

Issue: Access to the Grievance Procedure: Ruling Date: December 27, 2011; Ruling No. 2012-3167, 2012-3168, 2012-3169, 2012-3170, 2012-3171, 2012-3172, 2012-3173, 2012-3174; Agency: Department of Social Services; Outcome: Access Denied.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling Nos. 2012-3167; 3168; 3169; 3170; 3171; 3172; 3173; and 3174
December 27, 2011

The grievant has requested rulings on whether she had access to the grievance procedure when she initiated her eight grievances between September 8-16, 2011 with the Department of Social Services (the agency). The agency claims that the grievant does not have access to the grievance procedure because she voluntarily resigned on August 26, 2011 and thus was not an employee of the Commonwealth at the time she initiated her grievances. For the reasons set forth below, this Department concludes that the grievant does not have access to the grievance procedure.

FACTS

On August 26, 2011, the grievant had a meeting with her immediate supervisor. The facts of what transpired during that meeting are disputed. The purpose of the meeting, from the grievant's perspective, was to share with her supervisor concerns regarding alleged mistreatment by other employees. The agency asserts that the grievant tendered a verbal resignation during the meeting, a claim that the grievant refutes. Earlier in the day, at 9:50 a.m., the grievant received an e-mail from a friend asking: "How you doing?" The grievant responded: "I've asked for a meeting and haven't received a response yet. I'll make it. How are you?" Her friend replied: "JUUUUUUST DUCKY." Following this e-mail exchange the grievant had her meeting with her supervisor.

The next e-mail was from the grievant to her friend at 10:29 AM and in that correspondence the grievant writes: "Just had my meeting-and I did it. Finish next week and then leave time used through Sept. 16. She says it makes her very sad." At 10:31 AM the grievant's friend responded: "OOHHHH our messages pass in the air! How do you feel??" at 10:32 a.m. the grievant replied: "Defeated. And scared what will I do for income. But I know it had to be done." Other e-mails were exchanged between the grievant and her friend that morning.

On the following Monday, August 29, 2011, the grievant's supervisor sent the grievant an e-mail stating that:

On Friday morning, you stated that you planned to resign from your position effective September 16 and requested the ability to use leave beginning September 1 to carry you through September 16.

I have not received anything yet in writing from you documenting that this is your intent. Please provide this to me by COB today via e-mail. Thank you.

The grievant responded by stating that her intent was to work through September 1st and to begin leave September 2nd using short term disability and FMLA leave for 90 days. She continued that near the end of that period her condition would be re-evaluated and her return to work date assessed.

The agency maintains that the grievant verbally resigned on August 26, 2011 and has thus treated her employment as severed. The grievant challenges the agency's position, asserting that she never resigned.

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)."¹ Thus, once 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. Employees who voluntarily resign their employment 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.

The grievant argues that she never resigned from her position. Rather, she claims that she and her supervisor merely discussed the possibility of her resignation. The agency, on the other hand, contends that a verbal resignation was not only tendered, but accepted on August 26th. Based largely on the e-mail chain between the grievant and her friend on August 26th, we must conclude that the agency has provided sufficient evidence to support its position that the grievant resigned on August 26th.

First, the grievant states in her 10:29 AM e-mail that: "Just had my meeting—and I did it. Finish next week and then leave time used thorough Sept. 16. She says it makes her very sad." When the grievant was asked what the "it" that she "did" was, she explained that she "made it through the meeting." However, there is simply nothing in her e-mail that would tend to imply that the "it" accomplished was making it through the meeting. Moreover, when asked about the two following sentences about leave and sadness, the grievant explained that she was merely conveying to her friend one of the options (resignation) discussed with her supervisor. However, the three sentences read together simply do not appear to reflect that the grievant is merely explaining an option to her friend. The statement "[f]inish next week and then leave time used through Sept. 16," is more naturally read as a recitation of the grievant's plan, not just details of one of the options under consideration. There is simply nothing in the text of this e-mail that

¹ *Grievance Procedure Manual* § 2.3 (emphasis added). In addition, the employee must satisfy the other requirements for access to the grievance procedure, such as non-probationary status. *Id.*

tends to suggest that the grievant is merely relaying one of a number of options discussed; no other “options” are mentioned and there is no qualifying language such as: “one of the options we discussed was . . .”

In the next e-mail exchange the grievant was asked by her friend how she felt. The grievant responded: “Defeated. And scared what will I do for income. But I know it had to be done.” The grievant explains that when she states that “it had to be done,” she is relaying that “something” had to be done to address the hostility in the environment, meaning that she had to meet with her supervisor. As to the income reference, the grievant explained that if she were to resign she wouldn’t have any income and, therefore, it was not an option. While it indeed makes perfect sense that if she were to resign, she would have no income and such a prospect would be frightening, that is not what the grievant wrote. The language actually used by the grievant appears more indicative of reflection of a decision already made rather than one under contemplation.

In addition, the grievant’s friend’s response to her comment about being scared about her income situation seems telling. Her friend responds: “Call your friend . . . that was a sign . . . he said SEPTEMBER, you know . . .” and then the friend added one minute later in a follow-up e-mail: “Less stress . . . more money potential . . . SO . . . what was her actual reaction? In the friend’s response there is no counsel to carefully consider the pros and cons of “options” including resignation. Instead, the friend’s response seems entirely prospective in terms of replacement income, apparently referencing a potential job opportunity that the two seem to have discussed before.

In responding to the question “what was her reaction,” the grievant replied:

Surprise at first. Tried to argue with me on the first point about Monday. Then it became very apparent she saw I was right in what I was saying about everything else. Then she said she was sorry and that this made her very sad. She took notes. Wrote things down. I do think it bothered her. Just too late.

When asked about the “just too late” reference, the grievant explained that she meant that she believed her supervisor was truly bothered by the alleged misconduct that the grievant had just brought to her supervisor’s attention: things—the misconduct of others—that cannot be undone. This Department finds the “just too late” explanation unconvincing. It would appear that a more likely explanation is the “too late” refers to the grievant having given notice of her intent to resign.

In a follow-up 10:51 AM e-mail the grievant reiterated: “I am worried about money. I have none right now. Seriously. For the first time in 20 years I don’t have a reserve to fall back on. But I’ll make it work. We will make it work. Our venture will be much more fun. ☺” The grievant explained to this Department during the course of its investigation that this merely meant if she were to resign, money would be an issue and therefore, resignation was not a viable option. Again, this language simply does not appear to be a contemplative or speculative rumination of her financial state if she were to resign. The grievant had explained relevant to her 10:32 AM “scared about what will I do for income” e-mail that she had concluded that resignation “was not an option.” Thus, it is unclear why the grievant would need to again revisit

the potential impact of the apparently rejected option of resignation. This Department believes that a more plausible reading is that income remains a real and present concern because the grievant had resigned.

In response to the grievant's above e-mail which concludes "Our venture will be much more fun," the grievant's friend states "I just know that this is the right move for you Working w/ [] will be so much less stress for you and so much healthier too" When asked about working with "[]", the grievant explained that [] was an acquaintance who had indicated that he might have a job opening in September but there was ultimately no job offer and that she is not working for him.

Finally, in a 10:58 AM e-mail the grievant expresses thanks to her friend stating: "Thank you SOOO MUCH! I couldn't do this without you. I just decided that prolonging the agony just wasn't worth it anymore-to step out in faith and just fly without a net." The grievant explains that the "this" that she could not do without her friend was to speak up and talk with her supervisor and that "stepping out in faith and flying without a net" was a reference to having a discussion with her supervisor. This explanation is unconvincing. This Department believes, given the totality of the content—tenor and wording—of the e-mail chain, the reference is more likely related to a resignation than a discussion. The "flying without a net" statement follows several others that relate to apprehension regarding income and it would seem more likely than not that it is related to uncertainty surrounding the future rather than a descriptive related to a prior discussion with her supervisor. Finally, the grievant couches her gratitude by saying "I couldn't do this without you." Again, the language chosen is present/future oriented. She did not say "I couldn't have done this [go to my supervisor] without you."

Based on the entire e-mail and reading it in its most plausible terms, this Department believes that it reflects that the grievant verbally resigned. Accordingly, access to the grievance procedure must be denied.

APPEAL RIGHTS AND OTHER INFORMATION

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. For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this Department's access determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling.

Claudia Farr
Director