

Issue: Access to the Grievance Procedure; Ruling Date: October 16, 2008;
Ruling #2009-2133; Agency: Department of Motor Vehicles; Outcome:
Access Denied.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of the Department of Motor Vehicles
Ruling No. 2009-2133
October 16, 2008

The grievant has requested a ruling on whether he had access to the grievance procedure when he initiated his July 22, 2008 grievance with his employing agency, the Department of Motor Vehicles (DMV or agency). For the reasons set forth below, the grievant does not have access to the grievance procedure.

FACTS

The grievant worked for the agency as a probationary Customer Service Center Manager, Sr. On July 16, 2008, the grievant was presented with a memorandum stating that his employment was terminated effective immediately. His extended probationary period was due to end on July 25, 2008.¹

On July 22, 2008, the grievant initiated a grievance challenging the termination of his employment. He asserts that contrary to Department of Human Resource Management (DHRM) Policy 1.45 policy, he was not given a chance to meet with his supervisor 3 weeks prior to the end of his probationary period.

The agency concluded that the grievant lacked access to the grievance procedure due to his probationary status. The grievant has appealed the agency's access determination to this Department.

DISCUSSION

The General Assembly has provided that all *non-probationary* state employees may utilize the grievance process, unless exempted by law.² Thus, by statute, employees who have not completed their probationary period do not have access to the grievance procedure.³ DHRM Policy 1.45 provides that the probationary period for classified positions is generally twelve months effective from the date of employment, but that agencies may extend the twelve-month period for up to an additional six months for performance reasons, absences for an extended period of time, or if the employee moves

¹ In January of 2008, the agency extended the grievant's probationary period.

² Va. Code § 2.2-3001(A); *Grievance Procedure Manual* § 2.3.

³ *E.g.*, EDR Ruling No. 2007-1705; EDR Ruling No. 2005-1032.

to another position during the second six months of the initial twelve-month period.⁴ Moreover, while Policy 1.45 encourages an employing agency to provide clear performance expectations and feedback on progress, such measures are not a prerequisite to the extension of probation.

Here, on July 16, 2008, the agency terminated the grievant's employment prior to the conclusion of his probationary period on July 25, 2008. Accordingly, he did not have access to the grievance procedure. The grievant asserts that he was not given an evaluation near the end of his probationary period. It is true that DHRM Policy 1.45 states that "The supervisor should meet with the probationary employee approximately 3 weeks prior to the completion of his or her probationary period and provide a progress review." However, the "should" language used in Policy 1.45 is suggestive and not mandatory as would be a term such as "shall" or "must." Moreover, any failure to have the meeting had no bearing on the grievant's status as a probationary employee.⁵

APPEAL RIGHTS AND OTHER INFORMATION

For more information regarding actions that the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the determination that he does not have access to the grievance procedure to circuit court, he must notify his Human Resources Office, in writing, within five workdays of receipt of this ruling.

Claudia T. Farr
Director

⁴ DHRM Policy 1.45, *Probationary Period*.

⁵ Another point raised by the grievant in his ruling request is that he was granted unemployment benefits. The granting or denial of unemployment benefits has no bearing on grievance procedure access. Similarly, the agency head's reference in his August 28, 2008 Access Determination to the grievant's termination of employment as a "release" from employment has no bearing on access.