

Issue: Compliance/resolution steps/other grievance procedure; Ruling Date: March 2, 2006; Ruling #2006-1263; Agency: Virginia Community College System; Outcome: agency not in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Danville Community College
Ruling Number 2006-1263
March 2, 2006

Danville Community College (DCC or the agency) has requested a compliance ruling in the grievant's December 29, 2005 grievance.

FACTS

The grievant was employed as an administrative assistant in a "One Stop Center" located on the campus of DCC. At the time of the grievant's employment at the Center, Southside Works Consortium was the Center's "operator." The Consortium was selected as the operator of the one stop system by the Region XVII Workforce Investment Board. The Consortium is an organization of approximately 14 "partner" entities, who work together to provide workforce services to Danville, Martinsville, and Henry, Patrick and Pittsylvania counties under the provisions of the Workforce Investment Act. DCC is a member of the Consortium and was the fiscal agent for the One Stop Center at the time of the grievant's employment. The One Stop Center was operated by the Consortium on DCC's campus until January 13, 2006. The Center subsequently moved to another location and came under a new operator and fiscal agent.

DCC states that on or about December 22, 2005, the grievant was "released" from her employment at the One Stop Center by the Consortium's Program Director¹, at the direction of the Workforce Investment Board's President. The grievant subsequently initiated a grievance on December 29, 2005 challenging her termination. In her Grievance Form A, the grievant identified her employing agencies as the Workforce Investment Board, the Workforce Investment Act and the One Stop Center; she identified DCC as the facility at which she was employed. DCC has requested a compliance ruling to determine the proper agency to respond to the grievant and the appropriate step-respondents.

¹ The Program Director is an employee of the Department of Rehabilitative Services (DRS). DRS is also a member of the Southside Works Consortium.

DISCUSSION

Under the *Grievance Procedure Manual*, a grievance must arise in the agency in which the employee works.² This Department has long held that this provision requires an employee to initiate her grievance with her employing agency.³ Courts, relying upon the common law principles of agency, consider several factors in determining an employee's employment status.⁴ Although not dispositive for purposes of the grievance procedure, the courts' analysis of a party's employment status is nevertheless helpful and instructive for determining the grievant's employing agency in this case.

Under the facts presented here, the employing agency appears to be DCC. While DCC asserts that it was not the grievant's employer because it was not the operator of the One Stop Center, the agency admits that the grievant was listed on PMIS as a restricted classified employee "through" DCC; that the grievant was on DCC's payroll (although DCC received reimbursement from the Board); that the grievant's work was performed at a facility owned by DCC and with resources largely, if not entirely, provided by DCC; that the grievant's immediate supervisor was also a restricted classified employee "employed at" DCC; that DCC issued end-of-the year tax documentation to the grievant; and that DCC "would normally" have had the authority to hire and fire the grievant.⁵ Further, the Memorandum of Understanding between the Consortium and DCC, as fiscal agent, characterizes One Stop employees as employees of DCC.⁶ In contrast, the Consortium—which DCC argues was the grievant's employer—asserts that it does not have any employees and appears to be merely a fairly loosely organized group of approximately 14 partners, including DCC.⁷ For all these reasons, we find that for purposes of the grievance procedure only, the grievant's employing agency is DCC.

² *Grievance Procedure Manual* § 2.4(2).

³ See EDR Ruling No. 2006-1100 (recognizing a limited exception, not applicable here, for grievances against a former employing agency); EDR Ruling No. 2006-1101 (same); EDR Ruling No. 2003-530.

⁴ See *Atkins v. Computer Sciences Corporation*, 264 F. Supp. 2d 404 (E.D. Va. 2003) (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989)). ("[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in the business; the provision of employee benefits; and the tax treatment of the hired party.")

⁵ DCC's Human Resource Officer states that she was not aware of the grievant's dismissal until January 9, 2006.

⁶ Section VIII.B of the Memorandum of Understanding states that "all employees of Danville Community College, including Virginia Workforce Center employees, will operate by the College Grievance Procedure as stated in the Danville Community College Policy Manual. . . ."

⁷ In a telephone interview conducted as part of our investigation, the Chair of the Southside Consortium stated that those individuals working at the One Stop Center during its operation by the Consortium were employed by DCC.

Consequently, the grievant's designated management resolution step-respondents should be employees of DCC. In this case, the grievant's immediate supervisor's employment with DCC was terminated when the agency's relationship with the One Stop Center ended. Moreover, the grievance involves a loss of pay, which would have allowed the grievant to utilize the expedited grievance procedure (although the grievant did not elect to use this procedure).⁸ In light of these circumstances, this Department deems it appropriate for the first and second resolution steps to be collapsed, with the agency's second-step respondent (the vice president) conducting a second-step meeting and providing the grievant with a combined first- and second-step response. If the grievance is still unresolved following this response, the grievant may elect to proceed to the third resolution step (with the agency's designated third-step respondent).

Accordingly, unless otherwise waived in accordance with the grievance procedure, the parties are instructed to conduct a face-to-face meeting, and within five workdays of such meeting, the second-step respondent shall provide the grievant with a written response.⁹ Within five workdays of receipt of the second-step response, the grievant shall indicate on Form A whether or not she elects to proceed with her grievance and advance her grievance to the third-step respondent.

This Department's rulings on matters of compliance are final and nonappealable.¹⁰

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⁸ See *Grievance Procedure Manual*

⁹ See *Grievance Procedure Manual* § 3.2. If the grievant does not wish to proceed with her grievance in light of this Department's determination that DCC is her employing agency, she may conclude the grievance by notifying DCC's Human Resources Department in writing.

¹⁰ Va. Code § 2.2-1001(5).