 2005; Ruling #2005-1005; Agency: Department of Corrections; Outcome: access denied



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2005-1005
April 13, 2005

The grievant has requested a ruling on whether he had access to the grievance procedure when he initiated his grievance on January 12, 2005. The Department of Corrections (DOC or the agency) claims that the grievant does not have access to the grievance procedure because he was not an employee of the Commonwealth of Virginia at the time the grievance was initiated. For the reasons set forth below, this Department concludes that the grievant did not have access to the grievance process when he initiated his January 12th grievance.

FACTS

Prior to his separation from state service, the grievant was employed as a Probation and Parole Officer with DOC. Due to an alleged hostile work environment, the grievant voluntarily resigned from his position with DOC on October 5, 2004. On November 5, 2004, the grievant accepted a new job outside of state government but was quickly terminated when his new employer was allegedly informed by a DOC representative that the grievant's resignation was accepted "in lieu of termination." The grievant claims that at the time of his resignation, he was assured by DOC that if future employers inquired as to his reason for leaving DOC, such employers would be truthfully advised that the grievant voluntarily resigned.¹ The grievant further alleges that DOC has made false representations regarding his work performance to the Virginia Employment Commission (VEC).

After trying unsuccessfully to resolve the issue informally with DOC management, the grievant filed a grievance on January 12, 2005 regarding the agency's alleged improper characterization of the grievant's separation from state service and other false representations. The agency has determined that the grievant does not have access to the grievance procedure because he was not employed by the Commonwealth at the time he initiated his January 12th grievance. The grievant argues that he should be

¹ The grievant has presented evidence suggesting that his separation from state service was deemed a resignation. Specifically, a Notice/Election of Health Care Coverage Continuation form sent to the grievant on October 12, 2004 identifies the grievant's separation from state service as a resignation. Additionally, a Personnel Action Transmittal in the grievant's personnel file states the reason for grievant leaving state service as a resignation. On the other hand, a Payroll Notification regarding the grievant states that he "resigned in lieu of termination."

granted access to the grievance process because the agency's characterization of the grievant's resignation as "in lieu of termination" indicates that he had no choice in the matter and as such, his resignation was involuntary.²

DISCUSSION

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.³ Employees who voluntarily resign, however, may not have access to the grievance process, depending upon the surrounding circumstances, such as the nature of their claim or when the grievance is initiated. 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.⁴

Although the parties dispute the circumstances upon which the grievant was separated from state service, the grievant's own representations support a finding that the grievant voluntarily resigned from his position at DOC effective October 5, 2004. Indeed, the central premise of the grievance is that the agency has incorrectly designated the grievant's separation as one that was not entirely voluntary.⁵ Accordingly, because the grievant voluntarily resigned, he does not have access to the grievance procedure.⁶

² An employee no longer employed by the Commonwealth will be granted access to the grievance procedure if he is involuntarily separated from state service and grieves it within 30 calendar days of the date of involuntary separation. *See* Grievance Procedure Manual § 2.3 (3). The grievance procedure defines involuntary separation as "[s]eparation which is not of free will; resignation obtained through misrepresentation, deception, duress, coercion, or time pressure."

³ Va. Code § 2.2-3001(A) and *Grievance Procedure Manual* § 2.3(1) and (2).

⁴ 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. Thus, a resignation may be involuntary "(1) where [the resignation] was obtained by the employer's misrepresentation or deception... and (2) where forced by the employer's duress or coercion." *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167, 174 (4th Cir. 1988).

⁵ Even if the grievant "resigned in lieu of termination," this Department has long held that when a grievant is faced with the unpleasant decision to either resign or be terminated, and elects resignation, such a resignation will generally be deemed voluntary. *See* EDR Ruling Nos. 2003-497 and 2002-114.

⁶ Although the grievant does not have access to the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that he wishes to challenge, correct or explain information contained in his personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth his position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).

APPEAL RIGHTS AND OTHER INFORMATION

For more information regarding actions you may take as a result of this ruling, please refer to the enclosed sheet. If you wish to appeal the determination that you do not have access to the grievance procedure to circuit court, please notify your Human Resources Office, in writing, within five workdays of receipt of this ruling.

Claudia T. Farr
Director

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