

Issue: Access to the grievance procedure; Ruling Date: August 2, 2006; Ruling #2007-1401; Agency: Northern Virginia Community College (Virginia Community College System); Outcome: access denied.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR
In the matter of Northern Virginia Community College
Ruling No. 2007-1401
August 2, 2006

Northern Virginia Community College (NVCC or the agency) has requested the appointment of a hearing officer for the grievant's June 12, 2006 grievance. For the reasons stated below, this Department finds that the grievant lacks access to the grievance procedure and therefore denies the agency's request for appointment.

FACTS

The grievant is a former employee of NVCC. She was removed from employment effective December 19, 2005, after receiving three Group II Written Notices.¹ The grievant subsequently grieved the disciplinary actions, as well as her 2005 performance evaluation.² A hearing was held on the grievances on March 30, 2006.³

In his April 21, 2006 hearing decision, the hearing officer reduced two of the Written Notices, upheld the third, and ordered the agency to reinstate the grievant with back pay.⁴ On April 24, 2006, NVCC asked this Department to temporarily stay the hearing officer's April 21st order.⁵ In addition, on May 5, 2006, the agency sought a reconsideration decision from the hearing officer,⁶ as well as administrative reviews by this Department and the Department of Human Resource Management (DHRM).⁷ We note that a hearing officer's order is not effective until the conclusion of any administrative reviews and judicial appeal.⁸

On May 18, 2005, while the administrative reviews were pending, and prior to implementation of the hearing decision's order of reinstatement, the agency formally

¹ Hearing Decision in Case No. 8299/8300/8301/8302 ("Hearing Decision") at 1-2, 5-7.

² *Id.* at 1.

³ *Id.*

⁴ *Id.* at 10. The hearing officer also ordered the agency to revise the grievant's performance evaluation.

⁵ See EDR Ruling No. 2006-1341.

⁶ In his May 10, 2006 reconsideration decision, the hearing officer found that "[t]he Agency's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the Agency's request for reconsideration is **denied.**"

⁷ See EDR Ruling No. 2006-1341.

⁸ Va. Code §2.2-3006(C).

issued a Group III Written Notice to the grievant for allegedly “falsifying official state documents.” On June 12, 2006, the grievant initiated a grievance challenging the disciplinary action.⁹ After the parties failed to resolve the grievance during the management resolution steps, the agency qualified the grievance for hearing and requested the appointment of a hearing officer.

DISCUSSION

To have access to the grievance procedure, a state employee must: (1) not be listed as exempt from the Virginia Personnel Act under § 2.2-2905 of the Code of Virginia; (2) have been non-probationary at the time the event that formed the basis of the dispute occurred; (3) *and* have been employed at the time the grievance was initiated (unless the action grieved is a termination or involuntary separation, in which case the employee may initiate a grievance within 30 days of the termination or separation).¹⁰ These access requirements may not be waived or modified by the parties.

The grievant was not employed by the agency or the Commonwealth at the time she received the Group III Written Notice or at the time her grievance was initiated. As a consequence, she would have access to the grievance procedure only if the Group III directly resulted in her termination or involuntary separation.¹¹

That is not the case, however. Because the Group III was issued after the grievant’s termination by the agency, and before any reinstatement, it did not result in her termination or involuntary separation. Moreover, we have been advised by the Department of Human Resource Management (DHRM), the agency charged with developing and interpreting policies affecting state employees,¹² that DHRM Policy 1.60, “Standards of Conduct,” does not apply to former employees, and therefore a Written Notice should not be issued to an individual no longer employed by the state. As a result, it would appear that the Group III was null and void upon its issuance and had no effect on the grievant’s status.¹³ Accordingly, this Department concludes that the grievant did not have access to the grievance procedure when she initiated her June 12, 2006 grievance.

⁹ The grievant’s attorney signed the grievance on behalf of the grievant on June 12, 2006; the grievance was apparently received by the second-step respondent on June 13, 2006. As the grievant was not employed by the agency or the Commonwealth on either of these dates, it is unnecessary to determine the date on which the grievance was actually submitted.

¹⁰ *Grievance Procedure Manual* § 2.3 (emphasis added).

¹¹ See, e.g., EDR Ruling Nos. 2005-961, 2005-962, 2005-963, 2005-964, 2005-965, EDR Ruling No. 2005-1026.

¹² Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

¹³ We note, however, that if the grievant is subsequently reinstated and terminated for the conduct charged in the May 18th Written Notice, she would have access to the grievance procedure to challenge that disciplinary action.

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.

Claudia T. Farr
Director