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ACCESS RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2023-5530
March 31, 2023

On March 6, 2023, the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) received a dismissal grievance that challenged the grievant's separation from employment at the Department of Behavioral Health and Developmental Services (the "agency"). The agency subsequently requested a ruling from EDR on whether the grievant has access to the grievance procedure.

FACTS

On or about April 18, 2022, the grievant notified her management that she would be resigning her position with the agency, effective June 24, 2022, after apparently working at one of its hospitals for many years as a nurse. It appears that the grievant did in fact resign on June 24, and the agency issued her a final paycheck including unused paid leave balances. However, on July 22, 2022, the grievant requested in writing to rescind her resignation. According to the agency, it ultimately denied the request on grounds that management lacked sufficient time to process the grievant's change in status in accordance with DHRM Policy 1.70, *Termination/Separation from State Service*. However, due to persistent staffing issues, the agency allegedly had instituted a rolling/ongoing competitive recruitment for nursing positions such as the one the grievant had recently vacated. It appears that the agency re-hired the grievant to her former position through that process as of August 1, 2022. Because the agency rehired the grievant following a break in state service, its offer of re-employment noted that the grievant would be starting as a new employee, serving a standard probationary period under DHRM Policy 1.45, *Probationary Period*. The grievant signed the offer letter on the same date.

By memorandum dated March 2, 2023, the director of the grievant's facility notified the grievant that her employment at the agency was terminated as of that date. The memorandum noted the grievant's probationary status. On March 6, 2023, the grievant submitted a dismissal grievance, challenging her separation. In her grievance, she contends that she had rescinded her resignation, but was then erroneously designated as a new employee because of the agency's failure to process her timely rescission. Accordingly, she claims access to the grievance procedure to challenge her separation. The agency disagrees and has requested this access ruling from EDR.

An Equal Opportunity Employer

DISCUSSION

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.”¹ The General Assembly has further provided that all *non-probationary* state employees may utilize the grievance process, unless exempted by law.² EDR is the finder of fact on questions of access.³

In this case, the agency alleges that the grievant was re-employed on August 1, 2022, and accordingly was still serving in her 12-month probationary period on March 2, 2023, the date of her separation. Documentation provided by the agency supports this account. The agency’s personnel management records show that the grievant separated as of June 24, 2022 and was rehired effective August 1, 2022. In addition, the offer letter for the grievant’s rehire, which she accepted by signature on August 1, 2022, specified that she would be a new employee who must attend mandatory New Employee Orientation and serve a 12-month probationary period.

The grievant appears to argue that she rescinded her resignation within the time requirements provided by DHRM Policy 1.70, *Termination/Separation from State Service*. Under Policy 1.70, “[a]n agency may choose to accept an employee’s request to rescind his or her resignation within 30 calendar days of separation.”⁴ In this case, we find no evidence that the agency ultimately chose to accept the grievant’s request. The agency claims that it was unable to accept the grievant’s rescission because she submitted her request on a Friday afternoon, leaving insufficient time for agency staff to process the grievant’s reinstatement within the required timeframe of Policy 1.70. EDR notes that, under Policy 1.70, “acceptance” of an employee’s rescission of resignation does not necessarily require full administrative processing to be completed within 30 calendar days. However, even assuming agency management operated under a belief that DHRM would not permit it to accept the grievant’s rescission, we cannot conclude that the grievant’s rehire after a break in service was inconsistent with any policy requirement. Policy 1.70 makes clear that the decision to accept an employee’s rescinded resignation or not within 30 calendar days is within the agency’s discretion.⁵ In this case, it appears that the agency ultimately declined to accept the grievant’s resignation within DHRM’s prescribed timeframe for doing so, and EDR identifies nothing in the record to suggest that this choice violated any policy mandate or was otherwise improper.⁶

Because EDR has nothing to indicate that the agency accepted the grievant’s rescission of resignation, and all available information tends to show that she voluntarily accepted rehire to her former position on August 1, 2022 as a new employee, EDR concludes that the grievant was properly designated as a probationary employee as of March 2, 2023. Accordingly, EDR finds that

¹ DHRM Policy 1.45, *Probationary Period*, at 1.

² Va. Code § 2.2-3001(A); *Grievance Procedure Manual* § 2.3.

³ See Va. Code § 2.2-1202.1(5); see also *Grievance Procedure Manual* § 2.3.

⁴ DHRM Policy 1.70, *Termination/Separation From State Service*, at 1.

⁵ *Id.* at 1 (“[a]n agency may choose to accept an employee’s request . . .”) (emphasis added).

⁶ For example, there is nothing to indicate that the agency declined to accept the grievant’s rescission of resignation for the purpose of creating a break in service, necessitating a new probationary period.

the grievant does not have access to the grievance procedure.⁷ As a result, this dismissal grievance will not proceed to a hearing and EDR will close its file.⁸

EDR's rulings on access are final and nonappealable.⁹

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⁷ E.g., EDR Ruling No. 2020-5116; EDR Ruling No. 2011-2940.

⁸ This ruling does not address whether the grievant may have some other remedy, legal or otherwise, as to this situation. This ruling only determines that she is ineligible to pursue her claims through the state grievance procedure.

⁹ Va. Code § 2.2-1202.1(5).