

Issue: Compliance Ruling/Reconsideration request of Ruling #2006-1166; Ruling Date: January 9, 2006; Ruling #2006-1231; Agency: Department of Corrections; Outcome: EDR will not disturb its earlier ruling



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
COMPLIANCE RULING OF THE DIRECTOR

In the matter of Department of Corrections

No. 2006-1231

January 6, 2006

The Department of Corrections (DOC or agency) has requested that this Department (EDR) reconsider its November 28, 2005 decision in Ruling Number 2006-1166. For the reasons set forth below, this Department will not disturb its earlier ruling.

FACTS

The grievant served as a Deputy Chief Probation & Parole Officer with DOC. The grievant claimed that as a result of a serious health condition, he had been placed into long-term disability (LTD) on April 13, 2005. He further asserted that he was released to return to work on July 5, 2005, but was instructed by management not to return at that time. He claims 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, asserted that the grievant was informed, on June 14, 2005, 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 14, 2005.

This Department ruled that the event that formed the basis of the grievance was the grievant's separation from employment, which occurred when he was moved into LTD. We noted, however, that while the grievant may have known, on or about June 15, 2005, that he had been moved into LTD, DOC did not unequivocally inform him that he had been separated from employment until August 17, 2005. August 17th was the date that the grievant's 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. Thus, this Department concluded that 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 was therefore timely. [tab 2]

DISCUSSION

The agency has requested that this Department reconsider its decision on the basis that it is purportedly inconsistent with prior EDR rulings and the Department of Human

Resources Management (DHRM) policy. For the reasons set forth below, this Department disagrees.

The agency asserts that “we have received two prior rulings in which your office addressed access to the grievance procedure while on Long Term Disability (LTD)” and that in these rulings it was “clear that DHRM . . . has stated that because an employee on LTD is not guaranteed reinstatement to his/her former position, it considers the employee ‘separated’ from his/her position upon being placed on LTD.” The agency further states that it informed the grievant on several occasions prior to the August 17, 2005 letter that he had been placed on LTD.

First, this Department agrees with the premise that DHRM generally considers an employee who has been placed in LTD as separated from employment. However, DHRM recently clarified that it considers an employee who has been placed in LTD separated from employment only *if the employee has been informed that his position is not being held open for his return*. Conversely, when the employee is informed that his position is being held, the employee is *not* considered separated when he enters LTD. Thus, because an employee’s actual status (separated or not) appears to hinge largely on whether the employee’s position is being held open, it is crucial that the agency unequivocally inform the employee whether the position is being held.

Moreover, for purposes of triggering the grievance procedure’s 30 calendar day time period for filing a grievance, merely informing an employee that his position has not been held open does not provide him with adequate notice that he has been separated from employment. Although DHRM considers such an employee separated from state service when he moves into LTD, unambiguous notice that his employment has terminated is required to ascertain when the employee “knew or should have known” that his employment was terminated if the agency intends to challenge LTD separation grievances on the basis of untimeliness.

In this case, the agency first provided unambiguous notice of the grievant’s separated employment status in the August 17th letter.¹ Then, and only then, did the 30-day grievance timeframe begin to run.

The agency asserts that the potential impact EDR ruling 2006-1166 may have on future separations is great. The agency explains that if the “[grievant’s] attorney had written [the agency] eight months after the start of [the grievant’s] LTD, this ruling would have allowed him access to the grievance process at that point.” That assertion would be correct only if the grievant first received, eight months later, the first unambiguous notice that as a consequence of his movement into LTD, and the agency’s decision not to hold his job, his employment with the Commonwealth had terminated. If

¹ The August 17th letter stated that “Once [the grievant] was placed on long-term disability, he was separated from the Department of Corrections, in accordance with state policy.” This was the only document provided to this Department that clearly informed the grievant that his employment with DOC ended when he was placed in LTD.

such notice is provided to the employee at the same time he moves into LTD, the employee has 30 calendar days from that notice and movement into LTD during which he can grieve his LTD separation. Subsequent correspondence from an attorney or anyone else would do nothing to extend that 30-day time frame.

The critical point is that 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.² Until the agency clearly informs an employee that his employment with the Commonwealth has ended due to movement into LTD, the employee cannot be deemed to know of the event that forms the basis of his grievance—his separation from employment. To avoid the concern raised by the agency (having to deal with grievances initiated long after an employee has moved into LTD), an agency need only (1) inform the employee, clearly and unambiguously, when he moves into LTD whether his position is being held open, and if the position is not being held open, (2) notify the employee that his employment with the Commonwealth has ended as a consequence of moving into LTD.³

This Department's rulings on matters of compliance are final and nonappealable.⁴

Claudia T. Farr
Director

² Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4(1).

³ As pointed out in Ruling 2006-1166, the agency did not provide clear and unambiguous information on the status of the grievant's position when he moved into LTD. 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. As pointed out in Ruling 2006-1166, 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.

⁴ See Va. Code § 2.2-1001(5).