

Issue: Access to the Grievance Procedure; Ruling Date: November 20, 2018; Ruling No. 2019-4802; Agency: Virginia Community College System; Outcome: Access Denied.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

ACCESS RULING

In the matter of Virginia Community College System
Ruling Number 2019-4802
November 20, 2018

On October 22, 2018, the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) received a Grievance Form A from the grievant, challenging the proposed non-renewal of her contract for employment. Upon receiving a copy of the grievance, the Virginia Community College System (the “agency”) has asserted that the grievant does not have access to the state employee grievance procedure in order to initiate this grievance.

FACTS

By letter dated October 19, 2018, the grievant’s supervisor notified the grievant of her intent to recommend non-reappointment of the grievant’s employment contract, based upon allegedly unsatisfactory work performance. On or about October 22, 2018, the grievant initiated a grievance with EEDR, seeking to challenge this decision utilizing the state employee grievance procedure. However, the agency contends that the grievant does not have access to the state grievance procedure, as she is an “Administrative and Professional” faculty member, which would be covered by a separate grievance procedure.

DISCUSSION

The General Assembly has provided that all non-probationary state employees may utilize the state employee grievance process, unless exempted by law.¹ Generally speaking, employees who are in positions designated as exempt from the Virginia Personnel Act (“VPA”) do not have access to the grievance procedure.² Therefore, the question before us is whether the grievant was exempt from the VPA as a member of the agency’s “Administrative/Professional Faculty.”

Though EEDR has been unable to locate a specific provision of law that exempts “Administrative/Professional Faculty” from coverage by the state employee grievance procedure, we have determined in the past³ that the General Assembly did not intend for employees in these positions to be covered by the grievance procedure.⁴ Indeed, as in the case of this grievant, “Administrative/Professional Faculty” are often employed under a contract with specific terms,

¹ Va. Code § 2.2-3001(A); *Grievance Procedure Manual* § 2.3.

² Va. Code §§ 2.2-2905, 2.2-3002.

³ *E.g.*, EDR Ruling No. 2016-4338.

⁴ *Cf.* Va. Code § 23-1002.

which is distinguished from normal classified state employment. Further, employees working as “Administrative/Professional Faculty” receive the benefits of the faculty (non-tenured) employment system. Hence, it could be argued that such employees should not receive the benefits of both the faculty system and the classified system with access to the state grievance procedure.⁵

When the General Assembly adopted the Restructured Higher Education Financial and Administrative Operations Act in 2005, institutions of higher education were given approval to designate “positions that require a high level of administrative independence, responsibility, and oversight within the organization or specialized expertise within a given field” as administrative and professional faculty.⁶ This provision was included within the VPA, which gives support to the position that the General Assembly sought to differentiate “Administrative/Professional Faculty” from those positions normally covered by the VPA and the state employee grievance procedure. In fact, such an interpretation has already been made by the Department of Human Resource Management. DHRM Policy 2.20 defines a “non-covered employee” as a “salaried employee who is not subject to the [VPA] ... includ[ing] ... administrative and professional faculty.”

“An ‘elementary rule of statutory interpretation is that the construction accorded a statute by public officials charged with its administration and enforcement is entitled to be given weight.’”⁷ Accordingly, DHRM’s interpretation of the VPA and its lack of application to “Administrative/Professional Faculty” is due appropriate weight. Further, the General Assembly is presumed cognizant of DHRM’s construction and since that construction has continued for a long period without any change by the legislature, we must further presume acquiescence in the construction.⁸ Therefore, EEDR must conclude that the grievant as a member of “Administrative/Professional Faculty” is not covered by the VPA and, thus, exempted by law from coverage under the state employee grievance procedure.

The agency indicated that the grievant may pursue her grievance under the provisions of the faculty grievance procedure, which the grievant confirms that she has elected to do. Thus, EEDR will take no further action regarding this matter. EEDR’s rulings on access are final and nonappealable.⁹



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⁵ Faculty, including “Administrative/Professional Faculty” at the University, have access to a separate grievance process.

⁶ Va. Code § 2.2-2901(E).

⁷ *Tazewell County Sch. Bd. v. Brown*, 267 Va. 150, 163, 591 S.E.2d 671, 678 (2004) (quoting *Commonwealth v. American Radiator & Standard Sanitary Corp.*, 202 Va. 13, 19, 116 S.E.2d 44, 48 (1960)).

⁸ *Id.* at 163-64, 591 S.E.2d at 678.

⁹ Va. Code § 2.2-1202.1(5).