

Issue: Access to the Grievance Procedure; Ruling Date: October 24, 2007;  
Ruling #2008-1806; Agency: Virginia Workforce Investment Board; Outcome:  
Access Denied.



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

**ACCESS RULING OF DIRECTOR**

In the matter of Southwest Virginia Workforce Investment Board  
Ruling Number 2008-1806  
October 23, 2007

The grievant has requested a compliance ruling in his grievance with the Southwest Virginia Workforce Investment Board (the Board), alleging that it has failed to respond to his grievance within five workdays. However, this ruling addresses the initial question of whether the grievant has access to the Commonwealth's grievance procedure (Va. Code §§ 2.2-3000, et seq.) at all. For the reasons set forth below, this Department concludes that the grievant does not have access to the Commonwealth's grievance procedure.

FACTS

The grievant was previously employed as the executive director of the Board. At some time in late July 2007, the grievant was terminated from his position. The grievant then submitted a grievance to challenge his termination. He has not received a response to his grievance and now seeks a compliance ruling. The grievant alleges that the Board has failed to respond to his grievance within five workdays as required by the Commonwealth's grievance procedure.

DISCUSSION

While the grievant has requested a compliance ruling, the question of whether the grievant has access to the state grievance procedure administered by this Department must be determined before an assessment of the compliance matter can be made. "Unless exempted by law, all nonprobationary state employees shall be covered by the [state] grievance procedure."<sup>1</sup> Therefore, the initial issue to determine is whether the grievant is a state employee.

The grievant was employed by the Board, which serves Workforce Investment Area One (consisting of Buchanan, Dickenson, Russell, Tazewell, Lee, Scott, and Wise Counties, and the City of Norton). The purpose of the Board is to develop an integrated

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<sup>1</sup> Va. Code § 2.2-3001(A) (emphasis added).

service delivery system for workforce development to that area. Local workforce investment boards are established by the Workforce Investment Act.<sup>2</sup> They are composed of representatives in the local area from businesses, educational entities, labor organizations, and other groups.<sup>3</sup> The Board is chosen by the chief local elected officials (CLEOs)<sup>4</sup> in the area and certified by the Governor.<sup>5</sup> During the course of the grievant's employment, the Board was being reconstituted. Therefore, while he was employed, the grievant reported to the CLEOs.<sup>6</sup>

The manner in which the Board is established and its composition indicates that if the grievant was employed by a government entity at all,<sup>7</sup> it was a local level instrumentality, not the Commonwealth. There is no evidence of any entity of the Commonwealth controlling either the Board or the grievant.<sup>8</sup> The Governor and the Virginia Workforce Council have some authority to set goals, evaluate the performance of the Board, and make recommendations for best practices.<sup>9</sup> The Governor can even decertify the Board in certain situations.<sup>10</sup> However, neither the Governor nor any other state entity have the authority to control the grievant's day-to-day employment. That was the responsibility of the Board and the CLEOs, i.e., local entities. As such, it does not appear that the grievant was a state employee for purposes of the grievance procedure.<sup>11</sup>

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<sup>2</sup> 29 U.S.C. § 2832(a). The Workforce Investment Act is a federal law enacted to "provide workforce investment activities, through statewide and local workforce investment systems, that increase the employment, retention, and earnings of participants, and increase occupational skill attainment by participants, and, as a result, improve the quality of the workforce, reduce welfare dependency, and enhance the productivity and competitiveness of the Nation." 29 U.S.C. § 2811.

<sup>3</sup> 29 U.S.C. § 2832(b)(2).

<sup>4</sup> The CLEOs are the chief elected executive officers in each of the localities covered by Workforce Investment Area One. *See, e.g.*, 29 U.S.C. § 2801(6).

<sup>5</sup> 29 U.S.C. § 2832(c); *see also* Virginia Employment Commission, Policy No. 99-2, *Establishment of Local Workforce Investment Boards*.

<sup>6</sup> The grievant's employment contract provided that he was employed "under [Board] and CLEO direction and supervision." Indeed, the employment contract itself was signed by the grievant and the chief local elected CLEO.

<sup>7</sup> The Board's Business Plan (2004-2007) indicates that it is a public 501(c)(3) organization.

<sup>8</sup> "In 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." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989); *accord, e.g.*, *McDonald v. Hampton Training Sch. For Nurses*, 254 Va. 79, 81, 486 S.E.2d 299, 301 (1997) (applying similar test to determine whether an individual is an employee and holding that the power to control the means and method of performing the work is the determinative factor). "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 business; the provision of employee benefits; and the tax treatment of the hired party." *Community for Creative Non-Violence*, 490 U.S. at 751-52.

<sup>9</sup> Va. Code §§ 2.2-435.7, 2.2-2670.

<sup>10</sup> 29 U.S.C. § 2832(c)(3).

<sup>11</sup> Furthermore, employees of local government entities (counties, cities, towns, and districts) are exempted from the Virginia Personnel Act. Va. Code § 2.2-2905(12). Therefore, even if the Board was a

The result here is also entirely consistent with the fact that the grievant's employment with the Board was governed by an employment contract, which would appear to be inconsistent with normal employment by the Commonwealth. Indeed, the terms of the contract provide that the Board could terminate the grievant at any time with at least three weeks prior written notice (or one day notice in certain situations). Likewise, the grievant was able to quit upon giving at least four weeks prior written notice. There is nothing in this contract that appears to protect the grievant pursuant to the merit system that covers many state employees in the Commonwealth with access to the grievance procedure under the Virginia Personnel Act.<sup>12</sup>

### CONCLUSION

For all the above reasons, this Department concludes that the grievant in this case does not have access to the Commonwealth's 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. The grievant may choose to appeal to the circuit court this ruling's determination that he does not have access to the grievance procedure. If the grievant has access to another grievance procedure, such as one administered by a local entity, this Department does not have the authority to rule on the grievant's compliance ruling request.

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Claudia T. Farr  
Director

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government entity, the grievance procedure would not apply to the grievant as it appears he was employed by such a local instrumentality. Va. Code § 2.2-3002.

<sup>12</sup> Va. Code § 2.2-2900, et seq.