

Issue: Access/terminated employee and access to the grievance procedure
Qualification/performance evaluation – arbitrary/capricious, notice of improvement needed;
Ruling Date: June 15, 2005; Ruling #'s 2005-961, 2005-962, 2005-963, 2005-964, 2005-965;
Agency: Virginia Polytechnic Institute and State University; Outcome: access denied,
qualification denied.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS and QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Polytechnic Institute and State University
Ruling Nos. 2005-961, 962, 963, 964, and 965
June 15, 2005

The grievant has requested a ruling on whether his challenges to his 2004 performance evaluation and four Notices of Improvement Needed, as raised in five November 4, 2005 grievances with Virginia Polytechnic Institute and State University (VT or the university), qualify for a hearing. For the following reasons, the grievant does not have access to the grievance procedure with respect to these issues and his request for qualification is therefore denied.

FACTS

The grievant was employed by the agency as a Video Network Operations Technician. On October 4, 2005, the grievant received a "Below Contributor" performance evaluation and four Notices of Improvement Needed. In addition, the grievant was issued two Group II Written Notices. As a result of the Written Notices, the grievant was terminated from employment with the university effective October 5, 2005.

On November 4, 2005, the grievant initiated five grievances challenging his performance evaluation and the four Notices of Improvement Needed.¹ After the completion of the agency resolution steps, the agency denied the grievant's request for hearings on these grievances. The grievant now asks that this Department qualify these five grievances for hearing.

DISCUSSION

Under the grievance procedure, employees "must have been employed by the Commonwealth at the time the grievance is initiated (unless the *action grieved* is a termination or involuntary separation)."² Thus, once an employee has been terminated from state employment, the only claim for which the employee has access to the grievance procedure and for which relief may be granted is a challenge to the termination. A terminated employee does

¹ The grievant also initiated grievances challenging the two Group II Written Notices and his termination. The grievances proceeded to hearing on February 9-10, 2005, and decisions were issued upholding the disciplinary actions on February 14, 2005. Had the hearing officer reinstated the grievant, the grievant would have had access to pursue his grievances regarding his performance evaluation and Notices of Improvement Needed, because reinstatement would have had the effect of returning the grievant to the same rights, position, and status he would have enjoyed had the termination never occurred.

² *Grievance Procedure Manual* § 2.3 (emphasis added).

not have access to the grievance procedure for agency actions that did not directly result in his or her termination or involuntary separation; and for that reason, such claims may not be qualified for hearing. *See* EDR Ruling No. 2005-1026 (finding that the grievant did not have access after termination to pursue allegations regarding an arbitrary and capricious performance evaluation, a breach of the confidentiality of her personnel records, slander, an improper transfer, and a failure to provide training).

In this case, it is undisputed that the grievant was terminated from employment effective October 5, 2005, and that his grievances challenging his performance evaluation and Notices of Improvement Needed were not filed until November 4, 2005, after his termination. While the grievant had access to the grievance procedure to challenge his termination, and in fact has done so, he did not have access to the grievance procedure after his termination to challenge his performance evaluation and the related Notices of Improvement Needed, because those agency actions did not directly result in his termination. For this reason, we find that the grievant's remaining five grievances with the university do not qualify for hearing.

APPEAL RIGHTS AND OTHER INFORMATION

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

Claudia T. Farr
Director

Gretchen M. White
EDR Consultant