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ACCESS RULING

In the matter of the College of William and Mary
Ruling Number 2020-5089
April 30, 2020

On April 24, 2020, the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) received a dismissal grievance initiated by the grievant to challenge his separation from employment. The grievant’s former employer, the College of William and Mary (the “College” or the “agency”), challenges whether the grievant has access to the state employee grievance procedure to initiate this grievance. For the reasons set forth below, EDR concludes that the grievant does not have access to the state employee grievance procedure.

FACTS

Based on the information provided by the College, the grievant was given notice on or about December 17, 2019 that he would be terminated effective January 3, 2020 due to specified misconduct. On or about April 24, 2020, the grievant initiated a dismissal grievance with EDR challenging his separation and alleging the College’s decision to terminate his employment was discriminatory. The College asserts that the grievant was employed as a member of its professional faculty and, as a result, he does not have access to the state employee 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 employed in positions designated as exempt from the Virginia Personnel Act (“VPA”) do not have access to the grievance procedure.² When the General Assembly adopted the Restructured Higher Education Financial and Administrative Operations Act in 2005, institutions of higher education, like the College, 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

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

² Va. Code §§ 2.2-2905, 2.2-3002.

faculty, and this provision was included within the VPA.³ Accordingly, EDR has previously held that “Administrative/Professional Faculty” at institutions of higher education are exempt from the VPA and do not have access to the state employee grievance procedure.⁴ In this case, the College’s Classification Policy specifically provides that, pursuant to its authority to designate the classification of positions, “[p]rofessionals are considered ‘faculty’”⁵

Furthermore, and as is the case here, Administrative/Professional Faculty are often employed under a contract with specific terms, which is distinguished from normal classified state employment. 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 employee grievance procedure.⁶

For these reasons, EDR finds that the grievant was employed by the College in an Administrative/Professional Faculty position, and thus he does not have access to the state employee grievance procedure.⁷ As such, the dismissal grievance filed by the grievant with EDR is unable to proceed and the file will be closed.

EDR’s access rulings are final and nonappealable.⁸



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³ *Id.* § 2.2-2901(E).

⁴ *See, e.g.*, EDR Ruling No. 2019-4840; EDR Ruling No. 2013-3477; *see also* DHRM Policy 2.20, *Types of Employment* (defining a “non-covered employee” as a “salaried employee who is not subject to the [VPA] . . . [i]nclud[ing] . . . administrative and professional faculty.”)

⁵ College of William and Mary Classification Policy, § III(A)(3).

⁶ Based on the information provided by the College, it appears the grievant has access to the College’s faculty grievance procedure, and he should be permitted to pursue his grievance under the provisions of that process. While EDR encourages the parties to address the grievant’s concerns through that process, we ultimately have no authority to determine eligibility, compliance with, or the parameters of the College’s faculty grievance procedure. In addition, and to the extent he has not already done so, the grievant may file a complaint of discrimination with the federal Equal Employment Opportunity Commission, the entity responsible for enforcing federal anti-discrimination laws, based on his allegation that the College’s decision to terminate his employment was discriminatory.

⁷ Although the College has not disputed the timeliness of the grievant’s submission, the grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance. Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.2. When an employee initiates a grievance beyond the 30 calendar-day period without just cause, the grievance is not in compliance with the grievance procedure and may be administratively closed. Even assuming the grievant had access to the grievance procedure, he was terminated effective January 3, 2020, and thus should have filed his grievance no later than 30 calendar days from that date. The grievant initiated his grievance with EDR on or about April 24, 2020, more than 30 calendar days after his termination. As such, the grievance is untimely, and the grievant has provided no evidence of just cause for the delay except that he “was instructed to file” a grievance with EDR. Ultimately, however, this issue need not be addressed further, because the grievant does not have access to the state employee grievance procedure due to his employment in an Administrative/Professional Faculty position.

⁸ Va. Code § 2.2-1202.1(5).