

Issue: Compliance/Grievance Procedure/30 day rule; Access/Grievance  
Procedure/access; Ruling Date: February 15, 2007; Ruling #2007-1529, 2007-1543;  
Agency: Department of Mental Health, Mental Retardation and Substance Services;  
Outcome: grievant not in compliance with compliance issue, grievant has access



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

ACCESS AND COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Mental Health Mental Retardation  
and Substance Abuse Services  
Ruling Number 2007-1529, 1543  
February 15, 2007

The grievant has requested rulings on whether he was compliant with and had access to the grievance procedure when he initiated his two December 1, 2006 grievances with the Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency). The agency objects to the grievances on the basis of timeliness and that the grievant was not employed by the agency when he initiated his grievances.

FACTS

The grievant was previously employed by the agency at Facility A. He asserts that on March 12, 2006, he was involved in a domestic matter outside of work that led to charges being filed against him. The grievant was found guilty of misdemeanor sexual assault but he appealed the conviction. He asserts that he informed his management at Facility A about the incident and conviction, and was subsequently allowed to continue working at Facility A. Facility A confirmed that the grievant informed management of the conviction and appeal.

The grievant applied for a position at Facility B and on August 29, 2006, the agency offered the grievant a position there, which the grievant subsequently accepted. Facility B's offer letter expressly made the offer contingent on the grievant passing a background check.

The grievant tendered a letter of resignation to the agency (Facility A) on August 28, 2006 which was accepted on September 13, 2006. The grievant's last day of employment at Facility A was October 9, 2006, and his first day of employment at Facility B was October 10, 2006.

On October 26, 2007, the grievant was verbally informed that Facility B planned to rescind its offer of employment because of a "barrier crime conviction," apparently referencing the circumstances stemming from the March 12<sup>th</sup> incident. The Human Resource Department at Facility B advised the grievant to request that Facility A allow him to rescind his resignation. Later that same day, the grievant requested that Facility A accept his request to rescind his previous resignation with Facility A. The next day, on

October 27, the grievant received a written withdrawal of Facility B's job offer. On November 3, 2006, management at Facility A informed the grievant that it would not accept his letter requesting withdrawal of his resignation.

On December 1, 2006, the grievant initiated two grievances, one with Facility B in which he challenged the agency's withdrawal of its offer of employment (Grievance B), and one with Facility A in which the grievant requested that his resignation be rescinded (Grievance A).

## DISCUSSION

### *Grievance B*

The agency objects to Grievance B on the basis of timeliness, that is, that the grievance was initiated more than 30 days beyond the event that forms the basis of the grievance. 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.<sup>1</sup> When an employee initiates a grievance beyond the 30-calendar day period without just cause,<sup>2</sup> the grievance is not in compliance with the grievance procedure, and may be administratively closed.

In the case of Grievance B, the event that formed the basis of the grievance is the agency's withdrawal of its job offer. The grievant was informed on October 26, 2006, that Facility B planned to rescind its job offer and, the following day, the grievant was presented with the formal written withdrawal of the offer. Accordingly, the grievant had 30-days from October 27, 2006 to grieve the withdrawal of the offer. Because the grievance was initiated on December 1, 2006, it is untimely. The only remaining issue is whether there was just cause for the delay.

The grievant asserts that he was advised by management to await the outcome of the court decision in his case before initiating his grievance. Assuming this to be true, however, this Department has long held employees accountable for knowing the rules regarding the grievance procedure.<sup>3</sup> The *Grievance Procedure Manual* expressly states that employees 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. Thus, even if the grievant received advice from someone in management that contradicted the *Grievance Procedure Manual*, the grievant could have contacted this Department via the toll-free AdviceLine provided in the *Manual* (as well as on this Department's website)

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<sup>1</sup> Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4(1).

<sup>2</sup> *Just cause* is defined as a reason sufficiently compelling to excuse not taking a required action in the grievance procedure. *Grievance Procedure Manual* § 9.

<sup>3</sup> See, e.g., EDR Ruling No. 2003-126R. The *Grievance Procedure Manual* is available to all state employees through this Department's website, [www.edr.virginia.gov](http://www.edr.virginia.gov). In addition, an employee may learn how to obtain a copy of the *Manual* by contacting this Department's AdviceLine or his agency's human resources department.

for clarification regarding any discrepancy between the advice given by management and the terms of the *Manual*.<sup>4</sup> However, he did not contact this Department until more than 30 days after the offer withdrawal, instead electing to rely on the guidance of management. Accordingly, we find that the advice and decision to await the final court disposition of his conviction does not rise to the level of just cause.

The grievant also asserts that he was unable to gain access to a lawyer until Thursday, November 30, 2006. Again, assuming the truth of this contention, it does not rise to the level of just cause. The grievance procedure is intended to be a process that does not require the assistance of legal counsel. While some employees may find that aid from a lawyer is helpful, it is not mandatory.<sup>5</sup> Accordingly, the inability to gain access to a lawyer within the 30-day period does not constitute just cause.

Thus, for the reasons set forth above, Grievance B is untimely and may be closed. This Department's rulings on compliance are final and nonappealable.<sup>6</sup>

#### *Grievance A*

Facility A has declined to process Grievance A, claiming that the grievant does not have access to the grievance procedure. To have access to the grievance procedure, an employee "must have been employed by the Commonwealth at the time the grievance is initiated (unless the *action grieved* is a termination or involuntary separation)."<sup>7</sup> Thus, once an employee separates from state employment, the only claim for which he or she may have access under the grievance procedure is a challenge to a termination or an involuntary separation. Employees who voluntarily resign their employment may not have access to the grievance process, depending upon the surrounding circumstances such as the nature of their claim or when the grievance is initiated. For example, this Department has long held that any grievance initiated by an employee *prior* to the effective date of a voluntary resignation may, at the employee's option, continue through the grievance process, assuming it otherwise complied with the 30-day calendar rule. On the other hand, this Department has also held that once an employee's voluntary resignation becomes effective, he or she generally may not file a grievance because the action directly resulting in the separation of employment is the grievant's own voluntary decision to resign.

The facts in this case are unique. As noted above, typically once the effective date of a resignation has passed, an employee who attempts to rescind the resignation is not granted access to the grievance procedure because the only issue an employee can grieve after termination of employment is his termination or *involuntary* separation. In

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<sup>4</sup> Indeed, the grievant reports that he contacted this Department on the same date that he initiated his grievance.

<sup>5</sup> See EDR Ruling No. 2006-1201.

<sup>6</sup> Va. Code § 2.2-1001 (5).

<sup>7</sup> *Grievance Procedure Manual* § 2.3 (emphasis added). In addition, the employee must satisfy the other requirements for access to the grievance procedure, such as non-probationary status. *Id.*

this case, however, the passing of the October 9, 2006 effective date of resignation from Facility A is of no import because the grievant's employment with the Department of Mental Health, Mental Retardation and Substance Abuse Services did not end after October 9. Indeed, he was still an agency employee, albeit at Facility B, on October 10. It was the combined actions of Facility B's rescinding its job offer and Facility A's refusal to allow the grievant to rescind his resignation that led to the grievant's job loss. Moreover, the grievant's job loss is properly viewed as an "involuntary separation" because on October 26, 2006, one day before the grievant received official notification that Facility B was rescinding its offer, the grievant requested that he be allowed to rescind his resignation at Facility A. Accordingly, under the particular facts of this case, we find that the grievant is challenging his involuntary separation and thus has access to challenge Facility A's refusal to accept his attempted withdrawal of resignation.<sup>8</sup>

### CONCLUSION

The grievant has access to continue with his grievance challenging Facility A's refusal to accept his attempt to rescind his resignation (Grievance A). Accordingly, the second-step respondent shall arrange and hold the second step meeting within 5-workdays of receipt of this ruling. The challenge to Facility B's withdrawal of its job offer (Grievance B), however, is untimely and may be administratively closed.

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Claudia T. Farr  
Director

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<sup>8</sup> While the agency did not object to Grievance A on the basis of timeliness, we hold that Grievance A was timely initiated. As discussed above, a grievance must be initiated within 30 calendar days of when the grievant knows of or should have known of the event that forms the basis of the grievance. Here, as with Grievance B, the event that forms the basis of Grievance A is the grievant's loss of employment. While this may have occurred on October 27, 2006, when Facility B informed the grievant that it was rescinding its job offer, it was not necessarily evident to the grievant that his employment with the *agency* had ended on the 27<sup>th</sup>. First, Facility B suggested to the grievant that he approach Facility A and request that he be allowed to withdraw his resignation. Moreover, Facility A concedes that in the past, it has allowed employees to rescind resignations. Thus, it was not necessarily evident to the grievant that his employment with the agency had truly ended. See EDR Ruling No. 2006-1273 (the 30-calendar day timeframe began only when the agency unequivocally informed the employee that her movement into Long Term Disability resulted in her termination of employment.) Here, the grievant knew unequivocally on November 3, 2006 that his employment with the agency had ended when Facility A informed the grievant that it would not allow him to rescind his resignation. Thus, his December 1, 2006 grievance challenge to Facility A's refusal to accept his attempted rescission was initiated within 30 calendar days.