

Issue: Access to Grievance Procedure; Ruling Date: December 21, 2007;
Ruling #2008-1869; Agency: Virginia Department of Health; Outcome:
Access Granted.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of the Department of Health
Ruling Number 2008-1869
December 21, 2007

The grievant has requested a ruling on whether he had access to the grievance procedure when he initiated his grievance on October 2, 2007. The Department of Health (VDH or the agency) claims that the grievant does not have access to the grievance procedure because he voluntarily resigned his position effective September 18, 2007 and thus was not an employee of the Commonwealth at the time the grievance was initiated. For the reasons set forth below, this Department concludes that the grievant has access to the grievance procedure.

FACTS

Prior to his resignation, the grievant was employed as a Health Counselor with VDH. On September 4, 2007, the grievant notified the agency that he was resigning and had accepted a job offer from another employer. The effective date of the grievant's resignation was September 18, 2007. When the grievant's new employer allegedly failed to "follow through on some promises," the grievant contacted his previous VDH supervisor on September 24, 2007 and asked if he could rescind his resignation and return to employment at VDH. The grievant's former supervisor allegedly advised the grievant that he would have to submit a letter withdrawing his resignation.

On September 25, 2007, the grievant hand-delivered to his former supervisor the letter rescinding his resignation, which his former supervisor accepted and allegedly welcomed the grievant back to employment with VDH. Moreover, during this meeting with his former supervisor, the grievant and his former supervisor allegedly discussed a work-related issue, which the grievant indicated he would take care of the following day. However, later during the day of September 25, 2007, the grievant's former supervisor contacted the grievant and told him that his position was no longer available to him. On September 27, 2007, the Director of the health district where the grievant was employed ("Health District Director") allegedly informed the grievant that she would not accept his

rescission of his resignation due to his recent receipt of a speeding ticket while in a state vehicle and his previous driving record.

Subsequently, on October 2, 2007, the grievant initiated a grievance challenging the agency's actions. The Health District Director denied the grievant access to the grievance procedure due to his voluntary resignation which took effect on September 18, 2007. The grievant subsequently challenged the Health District Director's access determination to the VDH Commissioner. The VDH Commissioner likewise determined that the grievant did not have access to the grievance process when he initiated his October 2, 2007 grievance.

DISCUSSION

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.¹ Employees who voluntarily resign, however, 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 long held that once an employee's voluntary resignation becomes effective, he may not file a grievance.

In this case, there is no question that the grievant resigned from his position effective September 18, 2007. However, there is a question as to whether the grievant's rescission of his resignation was accepted and whether he was effectively re-employed by VDH on September 25, 2007 when his former supervisor welcomed him back to work and discussed a work-related issue with him. If so, arguably the Health District Director's later refusal to accept the rescission of his resignation amounted to removing him from his re-employment with VDH. The agency asserts that the grievant was never reinstated to employment with VDH and as such, he was not an employee of the Commonwealth at the time he initiated his grievance and accordingly, he does not have access to the grievance procedure.²

An agency's decision to accept or not accept an employee's attempt to rescind a resignation is entirely discretionary. The relevant state policy is the Department of Human Resource Management ("DHRM") Policy 1.70, which allows (but does not require) an agency to "accept an employee's request to rescind his or her resignation within 30 calendar days of separation."³ Because the decision to approve a withdrawal is

¹ Va. Code § 2.2-3001(A) and *Grievance Procedure Manual* § 2.3.

² In support of its position that the grievant does not have access, VDH asserts that the grievant was never actually reinstated to his former position as he was "not given any written documentation reinstating [him] to [his] former position" nor was any "personnel transaction paperwork completed or submitted to the VDH Office of Human Resources (OHR)."

³ DHRM Policy 1.70, "Types of Termination/Separation from State Service."

entirely discretionary, the agency cannot violate state policy by refusing to accept the withdrawal.⁴

Here, there is a factual question as to whether the grievant's former supervisor had the authority to accept the grievant's rescission of his resignation and actually did accept the grievant's rescission of his resignation. If the grievant's former supervisor did have such authority and if her actions on September 25, 2007 amounted to an acceptance of the grievant's withdrawal of resignation, it would appear that the grievant was effectively reinstated to employment with VDH on that date, and the Health District Director's later refusal to allow him to return to work amounted to a separation, thus entitling the grievant to challenge his separation through the grievance process. On the other hand, if the grievant's former supervisor did not have the authority to accept the grievant's withdrawal of resignation, and/or her actions did not constitute a reinstatement, the grievant would have been voluntarily separated from state employment on September 18, 2007, the effective date of his resignation, and as such, would not have had access to the grievance procedure when he initiated his October 2, 2007 grievance.

Generally, when this Department rules on questions of access to the grievance procedure, material facts are not in dispute (for example, that the grievant works in a P-14 status, *see* EDR Ruling No. 2006-1096) or the grievant's assertions, even if taken as true, are insufficient to establish access. In this case, though, the parties apparently dispute a material threshold issue: whether the grievant was reinstated to his employment with VDH on September 25, 2007. Accordingly, resolving this dispute would prematurely involve this Department in determining the merits of the grievance itself. In circumstances like this, *where the disputed event forms the basis of the grievance*, this Department avoids engaging in fact-finding on the merits of the grievance before the agency and the grievant have had the opportunity to review the grievance during the management resolution steps.⁵ This practice preserves a grievant's right to take his case on the merits through the resolution steps and does not prejudice the agency's case on the merits.⁶ Should the grievant later request a qualification ruling from this Department, he will be required to show that the facts, taken as a whole, support the qualification of his grievance for hearing. Likewise, the agency will have the opportunity to refute the merits of the grievant's claims and argue against qualification. We thus conclude that the grievant has access to pursue his October 2, 2007 grievance.

CONCLUSION

⁴ Of course, an agency could violate a policy other than 1.70 by refusing to accept a withdrawal of a resignation. For instance, if the agency's refusal was based upon a discriminatory animus, such as bias based on age, race, or handicap, such an action would violate Policy 2.05 (Equal Employment Opportunity).

⁵ This Department notes that on the Form A, the agency head has already made a qualification determination. However, because the grievant has not been afforded the required fact-finding meeting at the second management resolution step, which could reveal important factual information related to whether the grievant's resignation was effectively rescinded by his former supervisor's actions, the agency head's qualification determination is premature.

⁶ *See e.g.*, EDR Ruling #2007-1496.

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The grievant has access to the grievance procedure for purposes of his October 2, 2007 grievance. If the grievant wishes to continue with his grievance, he has five workdays from receipt of this ruling to return the grievance to the second step-respondent where the substantive issues of this grievance (e.g, whether the grievant's former supervisor effectively reinstated the grievant by her actions) can be explored and addressed. This ruling in no way determines the ultimate merits of the grievance and is not binding on future rulings or proceedings in this matter.

Claudia T. Farr
Director