

Issue: Access to the Grievance Procedure; Ruling Date: July 7, 2008; Ruling #2008-2054; Agency: Appalachian Juvenile Commission; Outcome: Access Denied.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of Appalachian Juvenile Commission
Ruling Number 2008-2054
July 7, 2008

The grievant has requested a ruling in her grievance with the Appalachian Juvenile Commission (the Commission). She initiated a grievance to challenge her termination, and now appears to seek qualification of her grievance for hearing. 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 at a group home that is under the direction of the Commission. On or about April 29, 2008, the grievant was terminated. The grievant then submitted a grievance to the Commission, which was prepared on a copy of the Grievance Form A utilized in grievances under the Commonwealth's grievance procedure. The grievance has apparently been addressed by individuals whom the grievant's counsel refers to as the "second-step respondent" and "third-step respondent." The grievant has now submitted a request to this Department that the grievance be qualified for a hearing.

DISCUSSION

While the grievant has requested a qualification 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 qualification matter can be made. "Unless exempted by law, all nonprobationary state employees shall be covered by the [state] grievance procedure."¹ Therefore, the initial issue to determine is whether the grievant was a state employee.

The grievant was employed at a group home under the direction of the Commission, which serves eleven localities: Buchanan, Dickenson, Russell, Smyth, Tazewell, Lee, Scott, Washington, and Wise Counties, and the Cities of Bristol and Norton. Virginia Code § 16.1-315 provides that "governing bodies of three or more

¹ Va. Code § 2.2-3001(A) (emphasis added).

counties, cities or towns ... may, by concurrent ordinances or resolutions, provide for the establishment of a joint or regional citizen juvenile detention home, group home or other residential care facility commission.” The eleven localities have apparently done so by creating the Commission. The manner in which the Commission is established indicates that the grievant was employed by a local level instrumentality, not the Commonwealth. There is no evidence of any entity of the Commonwealth controlling either the Commission or the grievant.² While the Director of the Department of Juvenile Justice, an executive branch agency of the Commonwealth, has certain authority to regulate and supervise the Commission,³ it does not appear that any such authority is granted to control the Commission’s employment decisions.⁴ Therefore, it is this Department’s determination that the grievant was not a state employee for purposes of the Commonwealth’s grievance procedure.⁵

Further, the grievant has provided no compelling argument to the contrary. While Commission employees allegedly participate in the Virginia Retirement System (VRS), such participation is not exclusive to state employees.⁶ In addition, the grievant has claimed that the Commission’s employee handbook indicates that employees are to use the state grievance procedure. Even assuming the handbook provided as much, the statement would not make Commission employees “state employees” under Va. Code § 2.2-3001(A). The Commission could not simply opt its employees into the state grievance procedure through statements in an employee handbook when the relevant grievance statutes provide they would not have access.

² “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.

³ See Va. Code §§ 16.1-309.4, 16.1-309.9, 16.1-309.10, 16.1-318.

⁴ See Va. Code § 16.1-318 (granting the Commission the power to “employ such technical experts, and such other officers, agents and employees as it may require, to fix their qualifications, duties and compensation and to remove such employees at pleasure”).

⁵ 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, the grievance procedure would not apply to the grievant as it appears she was employed by such a local level instrumentality. Va. Code § 2.2-3002.

⁶ See, e.g., Handbook for Members, Virginia Retirement System, “Membership,” at 5 (including as members in VRS “participating Virginia cities, counties, towns or political subdivisions including commissions and authorities that have elected to participate in VRS”).

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. If the grievant has access to another grievance procedure, such as one administered by the Commission or another local or regional entity, this Department does not have the authority to rule on the grievant's qualification ruling request.

The grievant may petition the circuit court having jurisdiction in the locality in which she was employed to review the determination in this ruling.

Claudia T. Farr
Director