

Issue: Access to the Grievance Procedure; Ruling Date: March 5, 2009; Ruling #2009-2223; Agency: Virginia Tobacco Settlement Foundation; Outcome: Access Denied.



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

**ACCESS RULING OF DIRECTOR**

In the matter of Virginia Tobacco Settlement Foundation  
Ruling Number 2009-2223  
March 5, 2009

The grievant has requested a ruling on whether she has access to the Commonwealth's grievance procedure (Va. Code §§ 2.2-3000, et seq.) as an employee of the Virginia Tobacco Settlement Foundation (VTSF or Foundation). For the reasons set forth below, this Department concludes that access to the Commonwealth's grievance procedure does not exist under the Code of Virginia.

FACTS

The grievant filed a Grievance Form A on January 15, 2009 to challenge her current performance evaluation.<sup>1</sup> The Foundation responded to the grievance by stating that the grievant did not have access to Commonwealth's state employee grievance procedure established under Title 2.2, Chapter 30 of the Code of Virginia, which this Department administers. The agency based its denial of access on Va. Code Section 2.2-2905 (26), which expressly exempts Foundation employees from the Virginia Personnel Act, and therefore, the agency asserts, from the grievance procedure as well. The Foundation also pointed out that it has adopted its own grievance process.

DISCUSSION

This ruling request presents an issue that this Department has not previously addressed: whether non-probationary employees of the Foundation have access to the Commonwealth's grievance procedure. 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) have been non-probationary at the time the event that formed the basis of the dispute occurred; (3) *and* have been 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).<sup>2</sup> These access requirements may not be waived or modified by the parties.

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<sup>1</sup> The Grievance Form A is the form that must be used to initiate a grievance under the state employee grievance procedure administered by the Department of Employment Dispute Resolution. *Grievance Procedure Manual* § 2.4.

<sup>2</sup> *Grievance Procedure Manual* § 2.3 (emphasis added).

In this case, employees of the Foundation are expressly exempt from the Virginia Personnel Act (VPA).<sup>3</sup> However, the matter is somewhat complicated by the language used in exempting the Foundation. Sub-section 2.2-2905 (26) states that Foundation employees “shall be treated as state employees for purposes of participation in the Virginia Retirement System, health insurance, and all other employee benefits offered by the Commonwealth to its classified employees.” The language “all other employee benefits offered by the Commonwealth” raises the issue of whether this provision was intended to convey, as a “benefit,” the right to use the grievance procedure established under Title 2.2, Chapter 30 of the Code of Virginia. For the reasons explained below, we conclude that this was not the intent of the General Assembly.

While the grievance procedure is indeed a beneficial and valuable alternative dispute resolution tool, the term “benefits,” as used in § 2.2-2905 (26), would appear to refer to traditional fringe benefits (i.e. forms of compensation other than salary or wages) and, thus was never intended to include the grievance procedure. First, the two benefits expressly listed, a retirement plan and health benefits, are traditional fringe benefits. More importantly, however, where the General Assembly intended for employees to retain grievance procedure rights, it has expressly provided for such. In three other subsections of the VPA (§2.2-2905 (19), (21), and (24)), the General Assembly has used the same language to clearly convey a right to grieve. Each of these three subsections states that “[s]uch employees shall remain subject to the provisions of the State Grievance Procedure (§ 2.2-3000 et seq.)” Thus, it is evident that when the General Assembly intends for employees to have grievance rights, it has consistently used the same unambiguous language to express that intent.<sup>4</sup> This unambiguous language is not found in § 2.2-2905 (26), the subsection exempting the Foundation. Accordingly, we cannot conclude that the General Assembly intended to extend grievance rights to Foundation employees.

### CONCLUSION

For the above reasons, this Department concludes that the grievant in this case does not have access to the state 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. 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 Foundation, in writing, within five workdays of receipt of this ruling.

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Claudia T. Farr  
Director

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<sup>3</sup> Va. Code § 2.2-2905 (26).

<sup>4</sup> *C.f.* *Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”)