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ACCESS RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2021-5262
June 9, 2021

On May 10, 2021, the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) received a Dismissal Grievance Form A from the grievant. Because the grievant was separated during a probationary period, the Department of Behavioral Health and Developmental Services (the “agency”) challenges whether she has access to the grievance procedure.

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 policy further provides that “[a] person who is selected for a position that requires certification following completion of a prescribed training program must complete a new probationary period.”² “Recruitment announcements for positions that require new probationary periods must include this requirement” and “[o]ffer letters or other written employment notification also must include information about the additional probationary requirement, as appropriate.”³ The General Assembly has further provided that all *non-probationary* state employees may utilize the grievance process, unless exempted by law.⁴

According to the agency, the grievant began working in a classified position at one of the agency’s hospitals on or about March 25, 2017. The grievant obtained an additional professional certification after applying for a program sponsored by the agency. The advertisement for the program stated that an additional 12-month probationary period would be required as a condition of employment. The grievant accepted a new position as a Licensed Practical Nurse on July 10, 2020. The offer letter for the position makes reference to a 12-month probationary period.

The grievant’s last day of work appears to have been March 14, 2021. A note from the grievant’s medical provider indicates that the grievant needed to be excused from work from March 15 through May 13. The grievant appears to have filed a claim for short-term disability under the

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

² *Id.* at 1-2.

³ *Id.*

⁴ Va. Code § 2.2-3001(A); *Grievance Procedure Manual* § 2.3.

Virginia Sickness and Disability Program (“VSDP”) on or around April 16. The agency terminated the grievant’s employment by letter dated May 3. The letter describes the grievant’s absence from work after March 14 as “multiple unplanned absences” from March 15 to March 31, “call outs without supporting documentation” from April 4 to April 7, and no call/no show on April 11 and April 12. The letter also indicates that the VSDP third-party administrator notified agency Human Resources on April 27 that it had not yet received medical paperwork from the grievant’s provider. The agency, therefore, determined that the grievant’s absences were unexcused. In a letter dated May 4, 2021, after the grievant’s termination, the third-party administrator approved the grievant’s VSDP claim through May 13.

Employees who have not completed their probationary period do not have access to the grievance procedure.⁵ Accordingly, the grievant does not have access to the grievance procedure to initiate a grievance challenging her termination. Therefore, this dismissal grievance will not proceed to a hearing and EDR will close its file. This ruling does not make any determinations as to whether the above-described events are consistent with law or policy. This ruling also does not address whether any legal or other remedy may be available to the grievant based on her concerns about her termination. This ruling only determines that she is ineligible to pursue her claims through the state employee grievance procedure.

EDR’s access rulings are final and nonappealable.⁶

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⁵ E.g., EDR Ruling No. 2020-5017; EDR Ruling No. 2019-4920.

⁶ Va. Code § 2.2-1202.1(5).