

Issues: Compliance – Grievance Procedure (5-Day Rule), Access and Qualification – Management Actions (Records); Ruling Date: May 2, 2008; Ruling #2008-1878, 2008-1889; Agency: Department of Corrections; Outcome: Access Denied; Compliance Issue moot (No Ruling).



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

**COMPLIANCE, ACCESS, and QUALIFICATION RULINGS OF
DIRECTOR**

In the matter of Department of Corrections
Ruling Nos. 2008-1878, 2008-1889
May 2, 2008

The grievant has requested a ruling on whether her September 13, 2007 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. In addition, the grievant has requested a compliance ruling. For the reasons stated below, this Department finds that the grievant lacks access to the grievance procedure, and therefore this grievance may not proceed to hearing.

FACTS

The grievant was previously employed with the agency as a Corrections Officer. On or about August 7, 2007, the grievant submitted a letter of resignation with an effective date of August 14, 2007. The grievant asserted that she was resigning as a result of family issues.

The agency claims that at the time the grievant submitted her resignation, she had been under investigation for alleged fraternization. The grievant asserts that she was unaware of any investigation at that time. Under agency policy, employees who do not give two weeks notice or who resign while under investigation, are generally ineligible for rehire.¹ The grievant purportedly did not find out until September 4, 2007 that her separation from the agency had been designated as a resignation in lieu of termination.

On September 13, 2007, the grievant initiated a grievance in which she requested that the agency remove the "in lieu of termination" designation of her resignation, along with the "ineligibility for rehire" classification. In addition, the grievant seeks access to her personnel file.

During the grievance resolution steps, the agency altered the DOC-3 Payroll form to state that the grievant "resigned for family issues while under investigation. Not eligible for rehire per DOC HR-2006-2." The agency has denied qualification of the grievance on the basis that the

¹ DOC Memo HR 2006-2 dated August 4, 2006.

grievant lacks access to the grievance procedure because she is not challenging a termination or involuntary separation.

DISCUSSION

Qualification and Access

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.² 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, she may not file a grievance.³ These access requirements may not be waived or modified by the parties.

In this case, the grievant was not employed by the agency or the Commonwealth at the time the September 13, 2007 grievance was initiated. She had submitted a voluntary resignation and does not argue that her resignation was involuntary. Once employment had ended, access to the grievance procedure is limited to challenging actions that directly result in termination or involuntary separation.⁴ Because the grievant filed her grievance after her employment ended, and because she is not challenging actions that directly resulted in a termination or involuntary separation, she does not have access to the grievance procedure.⁵

Agency's Alleged Noncompliance

The grievant asserts that the agency was noncompliant with the grievance procedure because it did not respond to her request for qualification within 5-workdays.

² Va. Code § 2.2-3001(A) and *Grievance Procedure Manual* § 2.3.

³ 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) be non-probationary at the time the event that formed the basis of the dispute occurred; *and* (3) be 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). *Grievance Procedure Manual* § 2.3 (emphasis added).

⁴ See, e.g., EDR Ruling Nos. 2008-1994, 2005-961, 2005-962, 2005-963, 2005-964, 2005-965, and 2005-1026.

⁵ Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that she wishes to challenge, correct or explain information contained in her personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).

The grievance procedure requires both parties to address procedural noncompliance through a specific process.⁶ That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department's (EDR's) involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.⁷ If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from the EDR Director, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for its delay in conforming to EDR's order.⁸

In this case, the grievant asserts that she notified the agency head of his failure to respond to her request for qualification. On November 20, 2007, the agency head responded to the grievance, denying qualification of the grievance, thereby rendering moot any issue of noncompliance for failure to respond. This Department's rulings on matters of compliance are final and nonappealable.⁹

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 to circuit court the determination that she does not have access to the grievance procedure, she should notify the Human Resources Office, in writing, within five workdays of receipt of this ruling.

Claudia T. Farr
Director

⁶ *Grievance Procedure Manual*, § 6.3.

⁷ *Id.*

⁸ While in cases of substantial noncompliance with procedural rules the grievance statutes grant the EDR Director the authority to render a decision on a qualifiable issue against a noncompliant party, this Department favors having grievances decided on the merits rather than procedural violations. Thus, the EDR Director will *typically* order noncompliance corrected before rendering a decision against a noncompliant party.

⁹ Va. Code § 2.2-1001 (5).