

Issue: Compliance/Grievance Procedure/resolution steps; Access/access to grievance procedure; Ruling Date: February 15, 2006; Ruling #2006-1203, 2006-1204; Agency: Virginia Department of Health; Outcome: access granted partially; grievance in compliance.



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

COMPLIANCE AND ACCESS RULINGS OF DIRECTOR

In the matter of Department of Health
Ruling Numbers 2006-1203 and 2006-1204
February 15, 2006

The Department of Health (VDH or the agency) seeks to administratively close the grievant's September 8 and September 23, 2005¹ grievances for noncompliance with the grievance procedure. Specifically, the agency claims that (1) the grievant has generated confusion by mishandling and mismatching grievance documents and checking inappropriate boxes on the Form A of her grievances; (2) the grievant has not complied with the grievance procedure requirements related to appealing the agency's decision to deny her access in both her September 8 and September 23, 2005 grievances; (3) the grievant's September 23, 2005 grievance duplicates a later September 30, 2005 grievance challenging her termination; and (4) at the time she initiated her September 8 and September 23, 2005 grievances, the grievant did not have access to the grievance procedure because she was no longer an employee of the Commonwealth of Virginia.

FACTS

On August 24, 2005, the grievant received a Group II Written Notice for failure to report to work as scheduled without proper notice and failure to follow her supervisor's instructions. Two days later, the grievant was issued a "Due Process Memorandum" noting the agency's intent to take additional disciplinary action against the grievant for unauthorized use and misuse of state property and abuse of state time and resources. Thereafter, on September 1, 2005, the grievant was issued a Group II Written Notice with termination for unauthorized use/misuse of state property and abuse of state time and resources.

¹ September 8 and September 23, 2005 represent the dates the two grievances were allegedly received by the agency. The September 8th grievance challenges a Group II Written Notice received by the grievant on August 24, 2005, while the September 23rd grievance challenges a "Due Process Memorandum" dated August 26, 2005.

The grievant challenged the above agency actions by initiating three separate grievances: on September 8, 2005, the grievant initiated a grievance challenging the August 24, 2005 Group II Written Notice; on September 23, 2005 she initiated a grievance challenging the August 26, 2005 “Due Process Memorandum” and finally, the grievant initiated a grievance on September 30, 2005 challenging the September 1, 2005 Group II Written Notice with termination.

Also on September 30, 2005, the grievant was verbally advised by the second management resolution step-respondent that she did not have access to the grievance procedure to challenge the August 24, 2005 Group II Written Notice because at the time the September 8, 2005 grievance challenging this action was initiated, the grievant was no longer an employee of the Commonwealth. Similarly, the grievant was advised by letter dated October 18, 2005, that she did not have access to the grievance procedure to challenge the August 26, 2005 “Due Process Memorandum” because at the time she initiated her grievance challenging the “Due Process Memorandum,” she was no longer an employee of the Commonwealth. The October 18, 2005 letter also advised the grievant of the process to follow if she desired to appeal the agency’s access determinations in both her September 8 and September 23, 2005 grievances. On October 28, 2005 the grievant e-mailed the agency head expressing her desire to appeal the agency’s determinations on access in her September 8 and September 23, 2005 grievances.

The agency subsequently sent the grievant a letter acknowledging receipt of the October 28th e-mail and advised the grievant that she was out of compliance with the grievance process and needed to check the appropriate boxes on the Form A’s regarding her desire to have the agency head determine whether she has access and send the complete original grievance records to the agency head for review. According to the agency, the grievant subsequently sent the agency mismatched and incomplete grievance documents and failed to indicate on the Form A her desire to appeal the agency’s access determinations in her September 8 and September 23, 2005 grievances. As a result, on November 30, 2005, the agency sought a compliance ruling from this Department.

DISCUSSION

Compliance

The grievance procedure requires both parties to address procedural noncompliance through a specific process.² That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department’s (EDR’s) involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five

² *Grievance Procedure Manual*, § 6.3.

workdays for the opposing party to correct any noncompliance.³ If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from the EDR Director, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for its delay in conforming to EDR's order.⁴

Grievant's alleged creation of confusion during the grievance process

The agency asserts that the grievant has made the grievance process confusing by returning mismatched grievance documents to the agency and checking boxes on the Form A that do not apply and/or checking multiple boxes in response to a particular management resolution step response. In particular, the agency claims that the grievant returned to the agency page one of the grievant's September 23rd grievance and attached thereto the second page of the grievant's September 8th grievance. Moreover, in response to management's denial of access to the grievance procedure in her September 8th grievance, instead of checking the box on the Form A that says "I want the agency head to determine whether I have access to the grievance procedure," the grievant checked the box on Form A that says "I advance my grievance to the third step" and further wrote in the comment section of Form A, "[p]lease qualify for hearing." Based upon these alleged acts by the grievant, the agency seeks to administratively close the grievant's September 8 and September 23, 2005 grievances.

While it appears that the grievant's responses on the Form A's have at times been confusing, the agency has failed to provide sufficient evidence that the grievant's actions in this regard were intentional. The grievant claims that she is doing her best (given her alleged compromised health) to respond to the grievances and return the appropriate documents to the agency. She asserts that any errors she has made were not done with the intent of frustrating or confusing the grievance process. Accordingly, this Department concludes that the grievant's actions do not warrant closure of her grievance at this time.

³ *Grievance Procedure Manual*, § 6.3.

⁴ While in cases of substantial noncompliance with procedural rules the grievance statutes grant the EDR Director the authority to render a decision on a qualifiable issue against a noncompliant party, this Department favors having grievances decided on the merits rather than procedural violations. Thus, the EDR Director will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, this Department will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

Nevertheless, this Department recognizes that the Grievance Form A is an official grievance document used by the parties to communicate throughout the grievance process and as such, is of paramount importance during the grievance procedure. Because the grievant, the agencies, and this Department rely on the Form A to ascertain the intent of the parties, it is incumbent on the parties to clearly and accurately express their intentions on the Grievance Form A. If either party is unclear of how to proceed with the grievance process and/or what box should be checked on the Form A, they should contact EDR's toll-free AdviceLine at 1-888-232-3842 for assistance.

Grievant's failure to properly appeal the agency's access determinations

The agency also asserts that the grievant has failed to comply with the grievance procedure because she has improperly appealed the agency's denial of access in both her September 8 and September 23, 2005 grievances. More specifically, the agency claims that despite its repeated instructions on how to challenge its access determinations, the grievant has failed to properly indicate on Form A whether she desires to appeal the agency's access determinations.

The grievance procedure states that if management denies the employee access to the grievance procedure and the employee wants the agency head to determine whether she has access, she "must make a written request to the agency head within 5 workdays of receiving notification that access has been denied."⁵ The grievance Form A supplies the grievant with a way to make the required written request to the agency head by providing an option at each management resolution step that states: "I want the agency head to determine whether I have access to the grievance process."

The grievant's Form A does not expressly state that she wants the agency head to determine whether she has access to the grievance procedure. However, on October 28, 2005, the grievant sent the agency head an e-mail asking him to grant her access to the grievance procedure. While it was this Department's intent that a grievant appeal management's denial of access by checking the appropriate box on the Form A, failure to do so does not constitute noncompliance with the grievance process when, as is the case here, the grievant submitted an *written request* to the agency head clearly asking that he make a determination on access. Accordingly, this Department concludes that the grievant has complied with the grievance process provisions on appealing an agency's access decision.⁶ This Department's rulings on matters of compliance are final and nonappealable.⁷

⁵ *Grievance Procedure Manual*, § 2.3.

⁶ We note this is not a case where the grievant's intent was unambiguously stated on the Form A and then she later attempted to change that statement. See EDR Ruling # 2004-696. In Ruling # 2004-696, the grievant, at the conclusion of her second management resolution step, unambiguously checked the box on her Grievance Form A that reads "I conclude my grievance and am returning it to the Human Resources Office." The grievant later claimed that she had made a mistake and that she intended instead to advance the grievance to the next step rather than conclude it. We ruled that we could only rely on the plain language of the Grievance Form A in determining the intent of the party. In contrast, however, in the

Based on this Department's conclusion, the next step in the grievance process would generally be for the agency head to provide a written response to the grievant's access appeal(s).⁸ However, in this case, the agency is seeking an access ruling from this Department in both the grievant's September 8 and September 23, 2005 grievances. Accordingly, although the agency head has not expressly denied the grievant access in either her September 8th or September 23rd grievance, this Department will deem the agency's request for an access ruling from this Department as an implicit denial of access by the agency head and will rule on whether the grievant has access to the grievance procedure in her September 8 and September 23, 2005 grievances.

Access

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)."⁹ Thus, once an employee has been terminated or involuntarily separated 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 or involuntary separation. A terminated or involuntarily separated employee does not have access to the grievance procedure for agency actions that did not directly result in his or her termination or involuntary separation.¹⁰

September 8, 2005 Grievance

In this case, it is undisputed that the grievant was no longer an employee of the Commonwealth of Virginia when she initiated her September 8, 2005 grievance challenging an August 24, 2005 Group II Written Notice.¹¹ However, the August 24, 2005 Group II Written Notice was relied upon by the agency to justify termination of the grievant's employment. More specifically, the grievant was issued a Group II Written

present case, the grievant has not expressed an unambiguous intent on the Form A that she was not appealing management's access decision or otherwise concluding her grievance. Indeed, her Form A asked that the grievance be advanced to the third step and qualified for hearing, which was entirely consistent with her email requesting an appeal of management's access determination.

⁷ See Va. Code § 2.2-1001(5).

⁸ See *Grievance Procedure Manual* § 2.3.

⁹ *Grievance Procedure Manual* § 2.3 (emphasis added).

¹⁰ See EDR Ruling Nos. 2005-961, 2005-962, 2005-963, 2005-964, 2005-965 (finding that grievant did not have access after termination to pursue allegations regarding an arbitrary and capricious performance evaluation and four related Notices of Improvement Needed). See also 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).

¹¹ The grievant was terminated from her employment with the Commonwealth of Virginia on September 1, 2005.

Notice with termination on September 1, 2005. In a memorandum accompanying the September 1st disciplinary notice, the agency asserts that its termination decision was based upon the charges outlined in the September 1, 2005 Group II Written Notice plus the grievant's receipt of a Group I Written Notice in August of 2004 as well as the August 24, 2005 Group II Written Notice. Accordingly, the agency appears to have relied upon, and more importantly, under policy *had* to rely upon, the August 24, 2005 Group II Written Notice in justifying termination of the grievant's employment with VDH.¹² As such, the August 24, 2005 Group II Written Notice directly resulted in the grievant's termination. Accordingly, this Department concludes that the grievant has access to the grievance procedure in her September 8, 2005 grievance.

The grievant was denied access to the grievance procedure in her September 8th grievance at the second management resolution step of the grievance process. And although the grievant had a face-to-face meeting with the second step-respondent, it does not appear that this meeting constituted a second step meeting as defined under the grievance procedure.¹³ In particular, there appears to have been no fact-finding but rather, the second step-respondent appears to have merely informed the grievant that she did not have access to the grievance procedure to challenge the August 24, 2005 Group II Written Notice. As such, the September 8th grievance should at this point resume with the second step-meeting. However, given the protracted nature of the September 8th grievance as well as the fact that it will automatically qualify for a hearing at the conclusion of the management resolution steps,¹⁴ the parties may agree in writing to skip any remaining steps they see fit. In the absence of such an agreement, the agency has 5 workdays from receipt of this ruling to schedule the mandated second step meeting.

September 23, 2005 Grievance

In this case, it is undisputed that the grievant was no longer an employee of the Commonwealth of Virginia when she initiated her September 23, 2005 grievance challenging the August 26, 2005 "Due Process Memorandum." While the grievant had access to the grievance procedure to challenge her termination, and in fact has done so, she did not have access to the grievance procedure, after her termination or involuntary separation, to challenge the "Due Process Memorandum." That is because the "Due Process Memorandum" itself did not directly result in her termination or involuntary separation; rather, the accumulation of disciplinary notices did. Accordingly, this

¹² A Group II Written Notice alone may not be used to terminate an employee. Rather, "[t]he normal disciplinary action for a Group II offense is issuance of a Written Notice only, or a Written Notice and up to ten workdays of suspension without pay." DHRM Policy 1.60, VII(D)(2)(a). However, a Group II Written Notice may result in termination if the employee has an existing active Group II Written Notice in her personnel file or three active Group I Written Notices in her personnel file. See DHRM Policy 1.60, VII(D)(2)(b)(1).

¹³ See *Grievance Procedure Manual* § 3.2.

¹⁴ See *Grievance Procedure Manual* § 4.1(a) (grievances challenging formal discipline automatically qualify for a hearing).

Department concludes that the grievant did not have access to the grievance procedure when she initiated her September 23, 2005 grievance.¹⁵

Given this Department's decision that the grievant does not have access to the grievance procedure in her September 23, 2005 grievance, it is unnecessary to address the agency's remaining claim that the grievant's September 23, 2005 grievance duplicates her later September 30, 2005 grievance.

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 to circuit court the determination that she does not have access to the grievance procedure with respect to her September 23, 2005 grievance, she should notify the Human Resources Office, in writing, within five workdays of receipt of this ruling.

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Director

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¹⁵ We note that by denying the grievant access to the grievance procedure to challenge the August 26, 2005 "Due Process Memorandum," this ruling in no way limits the grievant's ability to proffer evidence at her termination hearing to challenge agency claims outlined in that "Due Process Notice." The hearing officer has the ultimate authority and duty to determine whether to admit or exclude any particular piece of evidence the grievant proffers at hearing, and he must admit probative evidence and exclude only irrelevant, immaterial, insubstantial, privileged or repetitive evidence. *See* Va. Code § 2.2-3005 (C). Moreover, 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 she wishes to challenge, correct or explain information contained in her 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 her 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).