

Issue: Misapplication of Policy – Voluntary Resignation; Hearing Date: 04/10/07; Decision Issued: 04/12/07; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 8559; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:
Case No: 8559

Hearing Date: April 10, 2007
Decision Issued: April 12, 2007

PROCEDURAL ISSUES

In his written grievance in August 2006, grievant requested to be allowed to rescind his resignation and be reinstated in his position. In a letter submitted to the agency in February 2007, grievant sought reinstatement and transfer to another location, or alternatively, a written apology from four named employees. A hearing officer does not have authority either to transfer employees¹ or to require employees to write apologies.² Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
Five witnesses for Grievant
Regional Operations Director

¹ § 5.9(b)3. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

² § 5.9(b)7 & 8. *Id.*

Representative for Agency

ISSUES

Did the agency misapply policy when it denied grievant's request to rescind his resignation?

FINDINGS OF FACT

Grievant filed a grievance asserting, in effect, that the agency misapplied policy by not allowing grievant to rescind his written resignation.³ The agency closed the grievance at the first resolution step. Grievant appealed to the Department of Employment Dispute Resolution (EDR). The Director of EDR ruled that grievant had access to pursue his grievance through the grievance procedure to the extent stated in the Ruling.⁴ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing. The Department of Transportation (Hereinafter referred to as "agency") employed grievant as an electronics technician for two years.

The Commonwealth's policy on separation from state service defines resignation as an employee's voluntary separation from state service.⁵ An employee who plans to resign from state service is asked to give reasonable notice to his agency (preferably at least two weeks), along with a written explanation for the resignation. An agency may choose to accept an employee's request to rescind his resignation within 30 calendar days of separation.⁶

Before being hired by the agency, grievant lived in the eastern part of the state. He accepted a job with the agency in the western part of the state even though his family, friends, and girlfriend were in the eastern part of the state. From the beginning of his employment, grievant discussed with his supervisor and coworkers his desire to find employment in the eastern part of the state. Grievant often applied for job openings located in eastern Virginia and was frequently granted administrative leave to attend interviews for such jobs. At grievant's request, he was allowed to work a modified schedule (four 10-hour days) so that he could spend more time visiting his girlfriend and family in the eastern part of the state.

³ Agency Exhibit 2. Grievance Form A, filed August 29, 2006.

⁴ Department of Employment Dispute (EDR) Ruling Number 2006-1458, *Access Ruling of Director*, November 1, 2006.

⁵ Agency Exhibit 3. Section II.A.1, Department of Human Resource Management Policy 1.70, *Termination/Separation from State Service*, revised May 2004.

⁶ Agency Exhibit 3. Section II.A.3, *Id.*

On July 26, 2006, grievant submitted a written resignation to be effective August 26, 2006.⁷ Grievant did not state a reason for resigning but the letter was polite, cordial, and expressed gratitude for the support and friendship he had received during difficult times. Grievant wrote the resignation of his own free will; the resignation was not forced or written under duress. When grievant submitted his resignation, he had recently had a job interview and was confident that he might be offered the position. Grievant's supervisor accepted grievant's resignation and so advised him the same day. On July 27, 2006, grievant met with the regional operations director (the person to whom grievant's supervisor reports) and asked to extend his resignation date. The director told grievant he would give the request consideration but did not give an answer that day.

After submitting his resignation letter, grievant visited an agency contractor. After telling contractor personnel that he had resigned, grievant said work had become uncomfortable and said words to the effect of, "I have bombs I could drop and plenty of ammunition to fight with."⁸ Despite reassurances by grievant that he was only speaking figuratively, the contractor reported the incident to the agency. Grievant's supervisor knew that grievant owned a firearm. When grievant's girlfriend broke up with him in the summer of 2005, grievant was depressed and called his supervisor. The supervisor went to grievant's home and found grievant sitting with a gun on the coffee table in front of him. Grievant asked the supervisor to take the gun so that grievant would not have access to it.⁹ Because of this prior incident, the regional operations director met with grievant about his statements to the contractor. Grievant confirmed that he had not made any threats and had only spoken metaphorically. This incident was documented by the human resource manager, as required by policy.¹⁰

On August 3, 2006, grievant wrote to his supervisor expressing his desire to rescind his resignation.¹¹ On August 4, 2006, grievant wrote to the director requesting that he be allowed to rescind his resignation.¹² In this lengthy letter, grievant detailed what he characterized as stressors during his employment at the agency. According to grievant, there were extensive childish games and pranks among coworkers which were often perpetrated by his supervisor. Grievant had told his supervisor in 2005 that he did not like such activities and did not wish to be a part of it. After that grievant was, for the most part, kept out of the games and pranks. In August 2005, grievant was upset about his father's impending heart surgery. Another prank was played that was directed at grievant. Grievant told his supervisor about the stress he was under and that he was angry about the prank. The supervisor spoke to the other employees and thereafter, the horseplay subsided and grievant had no further disagreement with

⁷ Agency Exhibit 2. Letter from grievant to supervisor, July 26, 2005. [NOTE: Although grievant dated his resignation 2005, the letter was actually submitted on July 26, 2006.]

⁸ Agency Exhibit 2. E-mail from contractor to regional operations director, August 8, 2006.

⁹ The supervisor assisted grievant to contact the Employee Assistance Program for counseling as a result of grievant's depression.

¹⁰ Grievant Exhibit 5. Workplace Violence Incident Final Report.

¹¹ Grievant Exhibit 4. Letter from grievant to supervisor, August 3, 2006.

¹² Agency Exhibit 2. Letter from grievant to regional operations director, August 4, 2006.

the other employees. In March 2006, grievant entered his office to find a representation of a large penis drawn on a whiteboard.¹³ Grievant complained to the regional operations director who met with grievant and the supervisor. Since then, there have been no further drawings on the whiteboard in grievant's office.

In July 2006, grievant's relationship with his then current girlfriend dissolved which caused him distress. Grievant intensified his search for jobs in the eastern part of the state. After discussing these issues with his supervisor, grievant subsequently learned that the supervisor had disclosed some of the information to one of grievant's coworkers. Grievant was upset that information he considered to be confidential had been disclosed to a coworker. A few days later, on July 26, 2006, grievant and his supervisor discussed grievant's unhappiness with his job, and his desire to move to the eastern part of the state. Grievant acknowledged that he was burned out. The supervisor showed grievant how to use the state job search website (Recruit). After the meeting, grievant decided to resign, wrote his letter and submitted it to the supervisor.

On August 15, 2006, grievant filed a complaint with the agency's civil rights manager alleging sexual harassment (penis drawing), hostile work environment, and retaliation. The civil rights district office investigated the complaint and found that although there had been inappropriate jokes and pranks, they had ceased many months prior to grievant's resignation after grievant reported the incidents to management. It also concluded that the agency's decision to deny grievant's request to rescind his resignation was not retaliatory.¹⁴

The agency decided to allow grievant's resignation to take effect as scheduled because: 1) the resignation was properly submitted and timely accepted, 2) grievant had frequently applied for employment elsewhere and, 3) grievant had made it clear that he would leave the area as soon as he secured other employment.¹⁵ The agency maintains that grievant's allegations of harassment and his comments to the agency contractor were not factors in its decision to not permit grievant to rescind his resignation. Grievant was advised on August 15th and 16th that his resignation would take effect as scheduled on August 26th.¹⁶ In his exit interview, grievant stated that main reason for his resignation was the game-playing and pranks, particularly those that he believed were directed towards him.¹⁷

APPLICABLE LAW AND OPINION

¹³ Grievant Exhibit 3. Photographs of drawing on whiteboard.

¹⁴ Letter from Civil Rights Manager to grievant, September 12, 2006.

¹⁵ Agency Exhibit 2. E-mail from regional operations director to human resources, August 21, 2006.

¹⁶ Agency Exhibit 2. E-mail from regional operations director to grievant, August 16, 2006.

¹⁷ Agency Exhibit 2. Exit interview documentation, August 29, 2006.

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as a claim of misapplication of policy, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.¹⁸

Grievant acknowledged during the hearing that he was not coerced into writing a resignation; he wrote the letter of his own free will with no input from anyone else. Although grievant and his supervisor had earlier discussed the possibility of resigning, it was grievant's decision alone to resign. It is clear that grievant was distressed by several factors. He had recently broken up with a girlfriend, missed his family and friends, had for two years been seeking employment closer to home in the eastern part of the state, and did not feel comfortable in his job. In addition, he had recently had a job interview and was confident that he had a good chance of being selected for the position. All of these factors resulted in his decision to resign before he had an actual job offer in hand. Accordingly, it is concluded that grievant's resignation was voluntary.

Grievant soon realized that his resignation may have been premature and, to a degree, impulsive. Further, when the anticipated job offer did not materialize, grievant decided that it would best to continue working at his existing job. However, when the agency told grievant that it had accepted his resignation and that it would be effective as scheduled, grievant became upset. It was then that grievant's attitude changed from the cordiality of his resignation letter to an

¹⁸ § 5.8, *EDR Grievance Procedure Manual*, effective August 30, 2004.

attitude of resentment because the agency would not allow him to rescind his resignation. At this point, grievant raised all of his past dissatisfactions including the horseplay in 2005 and the drawing in March 2006. However, the evidence demonstrates that the agency had addressed grievant's complaints on both occasions. The horseplay was noticeably diminished and did not any longer involve grievant and, the drawings never recurred after March 2006.

State policy provides that the "agency may choose" to accept an employee's request to rescind his resignation. From this language, it is clear that once an employee makes a unilateral decision to sever the employment relationship by resigning, it is the *agency's option* to accept that resignation or to permit rescission if requested by the employee. The policy does not require the agency to permit rescission; it allows the agency to make a choice as to whether or not rescission would be in the agency's best interest. The agency may make its decision for any reason, as long as it does not violate any applicable law.

The agency cited its reasons for not agreeing to a rescission of the resignation and grievant has not rebutted the agency's rationale. The evidence demonstrates that grievant's resignation was voluntary, that grievant had continually expressed his desire to obtain employment elsewhere and that he had no intention of staying in the area once he secured other employment. Given these reasons, it is understandable and reasonable that the agency would agree that grievant's resignation should be allowed to stand. Knowing that grievant might obtain a job offer at any time, there would be little benefit to the agency to allow him to remain – especially given grievant's extreme dissatisfaction as expressed in his correspondence in August 2006. Grievant has not shown that his allegations of harassment in 2005 and early 2006 in any way influenced the agency's decision. Neither has he shown that the decision was retaliatory. Therefore, grievant has not proven, by a preponderance of evidence, that the agency misapplied policy by making the decision to allow his resignation to stand.

DECISION

Grievant has not borne the burden of proof to show that the agency misapplied policy when it decided not to allow grievant to rescind his resignation. Grievant's requests for relief are hereby DENIED.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you

may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹⁹ You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.²⁰ You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

¹⁹ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

²⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

*S/*David J. Latham

David J. Latham, Esq.
Hearing Officer