

Issue: Access to the Grievance Procedure; Ruling Date: February 27, 2013; Ruling No. 2013-3477; Agency: Norfolk State University; Outcome: Access Denied.



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

ACCESS RULING

In the matter of Norfolk State University
Ruling Number 2013-3477
February 27, 2013

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management issue a ruling on whether she has access to the grievance procedure. Norfolk State University (NSU or the University) claims that the grievant does not have access to the grievance procedure because she is an Administrative/Professional Faculty Member with access to the University's faculty grievance program. For the reasons set forth below, EDR concludes that the grievant does not have access to the state employee grievance process.

FACTS

On or about November 10, 2012, the grievant submitted a Grievance Form A challenging her November 2, 2012 performance appraisal directly to EDR. The grievant indicated within the Form A and to an EDR representative that she understood the University's Human Resources office to have denied her access to the state employee grievance procedure, and thus was seeking access from EDR.

In response, the University denies that the grievant was told that she did not have access to the grievance procedure, and states in support that the grievant never formally initiated a grievance with the University. However, the University asserts that the grievant, as "Administrative/Professional Faculty," does not in fact have access to the state employee grievance procedure and should have utilized the University's faculty grievance/conflict resolution program.

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

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

² Va. Code §§ 2.2-2905, 2.2-3002.

grievant was exempt from the VPA as a member of “Administrative/Professional Faculty” of the University.

Pursuant to Virginia Code § 2.2-2905(8), “teaching and research staffs of state educational institutions” are exempted from the VPA.³ In this instance, it is not disputed that the grievant does not perform teaching or research duties at the University. However, the University argues that employees designated as “Administrative/Professional Faculty” are equated with teaching and research faculty and thus exempted from the state employee grievance procedure. The University provides its policy regarding this classification of employees as support for its position.

This case presents a difficult question. On the one hand, we have been unable to locate a specific provision of law that exempts “Administrative/Professional Faculty” from coverage by the state employee grievance procedure. However, we are also confident 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, 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, like the University, 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). 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

³ None of the other twenty-seven provisions of § 2.2-2905 would appear to apply to Administrative/Professional employees, and indeed, the University has not advanced such an argument.

⁴ Cf. Va. Code § 23-38.117

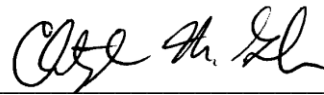
⁵ Faculty, including “Administrative/Professional Faculty” at the University, have access to a separate grievance process.

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)).

“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, EDR must conclude that the grievant as a member of “Administrative/Professional Faculty” of the University is not covered by the VPA and, thus, exempted by law from coverage under the state employee grievance procedure.

EDR’s access rulings are final and nonappealable.⁹ Although this grievance is not appropriate to proceed through the state employee grievance process, it would seem that the University ought to allow the grievant to pursue an appeal and/or grievance as would be appropriate under the “Administrative/Professional Faculty” system and applicable University policies.



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⁸ *Id.* at 163-64, 591 S.E.2d at 678.

⁹ Va. Code § 2.2-1202.1(5).