Issue: Access/access to state grievance procedure; Ruling Date: December 20, 2006; Ruling #2007-1499; Agency: Virginia Indigent Defense Commission; Outcome: no access to state grievance procedure

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of Virginia Indigent Defense Commission
Ruling Number 2007-1499
December 20, 2006

The grievant has requested a ruling on whether she has access to the Commonwealth's grievance procedure (Va. Code §§ 2.2-3000, et seq.) as an employee of the Virginia Indigent Defense Commission (VIDC or the Commission). For the reasons set forth below, this Department concludes that based on the particular facts of this case, access to the Commonwealth's grievance procedure cannot be granted.

FACTS

On November 7, 2006, the grievant's supervisor told the grievant that she would be terminated effective December 9, 2006. The grievant filed a Grievance Form A on November 8, 2006.[1] She also submitted a grievance form on November 9, 2006, pursuant to the VIDC's internal grievance procedure. The VIDC handled the latter grievance in accordance with its own internal grievance procedure, and at no time has the Commission responded to the Grievance Form A. The Deputy Director of the VIDC addressed the merits of the internal grievance and found that the grievant's claims were not grievable and that she had not alleged facts showing an improper termination. The VIDC Director agreed and concluded the internal grievance pursuant to VIDC policy. Thereafter, the grievant sought this Department's determination as to whether she has access to challenge her termination under the Commonwealth's state employee grievance procedure established under Title 2.2, Chapter 30 of the Code of Virginia, which this Department administers.

DISCUSSION

This ruling request presents an issue that this Department has not previously addressed: whether nonprobationary employees of the VIDC have access to the Commonwealth's grievance procedure. Because of the particular facts of this case, however, that broader issue need not be decided. Here, the VIDC has already reviewed the grievant's internal grievance contesting her termination in a manner similar to that

[1] The Grievance Form A is the form that must be used to initiate a grievance under the state employee grievance procedure administered by the Department of Employment Dispute Resolution. *Grievance Procedure Manual* § 2.4.

afforded by the management steps of the Commonwealth's grievance procedure. Moreover, even if the grievant had access to the Commonwealth's grievance procedure, there is no basis on which a hearing officer could grant the grievant any effectual relief.

Management Review Already Provided

If this Department determines that an employee has access to the Commonwealth's grievance procedure, the employee's agency would be required to address the grievance at increasing levels of management review, in accordance with the grievance procedure.[2] In this case, however, the grievant has already received such management review by the VIDC's Deputy Director and Director. A different order of management review would not be warranted given the grievant's intention to pursue an expedited grievance.[3] Consequently, the grievant has had her grievance addressed by the appropriate managers, effectively -- if not identically -- in accordance with the management steps portion of the Commonwealth's grievance procedure. As such, any ruling from this Department giving the grievant access to the Commonwealth's grievance procedure would result in the VIDC simply repeating what its Deputy Director and Director have already done, with respect to the agency review process.

Grievance Would Not Qualify For Hearing

Even if access to the Commonwealth's grievance procedure existed, this grievance does not present sufficient grounds to qualify for a hearing. While terminations often qualify for hearing, the grievant in this case has not presented any evidence that would permit a hearing officer to grant her relief.

Under the VIDC's enabling statute, it has the power to "hire and employ and, *at its pleasure*, remove … such other persons as it deems necessary."[4] The italicized statutory language provides that VIDC employees are "at will."[5] Moreover, the VIDC employee handbook provides that "Commission employees are employees at will." Therefore, it does not appear that the grievant's employment is restricted to termination only for good cause, and no evidence has been presented to the contrary. Nor has the

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[2] *Grievance Procedure Manual* § 3.

[3] Under the expedited process in grievances alleging termination, there is a single review by one management step respondent (normally the second-resolution step respondent) and then a determination by the agency head as to whether the grievance qualifies for hearing. *Grievance Procedure Manual* § 2.4.

[4] Va. Code § 19.2-163.01(8) (emphasis added).

[5] At-will employment generally means that an employee may be terminated for any reason upon reasonable notice. *E.g.,* Progress Printing Co. v. Nichols, 244 Va. 337, 340, 421 S.E.2d 428, 429 (1992). The grievant in this case indicated that her supervisor wrote prior to employment, "I would like for you to enroll in DOA's beginning payroll classes after you've worked with me in this area for at least 3-6 months depending on how quickly you learn." However, this statement does not alter the grievant's at-will employment status. The presumption of at-will employment may be rebutted by evidence showing that the "employment is for a definite, rather than indefinite, term." *Id.* The grievant's supervisor's comments do not establish a definite term of employment, and are even expressly contingent upon "how quickly" she learns.

grievant presented evidence that there was any unlawful basis for her termination.[6] Rather, she has stated that her supervisor chose to terminate her based on work-related reasons.

This Department has long held that qualifying a grievance for hearing is inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.[7] This is such a case. Hearing decisions "must be consistent with law and policy."[8] Given the grievant's at will status and the claims alleged, there is no effectual relief that a hearing officer could provide under law or policy.

CONCLUSION

For all the above reasons, this Department concludes that the grievant in this case does not have access to the state employee grievance procedure established under Title 2.2, Chapter 30 of the Code of Virginia. 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 to circuit court the determination that she does not have access to the grievance procedure, she should notify the VIDC, in writing, within five workdays of receipt of this ruling.

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Claudia T. Farr
Director

[6] Even at-will employees may not be terminated for unlawful reasons such as discrimination or retaliation under Title VII of the Civil Rights Act and other similar statutes. While the grievant has suggested that she may have been discriminated against based on her age, she has not shown any evidence that would raise a sufficient question as to this issue such that would qualify her grievance for a hearing. To qualify a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. The grievant's only argument is that her supervisor called her "kiddo" on occasion. Mere speculation without any supporting evidence is not sufficient grounds to warrant a hearing. *See, e.g.,* Grayton v. Shalala, No. 96-1562, 1997 U.S. App. LEXIS 7161, at *3 (4th Cir. 1997); *see also* Causey v. Balog, 162 F.3d 795, 802 (4th Cir. 1998) ("[C]onclusory statements, without specific evidentiary support, cannot support an actionable claim."); Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985) ("[A] genuine issue of material fact [cannot be created] through mere speculation or the building of one inference upon another."). There is no evidence that the termination decision was based on age-related discrimination.

[7] *E.g.,* EDR Ruling No. 2007-1405; EDR Ruling No. 2006-1309; EDR Ruling No. 2006-1090.

[8] *Grievance Procedure Manual* § 7.1.