

Issue: Access/to the grievance procedure; Compliance/step respondent; Ruling Date: January 20, 2006; Ruling #2006-1217; Agency: Norfolk State University; Outcome: access denied; agency in compliance



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

**ACCESS AND COMPLIANCE RULING OF DIRECTOR**

In the matter of Norfolk State University

Ruling No. 2006-1217

January 20, 2006

The grievant has requested a ruling on whether she had access to the grievance procedure when she initiated her November 26, 2005 grievance with Norfolk State University (NSU or the university). Additionally, the grievant claims that the university has failed to comply with the grievance procedure and seeks a compliance ruling from this Department.

FACTS

On October 27, 2005, the grievant was presented with her annual performance evaluation for 2005, which documented an overall rating of "Below Contributor." Thereafter, on November 4, 2005, the grievant was presented with a letter stating the university's intent to issue her a written notice and terminate her employment effective November 11, 2005. Prior to the effective date of termination however the grievant allegedly submitted an application for retirement with a retirement effective date of November 1, 2005. On November 11, 2005, the grievant was issued a Group II Written Notice with termination for failure to follow her supervisor's instructions and perform assigned work.

On November 26, 2005, the grievant challenged her 2005 performance evaluation by initiating a grievance. By letter dated December 5, 2005, the university's human resource director denied the grievant access to the grievance procedure to challenge her 2005 performance evaluation because she was no longer an employee of the Commonwealth of Virginia at the time she initiated her November 26, 2005 grievance. On December 8, 2005, the grievant requested that the agency head grant her access to the grievance procedure and cited the university with noncompliance because (1) the second step-respondent did not conduct the required second step meeting and respond to the grievance in a timely manner; and (2) the human resources director, not the designated second step-respondent, responded to the grievant's November 26, 2005 grievance. By letter dated December 14, 2005, the agency head agreed with the human resources director and denied the grievant access to the grievance procedure. The agency head's December 14<sup>th</sup> letter does not address the grievant's claims of noncompliance.

DISCUSSION

*Compliance*

According to the grievance procedure, agency management may deny an employee access to the grievance procedure at any point following receipt of a written grievance and if access is denied, the employee may ask the agency head to grant her access.<sup>1</sup>

Although initially denied access by the human resources director, who is not generally considered agency management, the grievant was subsequently denied access to the grievance procedure by agency management (i.e., the agency head). As such, this Department concludes that the grievant's claim that the university failed to comply with the grievance procedure when the human resources director responded to her November 26, 2005 grievance rather than the designated second step-respondent is now moot due to the agency head's access determination.

This Department's rulings on matters of compliance are final and nonappealable.<sup>2</sup>

### *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)."<sup>3</sup> 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.<sup>4</sup>

In this case, it is undisputed that whether through her retirement effective November 1<sup>st</sup> or her November 11<sup>th</sup> termination, the grievant was no longer an employee of the Commonwealth of Virginia when she initiated her November 26, 2005 grievance challenging her 2005 performance evaluation. 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 her performance evaluation, because although the grievant was terminated, in part, for poor performance, the 2005 performance evaluation itself was not the basis of her termination or involuntary separation, rather, a disciplinary notice was. Accordingly, this Department concludes that the grievant did not have access to the grievance procedure when she initiated her November 26, 2005 grievance.<sup>5</sup>

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<sup>1</sup> See *Grievance Procedure Manual* § 2.3.

<sup>2</sup> See Va. Code § 2.2-1001(5).

<sup>3</sup> *Grievance Procedure Manual* § 2.3 (emphasis added).

<sup>4</sup> 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).

<sup>5</sup> 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

We note that by denying the grievant access to the grievance procedure to challenge her 2005 performance evaluation, this ruling in no way limits the grievant's ability to proffer evidence at her termination hearing to challenge agency claims regarding her job performance. Because the grievant was essentially issued a disciplinary notice and terminated for alleged poor performance (failure to follow her supervisor's instructions and perform assigned work), she is entitled to seek admission of any evidence that she believes is relevant to agency claims regarding her work, as cited in the November 11, 2005 Group II Written Notice. In addition, this ruling does not preclude the grievant from seeking to introduce evidence at hearing relating to any of her performance evaluations for purposes such as background evidence or impeachment. 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.<sup>6</sup>

#### 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 she does not have access to the grievance procedure to circuit court, she should notify the Human Resources Office, in writing, within five workdays of receipt of this ruling.

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Claudia T. Farr  
Director

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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).

<sup>6</sup> See Va. Code § 2.2-3005 (C).