

Issue: Compliance/grievance procedure/30-day rule; Ruling Date: November 28, 2005;
Ruling #2006-1166; Agency: Department of Corrections; Outcome: grievance is timely



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
COMPLIANCE RULING OF THE DIRECTOR
In the matter of Department of Corrections
No. 2006-1166
November 28, 2005

The grievant has requested a ruling on whether his September 8, 2005 grievance with the Department of Corrections (DOC or agency) is in compliance with the grievance procedure. DOC management asserts that the September 8th grievance does not comply with the grievance procedure because the grievance is untimely. For the reasons set forth below, the grievance is timely.

FACTS

The grievant served as a Deputy Chief Probation & Parole Officer with DOC. The grievant asserts that as a result of a serious health condition, he was placed into long-term disability [LTD] on April 13, 2005. He asserts that he was released to return to work on July 5, 2005. The grievant further asserts that he was told not to return to work at that time and that he did not learn that his employment had been terminated until August 17, 2005, when he received a letter from the agency's Human Resources Director.

The agency, on the other hand, asserts that the grievant was informed on June 14, 2005¹ that he had been transferred to long-term disability effective April 13, 2005, and thus should have initiated his grievance within 30 days of June 14th.

DISCUSSION

Access

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.² 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)."³ The grievance procedure further states that if this criterion is not met, an agency may deny an employee access to the grievance procedure.⁴ In this case, the grievant is challenging the agency's termination of his employment.

¹ Contrary to the agency's assertion, the letter informing the grievant that he had been transferred to long-term disability was dated June 15th, not 14th.

² Va. Code § 2.2-3001(A).

³ *Grievance Procedure Manual* § 2.3.

⁴ *Id.*

The Department of Human Resource Management (DHRM), the agency charged with implementation and interpretation of the Commonwealth's personnel policies, has stated that because an employee on LTD is not guaranteed reinstatement to his former position, it considers that employee "separated" from his position. As with any separated employee, an individual on LTD may use the grievance procedure to challenge his separation from state service, i.e., his placement into LTD, so long as he is not exempt from the Virginia Personnel Act (VPA) and was "a non-probationary employee of the Commonwealth at the time of the event that formed the basis of the dispute occurred."⁵ In this case, the grievant was a non-probationary employee at the time he was moved into LTD (separated from employment) and he was not exempt from the VPA. Accordingly, he has access to the grievance procedure.

Timeliness of the Grievance

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he knew or should have known of the event or action that is the basis of the grievance.⁶ When an employee initiates a grievance beyond the 30-calendar day period without just cause, the grievance is not in compliance with the grievance procedure, and may be administratively closed.

In this case, the event that forms the basis of his grievance is the grievant's separation from employment, which occurred when he was moved into LTD.⁷ However, while the grievant may have known, on or about June 15, 2005, that he had been moved into LTD, DOC first informed him that he had been separated from employment on August 17, 2005, when his attorney received a letter from the DOC Deputy Director for Human Resources advising that the grievant's placement into LTD constituted a separation from employment under state policy. Accordingly, the grievance was initiated within 30 calendar days of August 17, 2005, the date the grievant knew or should have known of his separation from employment, and is thus timely.⁸

⁵ *Id.*

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

⁷ The grievance generally challenges the grievant's termination from employment, although the grievant specifically asserts that his termination was in violation of the Family Medical Leave Act.

⁸ While the grievant was informed on or about June 15, 2005, that approximately 2 months earlier on April 13, 2005 he had been placed on LTD, he had no express notice that he had been separated from employment. Agencies are encouraged to inform employees who are moved into LTD whether their jobs are being held. *See* VSDP FAQ'S for VSDP Coordinators and Human Resource Departments, page 5. In this case, the grievant was informed in a June 7, 2005 letter that his position "remains in an unprotected status *until* we receive documentation from Virginia Sickness and Disability that your disability claim has been approved." (Emphasis added). On or about June 15, the agency sent the grievant notice that his claim had been 'approved,' that is, that he had been moved into LTD on April 13th. Based on the June 7th letter's statement that the grievant's position remained in an unprotected status *until* his claim had been approved, it would not have been unreasonable for the grievant to interpret the letter to mean that once his claim was approved, it would be protected. In sum, under the facts of this case, it appears that the grievant first received clear notice that he had been separated from employment on August 17, 2005, when he was first informed in writing that he had been separated from employment April 13th.

CONCLUSION

The grievant's September 8, 2005 grievance is therefore timely. By copy of this ruling, the grievant and the agency are advised that the grievant has 5 workdays from receipt of this ruling to either conclude the grievance or inform the second-step respondent that he desires to continue with his grievance. If so notified, the second-step respondent shall schedule the second-step meeting within 5-workdays of the grievant's confirmation that he desires to advance his grievance. This Department's rulings on matters of compliance are final and nonappealable.⁹

Claudia T. Farr
Director

William G. Anderson, Jr.
EDR Consultant, Sr.

⁹ See Va. Code § 2.2-1001(5).