

Issue: Access to the Grievance Procedure; Ruling Date: April 8, 2009; Ruling #2009-2254; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Access Granted.



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

**ACCESS RULING OF DIRECTOR**

In the matter of the Department of Mental Health, Mental Retardation and  
Substance Abuse Services  
Ruling No. 2009-2254  
April 8, 2009

The grievant has requested a ruling on whether she had access to the grievance procedure when she initiated her January 23, 2009 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency) to challenge her January 12, 2009 termination of employment. For the reasons set forth below, the grievant has access to the grievance procedure.

FACTS

The grievant worked for the agency as a Housing Coordinator. According to the agency, the grievant was hired on January 10, 2008 and her probationary period was originally scheduled to end on January 10, 2009. The agency asserts that from about July 19, 2008 through August 10, 2008, and from December 9, 2008 through January 11, 2009, the grievant was out from work on Short-Term Disability Leave. The agency contends that because the grievant was on Short-Term Disability Leave for more than 14 consecutive calendar days, her probationary period was extended and not due to end until February 1, 2009.

On January 12, 2009, the agency gave the grievant the choice of quitting or being dismissed. The grievant refused to quit asserting that she had done nothing wrong.

On January 23, 2009, the grievant challenged the termination of her employment by initiating a grievance. The agency asserts that the grievant does not have access to the grievance procedure because she was a probationary employee at the time that she was terminated. The grievant has appealed the agency's access determination to this Department.<sup>1</sup>

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<sup>1</sup> We note that the grievant requested a ruling request from this Department prior to asking the agency head to grant her access. See *Grievance Procedure Manual* § 2.3 (which states that access appeals are directed to the *agency head* prior to seeking an EDR ruling). However, we also note that the human resource office instructed the grievant to direct her access appeal to the *facility director* who, in turn, denied her access. Thus, to expedite this ruling which was delayed by erroneous information provided by the agency, we now rule.

## DISCUSSION

The agency denied the grievant access to the grievance procedure on the basis that she was purportedly a probationary employee at the time of the event that formed the basis of the grieved dispute. The General Assembly has provided that all *non-probationary* state employees may utilize the grievance process, unless exempted by law.<sup>2</sup> Thus, by statute, employees who have not completed their probationary period do not have access to the grievance procedure.<sup>3</sup>

By statute, Department of Human Resource Management (DHRM) is exclusively charged with the promulgation and interpretation of state policy.<sup>4</sup> DHRM Policy 1.45 provides that:

Probationary periods must be extended when probationary employees are on any leave with or without pay, including Workers' Compensation, Family Medical Leave, Military leave with or without pay, or on VSDP (Virginia Sickness and Disability Program) short-term disability (STD) leave or long-term disability (LTD)-working status for more than 14 consecutive calendar days.

Policy 1.45 further instructs that: “[e]mployees must be notified in writing if their probationary periods will be extended for performance reasons or due to leave.” Finally, Policy 1.45 states that “[i]f a probationary employee works beyond a 12-month period without being notified (1) of satisfactory completion or (2) that the probationary period was extended, the employee will be regarded as having successfully completed the probationary requirement.”

Because this ruling requires a determination of whether the grievant was a non-probationary employee when the event that forms the basis of her grievance occurred, and because the answer to this question turns on state policy, this Department contacted DHRM for policy guidance in reading these provisions in harmony with one another.<sup>5</sup> DHRM provided the following summation of Policy 1.45:

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

<sup>3</sup> *E.g.*, EDR Ruling No. 2007-1705; EDR Ruling No. 2005-1032.

<sup>4</sup> *See* Va. Code § 2.2-1201(13) (Director of the Department of Human Resource Management “shall have the final authority to establish and interpret personnel policies”); *Murray v. Stokes*, 237 Va. 653, 657, 378 S.E.2d 834, 836 (1989) (stating that the “ ‘final authority’ language ... supports and is consistent with a legislative intent ... to preclude judicial review”); *Grievance Procedure Manual* § 7.2(c) (noting that decisions by the Director of Department of Human Resource Management (DHRM) are final and nonappealable).

<sup>5</sup> Policy interpretation may be viewed as analogous to statutory interpretation. A key principle of statutory construction is preserving the “harmony” of the entire scheme of a statute or rule. *Brown v. Black*, 260 Va. 305, 314; 534 S.E.2d 727, 731 (2000) (concurring opinion). A well-settled principle of statutory construction is that every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary. *Hubbard v. Henrico Ltd. P'ship*, 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998). Courts instruct that seemingly incongruent statutes “capable of coexistence” should be read harmoniously so that each retains meaning and neither is rendered illusory. *Seaton v. Commonwealth*, 42 Va. App. 739, 758-59, 595 S.E. 2d 9, 18-19 (2004)

An employee's probationary period must be extended when he/she is on leave for 14 consecutive calendar days or more. An agency is required to notify the employee of the extension in writing. However, if an agency fails to notify an employee of the required extension before the employee reaches the conclusion of the original 12 month probationary period from their date of hire, the employee shall be considered as having satisfactorily completed their probationary period.

DHRM further confirmed that the requirement to inform an employee of a probationary period extension is not satisfied by a general blanket provision in an agency manual. All such notifications must be made on an individual basis.

Here, the grievant's probationary period was to end on January 10, 2009. The agency concedes that it did not inform the grievant that her probationary period had ended.<sup>6</sup> Because the grievant worked beyond the 12-month period without being notified that her probationary period was extended, she completed the probationary requirement on January 10, 2009. Because the grievant was a *non*probationary employee at the time that she was terminated from employment on January 12, 2009, she has access to the grievance procedure.

#### CONCLUSION

The grievant had access to the grievance procedure to challenge her termination of employment when she initiated the January 23, 2009 grievance. If the grievant wishes to continue with her grievance, she has **five workdays from receipt of this ruling** to return the grievance to the agency so that the second step respondent may schedule the face-to-face fact-finding meeting.<sup>7</sup>

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Claudia T. Farr  
Director

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<sup>6</sup> The agency provided the grievant with no notice that her probationary period was extended. It only provided her with the Center Employee Manual when she was hired, which prospectively informs all employees that if an employee is out of work and on STD for more than 14 consecutive days, the probationary period will be extended. According to DHRM, this sort of blanket statement in a manual does not satisfy the notification requirement.

<sup>7</sup> It appears that a face-to-face fact-finding meeting did not occur prior to the issuance of second step response. This Department has held that if both parties wish to waive the second step meeting, this Department will not interfere with that decision. However, we have also held that if either party desires the face-to-face fact-finding meeting, generally, the meeting must occur. Therefore, if such a meeting did not occur and either party desires one, it shall take place consistent with §3.2 of the *Grievance Procedure Manual*. Once that meeting has occurred, the second step respondent will issue an amended response.