

Issue: Access to the Grievance Procedure; Ruling Date: December 19, 2011; Ruling No. 2012-3182; Agency: Department of Motor Vehicles; Outcome: No Ruling – premature.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of the Department of Motor Vehicles
Ruling No. 2012-3182
December 19, 2011

The grievant has requested a ruling on whether he had access to the grievance procedure when he initiated his grievance on March 10, 2011 with the Department of Motor Vehicles (the agency). The agency claims that the grievant no longer has access to the grievance procedure because he is receiving Long Term Disability (LTD) benefits, and thus no longer considered a classified employee with the state. For the reasons set forth below, this Department concludes that the ruling request is premature.

FACTS

The grievant was employed as a Driver Licensing Specialist with the Department of Motor Vehicles. On March 7, 2011, the grievant received a Group II Written Notice with demotion for insubordination and undermining comments and conduct, a Group I Written Notice with demotion for unsatisfactory performance, and a Group II Written Notice with demotion for interference with state operations. On March 10, 2011, the grievant initiated a grievance challenging all three Written Notices.

On May 6, 2011, the agency qualified the grievance for hearing. However, in its May 6, 2011 letter, the agency stated that because the grievant was receiving Short Term Disability (STD) benefits, it would not request a hearing officer to be appointed until the grievant was released to return to work. Moreover, the agency requested the grievant to notify the agency's employee relations manager when he was "released to report to work so that the hearing officer may be requested and the hearing scheduled." However, in a letter dated November 15, 2011, the agency notified the grievant that because he had subsequently transitioned from STD benefits into LTD benefits, the agency closed the March 10, 2011 grievance. The grievant now asks this Department to grant him access to the grievance process.

DISCUSSION

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).¹ These access requirements may not be waived or modified by the parties. If agency management denies access to the grievance procedure, which is apparently the case here, the employee's next step is to request that the agency head grant the employee access.²

In this case, the grievant's request for an access ruling with regards to the March 10, 2011 grievance is premature because the grievant has not shown that he first asked the agency head to grant him access, as required by the grievance procedure. The grievant is therefore advised that if he still desires an access ruling from this Department, he must first make a written request to the agency head. If the agency head denies access, then the grievant can appeal the agency head's decision to EDR, but only after such a denial is received.

This Department is compelled to note that an employee must be permitted to continue to advance a timely filed grievance even if employment with the Commonwealth has ended. Also, that some requested relief may not be available is not a reason that an employee may be denied access to the grievance process. Finally, that an employee is on disability leave alone does not always mean that a delay in a grievance hearing is necessary. The requirements of a job may be very different from those of a grievance hearing and the inability to perform one's job does not always equate to an inability to move forward with a hearing. Thus, if the grievant is cleared by his health care provider to move forward with the hearing, the fact that he has not been cleared for a full return to work (assuming without deciding that he has not) cannot be used as a basis to deny him a hearing.

Claudia T. Farr
Director

¹ *Grievance Procedure Manual* § 2.3 (emphasis added).

² *Id.*