

Issue: Compliance/30 day rule; Ruling Date: January 30, 2006; Ruling #2006-1187;
Agency: Department of Mental Health, Mental Retardation and Substance Abuse
Services; Outcome: grievance in compliance



Department of Employment Dispute Resolution

COMPLIANCE RULING OF THE DIRECTOR

In the matter of Department of Mental Health, Mental Retardation and
Substance Abuse Services
No. 2006-1187
January 30, 2006

The grievant has requested a ruling on whether her October 14, 2005 grievance with the Department of Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS or agency) is in compliance with the grievance procedure. The agency asserts that the October 14th 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 was employed as an Administrative Assistant. As a result of a serious health condition, she went into Short Term Disability (STD) in May of 2004 and was placed into Long-Term Disability (LTD) in February of 2005. She asserts that she was released to return to work by her physician after Labor Day. On September 2, 2005, the grievant spoke with her immediate supervisor about coming back to work. She claims that she was referred to the Human Resource Office and finally to the Director of Facility Operations, who informed her that for budgetary reasons, her position had been abolished.

On September 16, 2005, the grievant wrote the Deputy Commissioner of Facility Operations to discuss the possibility of coming back to work with the agency. She asserts that she received a response, dated September 28, 2005, confirming that her position had been abolished. In addition, the September 28th letter explained that under the Virginia Sickness and Disability Program (VSDP), employees who transition into LTD are separated from service. The letter also informed the grievant that when a LTD employee is released to return to work, the employee may seek re-employment through the competitive process. The letter concluded by encouraging the grievant to “apply for any position for which you feel you are qualified in order that you may be considered for re-employment.”

DISCUSSION

Access

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.¹ 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 The grievance procedure further states that if this criterion is not met, an agency may deny an employee access to the grievance procedure.³ In this case, the grievant is challenging the agency’s termination of her employment.

The Department of Human Resource Management (DHRM), the agency charged with implementation and interpretation of the Commonwealth’s personnel policies, considers an employee “separated” from Commonwealth employment once she moves into LTD, unless the agency has elected to keep the employee’s position open for her. As with any separated employee, an individual on LTD may use the grievance procedure to challenge her separation from state service, i.e., her placement into LTD, so long as she 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.”⁴ In this case, the grievant was a non-probationary employee at the time she was moved into LTD (separated from employment) and she was not exempt from the VPA. Accordingly, she 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 she knew or should have known of the event or action that is the basis of the grievance.⁵ 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.

Here, the event that forms the basis of this grievance is the grievant’s termination from employment, which occurred in this case when she was moved into LTD. The agency states that the grievant was informed on February 16, 2005 that she had been moved into LTD. While the February 16th letter makes several references to “separation,” the letter did not unequivocally state to the grievant that her employment

¹ Va. Code § 2.2-3001(A).

² *Grievance Procedure Manual* § 2.3.

³ *Id.*

⁴ *Id.*

⁵ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4(1).

with the Commonwealth had terminated as a result of her movement into LTD.⁶ Because movement into LTD does not always end Commonwealth employment, it is imperative that an agency inform its employees when their employment with the Commonwealth has terminated as a result of moving into LTD, if the agency wants to contest LTD separation grievances on the basis of untimeliness. As we recently recognized in Ruling Number 2006-1166, for purposes of triggering the grievance procedure's 30 calendar day time period for filing a grievance, merely informing an employee that her position has not been held open does not provide her with adequate notice that she has been separated from employment. Although DHRM considers such an employee separated from state service when she moves into LTD, unambiguous notice that her position will not be held open and that her employment has ended is required to ascertain when the employee "knew or should have known" that her employment was terminated, if the agency intends to challenge a LTD separation grievance on the basis of untimeliness.

Further, because a challenge to the grievance on the basis of timelines is tantamount to a statute of limitations claim, the burden is on the agency to show that it provided unambiguous notice of the event that forms the basis of the grievance, in this case, the termination of employment.⁷ Because the agency has not been able to provide evidence of any documentation to the grievant prior to September 28, 2006, unambiguously indicating that grievant's employment ended as a result of her movement into LTD, the October 14th grievance is deemed timely.⁸

⁶ The February 16th letter states that "[d]ue to your long-term disability status, the agency is not under any obligation to hold onto the position you currently held." This language, while accurate, does not unambiguously inform the grievant that the agency has elected not to hold the grievant's position open, only that it has no obligation to hold the position open.

⁷ See *Columbia Heights v. Griffith-Consumers*, 205 Va. 43,47-8 (1964), in which the Supreme Court of Virginia recognizes that "where the statute of limitations is pleaded as a defense, the party relying thereon has the burden of showing by a preponderance of the evidence that the cause of action arose more than the statutory period before the actions was instituted." While the agency has the burden to establish that it provided the grievant with notice of the event that forms the basis of the grievance (here, the termination of state employment), the grievant bears the burden of showing that she timely initiated the grievance, for example by retaining mailing receipt or an agency date-stamped copy of grievance. See *Grievance Procedure Manual* § 2.4.

⁸ The February 16th letter began by stating that "[t]he following paragraphs describe how your health benefits, life insurance, retirement contributions, and leave are affected upon your long-term disability separation." While the letter indeed goes on to discuss how benefits and the like were affected by the grievant's separation, the letter never clearly informed the grievant of how *her employment status* was affected by her movement into LTD. In other words, the letter fails to state what may be obvious to a human resources professional but not to a typical state worker—that as a consequence the grievant's movement into LTD and the agency's decision not to hold open her position, the grievant's employment with the Commonwealth ceased.

The September 28, 2005 letter from the Deputy Commissioner of the Facility ultimately provided the grievant with sufficient notice that her employment had ended. First, the letter expressly informed the grievant that employees who transition into LTD are separated from service. But more importantly, the letter instructed that once an LTD employee is released to return to work, the employee "may seek *re-employment* through the competitive process." (Emphasis added). The letter went on to encourage the grievant to "apply for any position for which you feel you are qualified in order that you may be considered for *re-employment*." (Emphasis added). From the perspective of grievance procedure compliance only, the

CONCLUSION

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 she desires to continue with her grievance. If so notified, the second-step respondent shall schedule the second-step meeting within 5-workdays of the grievant's confirmation that she desires to advance her grievance. This Department's rulings on matters of compliance are final and nonappealable.⁹

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Director

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separation language coupled with the "re-employment" language provides the grievant, for the first time, with adequate notice that her employment with the Commonwealth had ceased. If the February 16, 2005 letter had contained this same language, the grievance would have been untimely.

Documentation from the agency showing that it clearly informed the employee that her employment ended as a result of moving into LTD may not be required in all cases. For example, where a grievant concedes that she was unequivocally so informed more than 30 days prior to the initiation of her LTD separation grievance, such a grievance would be deemed untimely. But where there is no such acknowledgement by the grievant, this Department will give the benefit of doubt to the grievant because the agency was best positioned to eliminate any notice controversy by simply reducing the notice to an unambiguous writing.

⁹ See Va. Code § 2.2-1001(5).