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**ACCESS RULING**

In the matter of the Department of Behavioral Health and Developmental Services  
Ruling Number 2021-5270  
August 12, 2021

On May 24, 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.”<sup>1</sup> The policy further provides that “[p]robationary periods may be extended for up to 6 additional months for performance reasons. The reasons for the extensions must be documented on a Probationary Progress Review form. . . .”<sup>2</sup> The General Assembly has further provided that all *non-probationary* state employees may utilize the grievance process, unless exempted by law.<sup>3</sup>

According to the agency, the grievant began working in a classified position at one of the agency’s facilities on or about November 25, 2019. Effective August 14, 2020, the grievant’s probationary period was extended until May 25, 2021. The agency terminated the grievant on May 18, 2021 during her extended probationary period. As the grievant’s employment ended while she was still in her probationary period, she does not have access to the grievance procedure to challenge her termination. However, the grievant has challenged whether the agency had properly extended her probationary period.

During consideration of this ruling, EDR has reviewed information submitted by both the grievant and the agency relevant to the grievant’s performance and the extension of her probationary period in August 2020. The precipitating event that led to the probationary period extension concerned a verbal altercation with a co-worker on July 1, 2020, which the agency deemed a violation of DHRM Policy 2.35, *Civility in the Workplace*. The matter was investigated by agency human resources,

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<sup>1</sup> DHRM Policy 1.45, *Probationary Period*, at 1.

<sup>2</sup> *Id.* at 2.

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

which recommended that the grievant be terminated. The grievant's supervisor acknowledged that the grievant had difficulties with peers, but wanted to maintain the grievant's employment. As such, the grievant received a Notice of Improvement Needed/Substandard Performance and her probationary period was extended. The Notice of Improvement identified needed correction of performance deficiencies in "demonstrat[ing] respect for . . . supervisors and staff by resolving issues and disputes in a professional manner and through the proper chain of command." The grievant was also tasked with "work[ing] cooperatively with nursing staff to achieve work unit and agency goals and objectives by being open-minded, engaging in active listening, and following instructions."

Beyond this one incident, the other performance-related documentation that occurred during the original 12-month probationary period reflects positive performance by the grievant, including her three-month probationary progress review (February 24, 2020), an Acknowledgement of Extraordinary Contribution (April 16, 2020), six-month probationary progress review (June 17, 2020), another Acknowledgement of Extraordinary Contribution (November 2, 2020), and her annual performance evaluation, which rated her an Extraordinary Contributor (November 2, 2020). With the bulk of the grievant's performance apparently evaluated as overwhelmingly positive, this documentation makes it confusing to understand what performance deficiencies existed that supported the probationary period extension. It is unusual to see a probationary period extended as an apparent disciplinary measure; the relevant policy states that probationary period extensions are to be for "performance reasons."<sup>4</sup> Where, as here, the documentation reflects that the grievant's performance was meeting expectations, indeed surpassing them apparently, the propriety of the extended probationary period is questionable.

EDR sought additional information from the agency to understand the discrepancy between the written documentation and the stated basis for extending the grievant's probationary period. The agency provided EDR with additional written explanation about certain performance matters during the relevant time period.<sup>5</sup> Some of the content of this information is irrelevant, as it does not appear to relate to the deficiencies noted in the probationary period extension; nor do the alleged deficiencies appear in any other performance documentation about the grievant. However, the information does provide some detail as to concerns the grievant's supervisor observed in how the grievant handled disputes in the workplace, which was reflected in the Notice of Improvement Needed issued at the time of the extended probationary period. To the extent such matters were considered a significant concern, they were not documented well, or at all, in some instances. Nevertheless, agency management has broad discretion to evaluate employee performance.<sup>6</sup> The relevant state policy allows agencies to determine when it is appropriate to extend an employee's probationary period for "performance reasons."<sup>7</sup> The policy requires that the employee be given documentation reflecting the needed performance improvements and be informed in writing of the probationary period extension,<sup>8</sup> both of which occurred here. Further, EDR consulted with DHRM's Policy Manager, who affirmed

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<sup>4</sup> DHRM Policy 1.45, *Probationary Period*, at 2.

<sup>5</sup> The grievant was provided the opportunity to respond to the additional information submitted. EDR reviewed and considered the grievant's responses in reaching its conclusions in this ruling.

<sup>6</sup> The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government. Va. Code § 2.2-3004(B).

<sup>7</sup> DHRM Policy 1.45, *Probationary Period*, at 2.

<sup>8</sup> *Id.*

that the probationary period extension in this case complied with state policy. Thus, EDR is unable to identify facts that would establish that the grievant's probationary period extension was invalid under policy.

Employees who have not completed their probationary period do not have access to the grievance procedure.<sup>9</sup> 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 grievant's termination itself was consistent with law. 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. Further, EDR's ruling only addresses the procedural question of whether the grievant has access to the state employee grievance procedure and does not make determinations on the substantive matters raised in the grievance.

EDR's access rulings are final and nonappealable.<sup>10</sup>

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<sup>9</sup> E.g., EDR Ruling No. 2020-5017; EDR Ruling No. 2019-4920.

<sup>10</sup> Va. Code § 2.2-1202.1(5).