

Issues: Access and Compliance: Grievance Procedure – 30-day rule; Ruling Date: April 16, 2007; Ruling #2007-1570; Agency: Virginia Information Technologies Agency; Outcome: No Access; Grievant in compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS AND COMPLIANCE RULING OF DIRECTOR

In the matter of Virginia Information Technologies Agency
Ruling Number 2007-1570
April 16, 2007

The grievant has requested a compliance ruling pertaining to her February 12, 2007 grievance.¹ The Virginia Information Technologies Information (VITA or the agency) asserts that the grievant did not initiate her grievance within the 30-calendar day time period required by the grievance procedure and seeks to administratively close the grievance. For the reasons discussed below, this grievance is timely. However, because the grievant was separated from state employment on January 18, 2007, she did not have access to the grievance process to challenge her performance evaluation.

FACTS

The grievant worked for the agency as an IT Specialist II. The grievant entered into Short Term Disability (STD) on July 27, 2006. During this period of STD, the grievant asserts that she remained in contact with her immediate supervisor. In December, after not receiving an anticipated General Assembly awarded pay increase, the grievant contacted the agency's Human Resource (HR) Office to find out why she had not. On December 20, 2006, HR informed the grievant that she had not received an increase because her performance evaluation rating was "Below Contributor." The grievant was further informed that she had not been provided with her evaluation because she had not been at work. At the grievant's request, the HR Office e-mailed the grievant a copy of her evaluation.

On December 28, 2006 the grievant again e-mailed the HR Office seeking clarification regarding her performance rating.² In the January 3, 2007 response to the

¹ The grievant signed and dated the grievance February 9, 2007, but the grievance was not received by the agency until February 12, 2007.

² The grievant apparently did not contact the HR office until December 28th because the HR professional that she had been communicating with had informed her that she would be out of the office because of the holidays until December 28th.

grievant's inquiry, the HR Office noted that that if she was dissatisfied with her evaluation, she could contest it through the grievance process.

On January 10, 2007, the grievant wrote the HR office, essentially challenging her evaluation. She pointed out that: (1) she had remained in touch with the immediate supervisor to whom she had been assigned just before entering STD, (2) she did not know when the individual listed on the evaluation had become her immediate supervisor,³ and (3) she "had no idea who [the reviewer] is." She added that she "would certainly like to hear from them, or speak with them to see what facts they based [her] appraisal on and why [she] did not have the opportunity to go through the same evaluation process as the rest of [her] coworkers [sic]." The agency does not appear to have responded to the grievant's concerns over her performance rating.

On January 18, 2007 the grievant transitioned into Long-Term Disability.

DISCUSSION

Compliance-30 days

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.⁴ 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. In addition, this Department has held that when an employee has initiated a timely appeal of her performance evaluation under agency policy, that appeal essentially renders the initial evaluation a preliminary rather than a final decision. Thus, when an employee timely appeals his evaluation under agency policy, the 30-day period to initiate a grievance is extended until the agency has taken final action on the appeal.⁵ For the reasons set forth below we believe it reasonable to conclude that the grievant timely appealed her evaluation and is still awaiting a final response to her appeal. Thus, the 30-day period was effectively stayed.

We begin by noting that according to the HR Office, the agency does not have its own policy addressing appeals of performance evaluations. Rather it relies on the Department of Human Resource Management (DHRM) Policy 1.40 which states that: "If an employee disagrees with an evaluation and cannot resolve the disagreement with the

³ The person who appeared on the evaluation form as the supervisor, Ms. C., was not the same individual that the grievant asserts she was assigned to just before she left in July and with whom the grievant asserted that she had maintained e-mail contact, Mr. G.

⁴ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4 (1).

⁵ EDR Ruling Nos. 2007-1512 and 2004-920. Accordingly, if an agency fails to take action on the grievant's appeal, the 30-day period to challenge the agency's final action may be stayed indefinitely, until such time as the agency chooses to act.

supervisor, the employee may appeal to the reviewer for another review of the evaluation.”⁶ Here, the grievant presented her concerns not directly to her immediate supervisor but to the HR Office. Given the particular circumstances of this case, the grievant’s decision to present her concerns to the HR Office rather than her supervisor is understandable. The grievant had not worked since July 27, 2006, when she went into Short-Term Disability (STD). Just prior to moving into STD, the grievant had purportedly been assigned a new supervisor (i.e. Mr. G.) with whom she asserts she maintained e-mail contact. However, the person named on her evaluation as her supervisor was not Mr. G., but rather Ms. C. In addition, the grievant pointed out in her January 10th e-mail that while she had been assigned to Mr. G. just prior to leaving in July, she had actually been working for Mr. C and Mr. R. Thus, it would appear reasonable for the grievant to have sought clarification from HR regarding just who she should direct her appeal, or in the alternative, expect HR to forward her concerns to the appropriate individual. Neither appears to have occurred. Moreover, it is clear that the grievant intended to challenge her evaluation, noting the purportedly “many untrue statements on [her] appraisal” and her desire to hear from those who rated her. Thus, because it appears that the grievant did not receive any clear indication of what final action the agency would take in response to her appeal, the 30-day grievance initiation was stayed at least, as discussed below, until the grievant moved into Long Term Disability (LTD).

Access

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.⁷ Under the grievance procedure, employees “[m]ust have been employed by the Commonwealth at the time the grievance is initiated (unless the action grieved is a termination or involuntary separation).”⁸ Furthermore, 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.

The grievant moved into LTD on January 18, 2007 and the agency did not hold her job open for her. Therefore, as of January 18, 2007, the grievant was separated from state service and the only issue that the grievant could grieve was her involuntary separation from state service. Accordingly, because of her movement into LTD on January 18th and her separation of employment, the grievant no longer had access to the

⁶ Policy 1.40 further states that “Agencies may develop their own appeals process for reconsideration of employee evaluations,” and that “[t]he appeals process should be documented within the Agency Salary Administration Plan.” Any appeal process must provide for the appeal to be made in writing to the reviewer within 10 workdays of the initial performance meeting.

⁷ Va. Code § 2.2-3001(A).

⁸ *Grievance Procedure Manual* § 2.3.

grievance process to challenge her performance evaluation when she initiated her February 12, 2007 grievance.

CONCLUSION

For the reasons discussed above, this Department has determined that this grievance was filed within the 30-calendar day period and is timely; however, for the reasons set forth above, the grievant did not have access to the grievance process to challenge her performance evaluation. 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.⁹

Claudia T. Farr
Director

⁹ Id.