

Issue: Access to the Grievance Procedure: Ruling Date: April 20, 2010; Ruling #2010-2598; Agency: Department for the Blind and Vision Impaired; Outcome: Access Denied.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of Department of Blind and Vision Impaired
Ruling Number 2010-2598
April 20, 2010

The grievant has requested a ruling on whether she had access to the grievance procedure when she initiated her March 9, 2010 grievance concerning her termination. The Department of Blind and Vision Impaired claims that the grievant does not have access to the grievance procedure because she was a probationary employee when she was terminated. For the reasons set forth below, this Department concludes that the grievant did not have access to the grievance process when she initiated her grievance.

FACTS

On December 2, 2008, the grievant began work with another state agency. After accepting a new position with the Department of Blind and Vision Impaired (DBVI or the agency), the grievant began work there on September 25, 2009. DBVI informed the grievant by letter dated September 21, 2009 that because she had left her previous job during the last six months of her probationary period, the probationary period at DBVI would be extended until March 30, 2010. On November 18, 2009, the grievant received a probationary progress review from her supervisor. That form indicated that the projected probationary end date was January 2, 2010. According to the agency, that date was a "clerical error" caused by the fact that the grievant's supervisor had used a progress review form the grievant received at her old job, instead of a blank form, and neglected to alter certain information.

On February 12, 2010, the grievant was terminated by the agency. She submitted her March 9, 2010 grievance to challenge her termination and surrounding issues. The agency asserts that the grievant did not have access to the grievance procedure because she was still in her probationary period. The grievant now appeals that determination to this Department.

DISCUSSION

Department of Human Resource Management (DHRM) Policy 1.45 provides that employees "who begin 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 "[i]f an employee moves to a new position during the last 6 months of

¹ DHRM Policy 1.45, *Probationary Period*.

his/her probationary period, the employee's probationary period may remain as the original 12 months or may be extended so that the new supervisor has the benefit of the full 12-month probationary period."²

The agency's clearly expressed intent in the offer letter appropriately extended the grievant's probationary period until March 30, 2010. The grievant argues that the projected probationary period end date noted on her November 18, 2009 probationary progress review form altered this extension. While we can certainly understand and appreciate the reasonableness of the grievant's position, this Department cannot ultimately find in the grievant's favor. The unintentional clerical error on the probationary progress review form does not support a contention that the agency actually sought or intended to shorten the already clearly expressed extension of the probationary period until March 30, 2010.³ As such, it is this Department's determination that the grievant had not finished her probationary period when she was terminated on February 12, 2010.

The General Assembly has provided that all *non-probationary* state employees may utilize the grievance process, unless exempted by law.⁴ Employees who have not completed their probationary period do not have access to the grievance procedure.⁵ Accordingly, the grievant did not have access to the grievance procedure to initiate the March 9, 2010 grievance.⁶

APPEAL RIGHTS AND OTHER INFORMATION

For more information regarding actions that you may take as a result of this ruling, please refer to the enclosed sheet. If you wish to appeal the determination that you do not have access to the grievance procedure to circuit court, please notify your Human Resources Office, in writing, within five workdays of receipt of this ruling.⁷

Claudia T. Farr
Director

² *Id.*

³ Determining the actual intent of the agency here is consistent with the manner in which this Department has addressed other analogous situations of alleged inadvertent mistakes, such as notations on the Grievance Form A. *See, e.g.*, EDR Ruling No. 2007-1631; EDR Ruling No. 2007-1519.

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

⁵ *E.g.*, EDR Ruling No. 2005-1032.

⁶ While the grievant does not have access to file a grievance, there may be other options available to her. For instance, "[a] probationary employee who claims that termination or other disciplinary action was based on race, sex, color, national origin, religion, sexual orientation, age, political affiliation, veteran status, or disability may file a discrimination complaint with the Office of Equal Employment Services (OEES) in the Department of Human Resource Management or other agencies as appropriate." DHRM Policy 1.45. OEES can be contacted by calling 1-800-533-1414 or (804) 225-2136.

⁷ *See Grievance Procedure Manual* § 2.3.