

Issue: Access to the Grievance Procedure; Ruling Date: August 31, 2007; Ruling #2008-1790; Agency: Department of Corrections; Outcome: Access Denied.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**ACCESS RULING OF DIRECTOR**

In the matter of Department of Corrections  
Ruling No. 2008-1790  
August 31, 2007

**PROCEDURAL FACTS**

The grievant has requested that this Department (EDR) reconsider EDR Ruling 2007-1705. In that ruling this Department responded to the grievant's request for determination of whether she had access to the grievance procedure when she initiated her April 1, 2007 grievance. The Department of Corrections (DOC or the agency) had claimed that the grievant did not have access because she was a probationary employee when the grounds giving rise to her grievance arose. This Department held that the grievant, who began her employment with the agency on July 10, 2006 as a rehabilitation counselor, resigned in lieu of termination prior to the completion of the Commonwealth's one-year probationary period. Ruling 2007-1705 explained that only *non-probationary* state employees may utilize the grievance process and because the grievant was a probationary employee when she resigned on March 6, 2007, the grievant did not have access to the grievance process to initiate her April 1, 2007 grievance.

Ruling 2007-1705 noted that DOC Procedure No. 5-8, which relates to probationary periods, appears inconsistent with the Commonwealth's policy. With certain exceptions, Procedure 5-8 provides that new employees "shall serve a probationary period of six calendar months from the actual date of employment." Controlling state policy, promulgated by the Department of Human Resource Management (DHRM), provides 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> We held that to the extent that the two policies are in conflict, the DHRM policy controls. The grievant now seeks reconsideration based on this Department's holdings regarding the apparently conflicting policies and our determinations regarding which controls.

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<sup>1</sup> Department of Human Resource Management (DHRM) Policy 1.45.

## DISCUSSION

In Ruling 2007-1705, this Department explained that if the grievant wished to appeal EDR's determination that she does not have access to the grievance procedure, she should notify her Human Resources Office, in writing, within five workdays of receipt of the ruling. The *Grievance Procedure Manual* explains:

If EDR denies the employee access, the employee may appeal to the circuit court. If the employee wishes to appeal to the court, the employee must submit her grievance form to the agency's Human Resources Office within 5 workdays of receiving EDR's access decision. Within 5 workdays of receipt of the appeal request, the agency's Human Resources Office must copy and mail the grievance record, complete with attachments, to the circuit court in the jurisdiction in which the grievance arose. The Human Resources Office must list the EDR Director as a copy recipient on the cover letter to the court accompanying the grievance record. The decision of the circuit court is final and nonappealable.<sup>2</sup>

Thus, it is clear that any appeal of EDR's access decision is appropriately directed to the court (via the agency's Human Resources Office), not to EDR for reconsideration.<sup>3</sup>

We note that in response to the grievant's request for reconsideration, this Department verbally instructed the grievant that she would have to direct her appeal of EDR's access determination to the circuit court. The grievant subsequently requested a written response to her request for reconsideration and explained that she had attempted to appeal EDR Ruling 2007-1705 to the circuit court but missed her court date due to a scheduling misunderstanding. While the grievant's error is regrettable, it cannot serve as a basis for this Department deviating from the long-standing appeal process described above. Thus, this Department will not reconsider Ruling 2007-1705.

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Claudia T. Farr  
Director

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<sup>2</sup> *Grievance Procedure Manual* § 2.3. An enclosure with Ruling 2007-1705 also explained that any appeal should be directed to circuit court via the agency's Human Resource Office.

<sup>3</sup> This Department has reconsidered *compliance* rulings for which there are no other external appeals available. But where an external review is available, such as with EDR access and qualification determinations which can be appealed to the circuit court, this Department believes that the appropriate venue for such reviews is the circuit court in the jurisdiction in which the grievance arose, not EDR.