

Issue: Access to the Grievance Procedure; Ruling Date: March 24, 2009;  
Ruling #2009-2234; Agency: Department of Corrections; Outcome: Access  
Granted.



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

**ACCESS RULING OF DIRECTOR**

In the matter of Department of Corrections  
Ruling Number 2009-2234  
March 24, 2009

The grievant has requested a ruling on whether she had access to the grievance procedure when she delivered a grievance to the Department of Corrections (the agency) on December 4, 2008. For the reasons set forth below, this Department concludes that the grievant has access to the grievance procedure for this grievance.

FACTS

The grievant was previously employed by the agency, but resigned on November 6, 2007, following the agency's proposal of a disciplinary action against her. The grievant initiated a grievance concerning her separation, alleging that it was an involuntary resignation. The grievant prevailed at hearing in that grievance. In his November 11, 2008 decision, the hearing officer ordered:

I hereby order the agency to return the grievant to employee status, as it existed at the time of her submitting her resignation. The agency is entitled to offer the grievant the opportunity to submit an unconditional resignation, a resignation in lieu of termination, or discipline with termination.<sup>1</sup>

Following the hearing decision, the grievant was contacted by the agency to schedule a meeting at which she would have the option to resign in lieu of termination or be terminated with the original proposed disciplinary action (which she could then grieve). The meeting was subsequently scheduled for December 5, 2008. On December 4, 2008, one day prior to that meeting, the grievant delivered to the agency the instant grievance concerning her 2007 performance evaluation. During the December 5, 2008 meeting, the agency terminated the grievant, effective November 6, 2007, on the basis of the originally contemplated disciplinary action. The agency also later determined that the grievant did not have access to the grievance procedure to initiate the grievance challenging her performance evaluation because she was not an employee of the agency on December 4, 2008. The grievant now seeks an access ruling from this Department.

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<sup>1</sup> Decision of Hearing Officer, Case No. 8936, Nov. 11, 2008 ("Hearing Decision"), at 8.

## DISCUSSION

To have access to the grievance procedure, an employee “must have been employed by the Commonwealth at the time the grievance is initiated (unless the action grieved is a termination or involuntary separation).”<sup>2</sup> Thus, after an employee separates from state employment, the only claim for which he or she may have access to the grievance procedure is a challenge to a termination or an involuntary separation. On the other hand, before a non-probationary employee separates from state employment, he or she has access to grieve any matter, and may continue with such a grievance even after a subsequent termination or separation.<sup>3</sup>

This case presents unique procedural questions that this Department has yet to address in any prior ruling. This Department must determine what effect the grievant’s return to “employee status,”<sup>4</sup> as ordered by the hearing officer, had on her ability to initiate another grievance unrelated to her termination. As a result of the hearing officer’s finding that the grievant’s November 6, 2007 resignation was involuntary, and his express order returning her “to employee status, as it existed” just prior to that resignation, we conclude that the grievant was reinstated,<sup>5</sup> even if only for an extremely brief period, until she was once again separated by disciplinary action. Further, the hearing decision restored the grievant to employment “as it existed at the time of her submitting her resignation.”<sup>6</sup> Such a reinstatement must naturally carry the full rights of a state employee that she possessed prior to her involuntary resignation. Thus, after significant consideration, this Department determines that upon reinstatement the grievant held the same employment-related rights she had in 2007 immediately prior to her resignation, including the ability to challenge her 2007 performance evaluation.<sup>7</sup>

The record indicates that the grievant was only reinstated for a brief period for purposes of the December 5, 2008 meeting, where she had the opportunity to resign or be terminated again. Nothing in the agency’s November 21, 2008 letter appears to have brought the grievant back to employee status prior to that time. Therefore, for purposes of the grievance procedure, although the grievant may not have yet been placed in

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<sup>2</sup> *Grievance Procedure Manual* § 2.3. In addition, the employee must satisfy the other requirements for access to the grievance procedure, such as non-probationary status. *Id.*

<sup>3</sup> *See, e.g.*, EDR Ruling No. 2009-2232; EDR Ruling No. 2008-1951; EDR Ruling No. 2001-060.

<sup>4</sup> Hearing Decision at 8.

<sup>5</sup> *Cf. Schultz v. United States Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987) (finding that an employee is “entitled to reinstatement” if the employee establishes that his or her resignation was involuntary).

<sup>6</sup> Such reinstatement is consistent with this Department’s instructions to the hearing officer in the qualification ruling for this case. The hearing officer was directed that if he should find that the grievant’s separation was involuntary, the relief available was to return the parties “to the point at which the separation occurred.” EDR Ruling No. 2008-2027.

<sup>7</sup> *Cf., e.g.*, *Frank v. EEOC*, 90 M.S.P.R. 458, 461 (2001) (“When an agency rescinds a removal action, the appellant must be restored to the *status quo ante*. Return to the *status quo ante* means placing the appellant ‘as nearly as possible in the same situation that ... she would have been in if the action rescinded had never occurred.’”) (citation omitted).

“employee status” on December 4, 2008, this Department concludes that the delivery of her grievance to the agency that day, in anticipation of her December 5, 2008 return to employee status, was effective under the unique facts and circumstances of this case to initiate this grievance as of December 5, 2008.

#### CONCLUSION

The grievant had access to the grievance procedure to challenge her 2007 performance evaluation when she initiated this grievance on December 5, 2008. If the grievant wishes to continue with her grievance, she has **five workdays from receipt of this ruling** to return the grievance to the agency so that the first step-respondent may address the grievance further.

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Claudia T. Farr  
Director