



**COMMONWEALTH OF VIRGINIA**  
***Department Of Human Resource Management***  
***Office of Employment Dispute Resolution***

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**ACCESS and QUALIFICATION RULING**

In the matter of Norfolk State University  
Ruling Number 2022-5406  
June 3, 2022

On or about May 5, 2022, the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) received a Grievance Form A – Expedited Process challenging the grievant’s separation from employment.<sup>1</sup> In response, Norfolk State University (“the university”) has asserted that the grievant was a probationary employee and, thus, asks EDR to rule that the grievant does not have access to the grievance procedure.

The General Assembly has provided that “all *non-probationary* state employees shall be covered by the grievance procedure,” unless exempted by law.<sup>2</sup> DHRM Policy 1.45, *Probationary Period*, states that employees “who begin either original employment or re-employment in classified positions must serve 12-month probationary periods effective from the dates of their employment.”<sup>3</sup> In addition, the policy further provides that “[a] person who is selected for a position that requires certification following completion of a prescribed training program must complete a new probationary period.”<sup>4</sup> For such positions, recruitment announcements and offer letters “must include information about the additional probationary requirement, as appropriate.”<sup>5</sup> Moreover “[a]gencies should identify positions having such requirements in their Agency Salary Administration Plans.”<sup>6</sup>

In this case, the grievant began her position with the university on June 25, 2021, the day after leaving her former position as a non-probationary employee at another state institution, which she held for several years. As reflected in the state’s Personnel Management Information System (“PMIS”), the grievant’s transfer to the university was described as a classified promotion, with neither a break in state service nor new probationary period recorded. Nevertheless, it appears that the university then proceeded to treat the grievant as a probationary employee, with at least one

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<sup>1</sup> It appears that the grievant chose to use the grievance form for the expedited process due in part to apparent uncertainty about whether her state employment had actually ended. Upon review of the submission materials reflecting the grievant’s separation for performance reasons, EDR deemed it appropriate to receive the grievance as a dismissal grievance. *See Grievance Procedure Manual* § 2.5.

<sup>2</sup> Va. Code § 2.2-3001(A); *see also Grievance Procedure Manual* § 2.3.

<sup>3</sup> DHRM Policy 1.45, *Probationary Period*, at 1.

<sup>4</sup> *Id.* at 1-2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 2.

probationary progress review. On or about April 8, 2022, the university presented the grievant with a notice of termination, citing unsatisfactory performance.

Upon consideration of all the facts and circumstances, and in consultation with DHRM's Policy office, EDR cannot conclude that the grievant's designation as a probationary employee is consistent with DHRM Policy 1.45, *Probationary Period*. Policy 1.45 requires a probationary period for employees beginning either original employment with the state or re-employment, *i.e.* employment after a break in state service – neither of which applied to the grievant when she began her position at the university. Although the policy also contemplates a new probationary period for positions that require the employee to complete a specific training and certification program, we do not find support for this situation in this record.

The university has asserted that a probationary period was appropriate for the grievant in this case because her position with the university constituted a promotion – that is, she moved from an administrative assistant position in Pay Band 3 to an executive assistant position in Pay Band 4. However, as a matter of DHRM policy, a promotion of this type is not sufficient in itself to support a new probationary period. Without evidence in the record of a special training and certification requirement for the grievant's new position, we find no basis in Policy 1.45 for the university to have designated the grievant as a probationary employee upon hiring her. In addition, no such designation is evident in the PMIS record of the grievant's transfer.

As a matter of access to the grievance procedure, EDR also cannot conclude that the grievant has waived her opportunity to challenge or object to her alleged probationary status. Even assuming that the grievant was on adequate notice that the university had designated her as a probationary employee,<sup>7</sup> EDR cannot consider an employee probationary, as thus lacking access to the grievance procedure, based on the employer's apparent misapplication of DHRM Policy 1.45. In addition, the essential management action or omission grieved in this case is the grievant's separation from employment, which apparently occurred effective April 8, 2022. To the extent that the grievant asserts that her separation was not consistent with state policies, we perceive no basis to conclude that her grievance initiated on May 5, 2022 was untimely.

Accordingly, EDR concludes that the grievant is most appropriately considered a non-probationary employee and, as such, she has access to the grievance procedure. Because the record reflects that the university terminated the grievant's employment due to unsatisfactory job performance, we further conclude that the grievance automatically qualifies for a hearing,<sup>8</sup> where the university may present arguments as to why termination of the grievant's employment was

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<sup>7</sup> We note that the record evidence is mixed as to whether the grievant knew or should have known that she was considered a probationary employee. The university's offer letter to the grievant stated generally: "All newly hired and rehired classified employees are required to satisfactorily complete a twelve-month probationary period." As explained above, neither of these categories applied to the grievant. The grievant also apparently received and signed a Probationary Progress Review form on November 1, 2021, which indicated satisfactory performance. However, the form provided no date in the field for the grievant's Projected Probationary End Date, and it was completed on November 1, 2021 – coinciding with a typical performance review period for state employees. *See* DHRM Policy 1.40, *Performance Planning and Evaluation*. In consideration of all the evidence, we cannot say that the Probationary Progress Review form provides clarity as to grievant's employment status at that time.

<sup>8</sup> *See* Va. Code § 2.2.-3004(A); *Grievance Procedure Manual* § 4.1(a).

warranted and appropriate and consistent with state and university policies. The grievance qualifies in full, to include any of the affirmative defenses the grievant has asserted to the effect that her separation was not consistent with DHRM Policy 1.60, *Standards of Conduct*; DHRM Policy 2.35, *Civility in the Workplace*; or other applicable laws or policies. However, nothing in this ruling should be read to prevent the parties from pursuing discussions for the purpose of settling these issues independently, should they choose to do so. The parties are encouraged to contact EDR if our office can offer resources to support such efforts.

At this time, EDR is in receipt of a fully completed Form B from the university. Accordingly, we anticipate appointing a hearing officer with notice to the parties in a subsequent communication.

EDR's access and qualification rulings are final and nonappealable.<sup>9</sup>

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Office of Employment Dispute Resolution

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<sup>9</sup> Va. Code § 2.2-1202.1(5).