

Issue: Access to the Grievance Procedure; Ruling Date: April 29, 2016; Ruling No. 2016-4338; Agency: Virginia Community College System; Outcome: Access Denied.



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

ACCESS RULING

In the matter of Virginia Community College Systems
Ruling Number 2016-4338
April 29, 2016

The Virginia Community College System (the “agency”) and the grievant have requested that the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management issue a ruling on whether the grievant has access to the state employee grievance procedure and whether her dismissal grievance is timely. The agency claims, in part, that the grievant does not have access to the grievance procedure because she is an Administrative/Professional Faculty Member with access to the faculty grievance program. For the reasons set forth below, EDR concludes that the grievant does not have access to the state employee grievance process.¹

FACTS

The grievant is currently employed by the agency under a one-year “Faculty Employment Contract” dated June 26, 2015. That contract appoints the grievant to the rank of “Professor/Vice President.” The contract further provides that it is made in accordance with the requirements of the agency Policy Manual and applicable state and federal law. By letter dated February 24, 2016, the agency advised the grievant that although she would be offered a contract covering the period from July 2016 to June 2017, that contract would not be renewed after June 2017.² In the same letter, the grievant was advised that she would be reassigned at her current rank and salary to another position effective February 29, 2016, and that she would receive a subsequent “nonrenewable contract continuing this special assignment during the period from July 1, 201[6] to June 30, 2017.”

¹ Because EDR determines that there is not access to initiate this grievance under the state employee grievance procedure, the issue of whether the grievance was timely filed need not be addressed.

² The agency’s policy manual provides that administrative and professional faculty members must be notified of “nonreappointment” no later than January 15 prior to the expiration of the current contract. VCCS Policy Manual § 3.12.1, “Faculty Sanctions.” Thus, in February 2016, that date had passed to provide grievant sufficient notice that her current contract would not be renewed. The agency has essentially given her a very long period of advance notice of her “nonreappointment” to the forthcoming contract, which will cover July 2016 – June 2017. To the extent such an advance notice is not effective, given that the forthcoming contract has not been executed yet, the agency could provide similar notice of “nonreappointment” before the January 15 deadline once the 2016-2017 contract is in effect. Whether the grievant’s ability to challenge such “nonreappointment” accrues at this time need not be addressed in this ruling. Regardless of how the grievant’s grievance is characterized in what it is challenging, for the reasons discussed below, she does not have access to the Commonwealth’s grievance procedure to raise them here.

On or about March 1, 2016, the grievant initiated a grievance before a State Appeals Panel in accordance with the agency Policy Manual. It is unclear whether the grievant abandoned or withdrew that faculty grievance. However, the grievant thereafter submitted a dismissal grievance to EDR on March 25, 2016. The agency has argued that the grievant does not have access to the state grievance procedure, as she is “administrative/professional faculty.”

DISCUSSION

The General Assembly has provided that all non-probationary state employees may utilize the state employee grievance process, unless exempted by law.³ Generally speaking, employees who are in positions designated as exempt from the Virginia Personnel Act (VPA) do not have access to the grievance procedure.⁴ Therefore, the question before EDR is whether the grievant was exempt from the VPA as a member of “Administrative/Professional Faculty” of the agency.

EDR has previously concluded that employees designated as “Administrative/Professional Faculty” are exempt from the VPA.⁵ The agency has presented evidence that the grievant is classified as Administrative/Professional Faculty, and that the grievant is employed by the agency under a one-year faculty employment contract. The grievant asserts that she is not employed as a faculty member at any individual college and therefore should not be considered “faculty” for purposes of the grievance procedure.⁶

As EDR has previously noted, 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.⁷ 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” presumably 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.⁸

When the General Assembly adopted the Restructured Higher Education Financial and Administrative Operations Act in 2005, institutions of higher education, like those administered by the agency, were given approval to designate “positions that require a high level of

³ Va. Code § 2.2-3001(A); *Grievance Procedure Manual* § 2.3.

⁴ Va. Code §§ 2.2-2905, 2.2-3002.

⁵ See EDR Ruling No. 2013-3477.

⁶ She also asserts that she is not employed as a president, or in a teaching or research position, and as such, is not subject to the VPA exemption. Pursuant to Virginia Code § 2.2-2905(8), “teaching and research staffs of state educational institutions” are exempted from the VPA. EDR need not directly address this point or an interpretation of this particular provision for the reasons discussed below.

⁷ Cf. Va. Code § 23-38.117

⁸ Faculty, including “Administrative/Professional Faculty” at the agency, appear to have access to a separate grievance process. VCCS Policy Manual § 3.12.4, “Faculty Sanctions.”

administrative independence, responsibility, and oversight within the organization or specialized expertise within a given field” as administrative and professional faculty.⁹ 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.’”¹⁰ 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.¹¹

Neither the grievant’s assignment to the agency, rather than a college, nor her job duties are sufficient to override her designation by the College as “Administrative/Professional Faculty.” As such, EDR 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 grievant should, presumably, have access to the agency’s faculty grievance procedure and should be permitted to pursue her grievance under the provisions of that process. EDR encourages the parties to address these concerns through that process, but ultimately has no authority to determine eligibility, compliance with, or the parameters of the agency’s faculty grievance procedure.

EDR’s access rulings are final and nonappealable.¹²



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⁹ Va. Code § 2.2-2901(E); *see also* Va. Code § 23-38.88(A)(10).

¹⁰ *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)).

¹¹ *Id.* at 163-64, 591 S.E.2d at 678.

¹² Va. Code § 2.2-1202.1(5).