

Issue: Grievance Procedure/Access; Separation from State/Involuntary Resignation; Ruling Date: October 7, 2005; Ruling #2006-1111; Outcome: access granted



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**ACCESS RULING OF DIRECTOR**

In the matter of the Department of Health  
Ruling Number 2006-1111  
October 7, 2005

The grievant has requested a ruling on whether he had access to the grievance procedure when he initiated his grievance on June 3, 2005. The Department of Health (VDH or the agency) claims that the grievant does not have access to the grievance procedure because he voluntarily resigned his position on May 19, 2005 and thus was not an employee of the Commonwealth at the time the grievance was initiated. The grievant asserts that he did not quit or resign his position, and that the agency instead terminated his employment. For the reasons set forth below, this Department concludes that the grievant has access to the grievance procedure.

FACTS

The grievant was employed with the agency as a Storekeeper Assistant. On May 19, 2005, the grievant attended a meeting with his supervisor (the Fiscal Supervisor) and a human resources analyst. During that meeting, his supervisor discussed several alleged performance concerns and presented the grievant with a counseling memorandum. The grievant states that the supervisor insisted that he sign the memorandum and refused to allow him to write any rebuttal on the document. He alleges that he did not want to sign the memorandum, as he believed that it was unwarranted and could ultimately result in his termination; and that when his supervisor insisted that he sign, he responded that he guessed he would have to get another job. He also states that he asked the supervisor to "give [him] four hours" so that he could find someone higher in management with whom to discuss his concerns about the memorandum. He alleges that he then left the meeting room because he felt "overcome."

The supervisor and the HR analyst deny that the supervisor demanded that the grievant sign the counseling memorandum. Rather, they assert, the supervisor asked the grievant to review the memorandum and indicated that after he had completed his review, they would discuss the memorandum, as well as a performance plan. The supervisor and HR analyst state that after quickly looking at the memorandum, the grievant announced that he could not sign the memorandum. They allege that he then stated that he had another job which started in four hours and left the room. The grievant denies that he indicated that he had other employment and states that he has been unemployed since leaving the agency.

The grievant asserts that after leaving the meeting room, he went back to his desk and attempted to locate his employee handbook in a box he kept under his desk. He also states that he resumed working, unpacking several shipments which had arrived. The supervisor and HR analyst assert that the grievant went to his desk and began angrily packing his belongings.

The HR analyst states that after the grievant failed to leave the building in what the agency considered a timely manner, she and the business manager asked the building's security officer to escort the grievant out of the building. The grievant claims that the security officer came to his desk approximately twenty minutes after he left the meeting and told the grievant that he could stay if he signed the memorandum, to which the grievant allegedly responded that he could not sign it.

The grievant further asserts that the security officer then returned approximately twenty-five minutes later and told the grievant that he needed the grievant's keys, American Express card and identification, and advised the grievant that he needed to leave the building. The grievant states that by the time the security officer arrived, he had begun packing several personal items, because he believed the agency would force him to leave. He also alleges that when he attempted to cancel his American Express card before surrendering it, the officer grabbed his arm and his shoulder and would not allow him to call the credit card company. The grievant alleges that because the officer's conduct made him feel physically threatened, he may have told the officer that he *would* quit, so that the officer would leave him alone and allow him to leave peacefully.<sup>1</sup> The grievant states that the officer then physically escorted him to his car and told him that he could not come back to or call anyone at the facility. The grievant denies that he told the security officer that he had another job; rather, he alleges he advised the officer that his "new job was looking for a job."

The security officer provides a different description of the events of May 19<sup>th</sup>. He asserts that after the agency's Business Manager asked him to escort the grievant from the worksite, he went to the grievant's desk, where he found the grievant packing personal items from his desk drawers. He states that after he asked the grievant to provide him with his keys, American Express card and identification, the grievant responded, "Well, yeah, I quit. I can't take this s—t anymore. I've got something lined up anyway." The security guard describes the grievant as very agitated during this conversation. The security guard denies that he told the grievant that he could stay if he signed the counseling memorandum, although he admits that he advised the grievant to think about his decision to quit.

The agency has also given this Department a statement by the grievant's former supervisor, in which she asserts that after the meeting on May 19<sup>th</sup>, the grievant told her that he had quit. She states that she asked him what happened, and that he responded that "he did not like the meeting . . . and that he felt that they were trying to fire him. But that he would quit before he got fired." She also states that the grievant told her he "had another job starting in four hours," but that when she inquired further, he admitted that he did not have other employment.

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<sup>1</sup> During this Department's investigation, the grievant stated that he may have told the security officer that he "would quit." In an attachment to his grievance for the second resolution step, the grievant states that he said he "would quit" after the security officer "said he would carry [the grievant] out and he would use force if he had to."

The grievant denies the statements attributed to him by his former supervisor. He states that after the meeting, he told her that he could not sign the counseling memorandum, so that meant he would “have to go.” He asserts that she responded to this statement by saying, “So, you’re quitting,” and that he explained that he could not sign the memorandum. He alleges that they exchanged these two statements repeatedly, and that she then said, “Well, that means [you’re] quitting.” The grievant also alleges that that his former supervisor called him the next day to ask what he was going to do. He claims that he advised her that he would be filing a grievance against the agency.

The grievant states that after leaving the agency on May 19, 2005, he was unsure of his work status and expected his facility’s director or administrator to call him to discuss the events of the morning. The grievant alleges that the next day, he received a letter from his supervisor informing him that his resignation had been accepted effective May 19, 2005.

On June 3, 2005, the grievant initiated a grievance challenging his involuntary separation and/or involuntary resignation. Because his grievance challenges an alleged termination, the grievant elected to use the expedited grievance process. The second-step respondent concluded that the grievant did not have access to the grievance procedure, as he had voluntarily resigned his employment with the agency. The grievant subsequently appealed this decision to the agency head, who also determined that the grievant lacked access to the grievance procedure.

#### DISCUSSION

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.<sup>2</sup> 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.

In this case, the grievant maintains that he did not in fact resign from employment. Rather, he states, he advised his supervisor that if she continued in her efforts to have him sign the counseling memorandum—which he allegedly perceived as a first step toward terminating his employment—he would have to get another job. He denies telling his supervisor that he had a new job starting in four hours; instead, he asserts, he asked for four hours to seek assistance from higher management in dealing with the counseling memorandum. He also denies ever stating during the May 19<sup>th</sup> meeting that he quit, or telling his former supervisor and the security guard that he had quit. Because he did not resign from employment, the grievant asserts, his separation from employment with the agency constituted an involuntary termination.

In contrast, the agency argues that the grievant voluntarily resigned his employment during the meeting on May 19<sup>th</sup>, and it has presented the verbal statements of the supervisor, the HR

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

analyst and the security officer, as well as a written statement by the grievant's former supervisor, in support of its position. The agency asserts that because the grievant voluntarily resigned, he did not have access to the grievance procedure on June 3, 2005.

This Department has carefully considered the evidence presented by both parties and has conducted extensive factfinding in this matter, including interviewing the grievant, his supervisor, the HR analyst and the security officer. Generally, when this Department rules on questions of access to the grievance procedure, material facts are not in dispute (for example, that the grievant works in a P-14 status, *see* EDR Ruling No. 2006-1096) or the grievant's assertions, even if taken as true, are insufficient to establish access (where the parties agree that the grievant tendered a letter of resignation as an alternative to termination, *see* EDR Ruling No. 2005-1043, but disagree as to whether that resignation was voluntary). Here, however, the parties dispute a material threshold issue: whether the grievant in fact said he quit or otherwise expressed a resignation during the May 19<sup>th</sup> meeting, and they offer plausible but diametrically opposing descriptions of the events of that day. As a result, deciding whether the grievant even said he quit his employment requires us to determine whether the grievant or the agency's witnesses are more credible.<sup>3</sup> We acknowledge, however, that this determination is difficult to make in the rulings context, because there is no opportunity to observe the witnesses and no cross-examination.

After reviewing the available evidence, we are unable to find that the grievant said he quit or otherwise expressed a resignation during the May 19<sup>th</sup> meeting. This Department therefore concludes that there is insufficient evidence to support a finding that the grievant lacked access to the grievance procedure. We thus conclude that the grievant has access to pursue his June 3, 2005 grievance.

### CONCLUSION

The grievant has access to the grievance procedure for purposes of his June 3, 2005 grievance. If the grievant wishes to continue with his grievance, he has five workdays from receipt of this ruling to return the grievance to the second-step respondent so that he or she may conduct the mandated second-step meeting and address the grievance on the merits. This ruling in no way determines the ultimate merits of the grievance, and is not binding on future rulings or proceedings in this matter.

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Claudia T. Farr  
Director

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Gretchen M. White

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<sup>3</sup> While the agency has presented several witnesses in support of its position, as the Virginia Court of Appeals has noted, "[w]hen weighing conflicting testimony, the 'touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity.'" *Stump v. Commonwealth of Virginia*, 2004 Va. App. LEXIS 471, at \*8 (Va. Ct. App. Oct. 5, 2004), quoting *Weiler v. United States*, 323 U.S. 606, 608 (1945).

October 7, 2005  
Ruling #2006-1111  
Page 6

EDR Consultant