

Issue: Involuntary Resignation; Hearing Date: 11/13/08; Decision Issued: 01/20/09;  
Agency: DMBE; AHO: Carl Wilson Schmidt, Esq.; Case No. 8960; Outcome: No  
Relief – Agency Upheld in Full; Substituted Decision issued -1/21/09; **Administrative  
Review: EDR AR Request received 02/02/09; EDR Ruling #2009-2219 issued  
02/19/09; Outcome: Remanded to AHO; Remanded Decision issued 02/23/09;  
Outcome: Original decision affirmed.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8960**

Hearing Date: November 13, 2008  
Decision Issued: January 20, 2009

**PROCEDURAL HISTORY**

Grievant resigned her position with the Department of Minority Business Enterprise on January 4, 2008. On January 24, 2008, Grievant timely filed a grievance alleging that her resignation was involuntary. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On September 4, 2008, the EDR Director issued Ruling 2008-2011 qualifying the grievance for hearing. On September 29, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 13, 2008, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant Representatives  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Grievant to show that the relief she seeks should be granted. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Minority Business Enterprise employed Grievant as an Office Specialist III. Grievant had prior active disciplinary action. She had an active Group I Written Notice for disruptive behavior and a Group II Written Notice for failure to follow a supervisor's instructions.

The Agency does not employ a Human Resource Director or Manager. Instead, it receives services from an employee, Mr. S, of the Department of Human Resources. Mr. S provides human resource advice to the Agency and its employees. He also provides assistance to approximately nine other State agencies. Mr. S began working for DHRM in February 2007. He had been the Director of Human Resources at a State mental health facility. He has 30 years of experience in State human resources.

On December 18, 2007, Grievant left work during her lunch break because her mother was being discharged from the hospital. Grievant expected to return a short time later. Grievant was unaware that her mother and her mother's doctor disagreed on whether the mother should be discharged from the hospital. The doctor finally agreed to the discharge conditioned on Grievant immediately obtaining necessary prescription medications for her mother. Grievant was overwhelmed with emotion given her mother's life threatening illness. Grievant focused on her expectation to obtain medication for her mother and failed to notify the Agency that she would not be returning for the rest of the day.

Because of Grievant's failure to return to work or obtain approval for her absence, the Agency decided to initiate disciplinary action against Grievant.

On December 26, 2007, the Manager met with Grievant in a conference room located at the Department of Minority Business Enterprise. Mr. S was also present in the meeting and he introduced himself to Grievant. The Manager told Grievant that the meeting was regarding her not returning to work on December 18, 2007. He said he planned on issuing Grievant a Group II Written Notice that would result in her removal from employment. He told her she would have the opportunity to explain in writing why she should not receive the Group II Written Notice. The Manager told Grievant to have the memorandum ready at 8:30 a.m. the next morning. Mr. S asked Grievant why she did not return to work on December 18, 2007. Grievant explained her reasons for failing to do so.

On December 27, 2007, Grievant reported to the scheduled meeting at the Department of Human Resource Management conference room. Mr. S greeted her and spoke with her about the matter. The Manager had not yet arrived for the meeting. Mr. S recalled that Grievant had expressed dissatisfaction with working for the Agency. He wanted to advise her of the option of resigning instead of filing a grievance to challenge the disciplinary action he expected the Manager would issue shortly to Grievant. Mr. S explained several items to consider in the event she elected to resign. Grievant said she wanted to see how it "played out" with the Manager rather than deciding what to do at that point.

During the meeting with the Manager and Mr. S, Grievant presented her memorandum explaining her special circumstances and her mother's hospital discharge paperwork. After reading the memo, the Manager said that the memorandum did not provide a reason for him to refrain from issuing a Group II Written Notice. He told Grievant he was issuing the Group II Written Notice. Grievant then asked the Manager about the possibility of educational leave or resignation as options. The Manager said he did not have the authority to grant educational leave and that only the Agency's Director had such authority. The Manager added that he doubted the Agency Director would grant Grievant's request for educational leave. Grievant decided she should resign. The Manager said that the Agency would not challenge Grievant's request for unemployment benefits and that she would be given the opportunity to write a letter of resignation. Mr. S suggested Grievant resign effective January 4, 2008 so that she could remain eligible for health insurance benefits until January 31, 2008.

On December 27, 2007, Grievant wrote and signed a letter addressed to the Manager stating:

Please accept this letter as my formal resignation from the Virginia Department of Minority Business Enterprise effective January 4, 2008. I would like to thank you for the opportunity to work for the Virginia Department of Minority Business Enterprise. It was an honor to be a part

of increasing opportunities for small, women and minority-owned businesses.<sup>1</sup>

## CONCLUSIONS OF POLICY

Grievant contends that her resignation was involuntary. The determination of whether a resignation is voluntary is based on an employee's ability to exercise a free and informed choice in making a decision to resign. Thus, a resignation may be involuntary "(1) where [the resignation was] obtained by the employer's misrepresentation or deception ... and (2) where forced by the employer's duress or coercion."<sup>2</sup>

Grievant alleges that the Agency misrepresented the consequences of her resignation and that she relied upon this misrepresentation in resigning her position with DMBE.

Under the 'misrepresentation' theory, a resignation may be found involuntary if induced by an employee's reasonable reliance upon an employer's misrepresentation of a material fact concerning the resignation. A misrepresentation is material if it concerns either the consequences of the resignation or the alternative to resignation. A resignation or retirement is involuntary if it is obtained by agency misinformation or deception. An objective test applies to such situations and a court in applying this test will not inquire into the subjective perceptions of the employee or the subjective intentions of the agency. Unlike a resignation which is induced through duress, there is no requirement that an employee be *intentionally* deceived about her employment options, it being sufficient that "the employee shows that a reasonable person would have been misled by the agency's statements. The misleading information can be negligently or even innocently provided. If the employee materially relies on the misinformation to her detriment, her resignation is considered involuntary."<sup>3</sup>

Mr. S is not an employee of the Agency. He is employed by another Agency, DHRM. Mr. S acted independently of the Manager. The Hearing Officer will assume for the sake of argument that Mr. S's actions are binding on the Agency because doing so does not affect the outcome of this case.

If the Manager had issued the Group II Written Notice with removal, Grievant could have filed a grievance challenging that that action. Whether Grievant would have prevailed on that grievance is not a material fact for the Hearing Officer to consider. It is clear that the Agency intended to issue the Group II Written Notice because it believed

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<sup>1</sup> Grievant Exhibit 3.

<sup>2</sup> Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 174 (4<sup>th</sup> Cir. 1988).

<sup>3</sup> See EDR Ruling 2008-2011.

Grievant had engaged in behavior giving rise to disciplinary action. The Agency's proposed disciplinary action was not frivolous or considered for an improper purpose.

Grievant contends Mr. S told her that her personnel file would not "travel" with her to another agency if she resigned from the Department of Minority Business Enterprise and then sought and received employment with another State agency. It was important to Grievant that her personnel file not go to another State agency because she believed it contained an inappropriate request for medical documentation of her fitness for duty. She did not want any future State employer to know that the Agency had asked her to obtain such an assessment. Grievant also testified that Mr. S advised her that if she resigned, the Agency would not challenge her request for unemployment benefits and that she would be giving up her right to file a grievance regarding her resignation. Grievant testified that because of the representations of Mr. S she chose to resign instead of receiving the Group II Written Notice and challenging that disciplinary action.

Mr. S testified that he met with Grievant in order to provide her with options as to what she should do. He did not attempt to persuade Grievant that one option was better than another. Mr. S told Grievant he understood she was dissatisfied with the Agency as a place to work. He asked her if she thought she might want to work for the Commonwealth again at another agency. Grievant said she would consider that as a possibility. He told Grievant that if she resigned and then filed a grievance, the Agency would argue she had resigned voluntarily. He told her since he did not know the merits of the Agency's case against her, she should consider how strong her case was with respect to challenging the disciplinary action. He told Grievant that if she filed for unemployment benefits, the Agency could argue that she was not eligible for benefits because her resignation was voluntary. Mr. S told Grievant that if she resigned, then the State's computer database would show the last transaction as a resignation. If she was terminated, then the last transaction would show a termination.<sup>4</sup> Mr. S told Grievant she was the only one who knew what she would present to the Manager. Grievant responded that she wanted to see how things "played out" with the Manager. When the Manager came into the meeting with Grievant and Mr. S, Grievant presented her position and negotiated with the Agency. Grievant concluded she wanted to resign rather than receive the disciplinary action. The Manager agreed not to challenge Grievant's request for unemployment benefits.

Based on the evidence presented, Grievant has not established that Mr. S made a misrepresentation of material fact regarding her resignation. His testimony was credible. Based on his years of experience in State human resources, it is unlikely he made the statements Grievant contends he made. Grievant has the burden of proof in

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<sup>4</sup> This significant of an employee's status in the State's database is that prospective State agency employers have access to the database prior to making hiring decisions. They do not have access to the personnel files of prospective employees until after the employee is hired and then the former agency employer is supposed to send that personnel file to the new agency employer. Mr. S testified that he told Grievant that sometimes the former employer sends the personnel file to the new State employer and sometimes the former employer does not send the file.

this matter. At best, she has only established that it is equally as likely that her version of the conversation occurred as it is likely that Mr. S's version of the conversation occurred. Her burden of proof is to show that her version of the conversation is more probable than Mr. S's version. Grievant has not met that burden.

A resignation may also arise from duress or coercion and, thus, be involuntary if in the totality of circumstances it appears that the employer's conduct effectively deprived the employee of free choice in the matter. Factors to be considered are: (1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice he or she was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether he or she was permitted to select the effective date of resignation.<sup>5</sup>

Based on the totality of the circumstances in this case, it does not appear that Grievant resigned under duress or coercion. Grievant was given an alternative to resignation, namely receiving a Group II Written Notice and challenging that disciplinary action through the grievance process. Grievant understood most of the material aspects of her choice of resignation. Grievant was given a reasonable time to choose whether to resign. She told Mr. S that she wanted to see how it "played out" with the Manager before deciding whether to resign. After she informed the Manager of her position regarding the disciplinary action and his response, Grievant decided to resign. Grievant selected the date of resignation several days later in order to enhance her available benefits following resignation.

## **DECISION**

For the reasons stated herein, Grievant's request for relief is **denied**.

## **APPEAL RIGHTS**

You may file an administrative review request within **15 calendar** days from the date the 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. Please address your request to:

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<sup>5</sup> See EDR Ruling 2007-1496.

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that 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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
600 East Main St. STE 301  
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 a copy of all of your appeals to the other party and to the EDR Director. 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. 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.<sup>6</sup>

[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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.





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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8960-S**

Hearing Date: November 13, 2008

Decision Issued: January 20, 2009

Substituted Decision Issued: January 21, 2009

**PROCEDURAL HISTORY**

Grievant resigned her position with the Department of Minority Business Enterprise on January 4, 2008. On January 24, 2008, Grievant timely filed a grievance alleging that her resignation was involuntary. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On September 4, 2008, the EDR Director issued Ruling 2008-2011 qualifying the grievance for hearing. On September 29, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 13, 2008, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant Representatives  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

5. Whether Grievant's resignation was involuntary.

## **BURDEN OF PROOF**

The burden of proof is on the Grievant to show that the relief she seeks should be granted. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

## **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Minority Business Enterprise employed Grievant as an Office Specialist III. Grievant had prior active disciplinary action. She had an active Group I Written Notice for disruptive behavior and a Group II Written Notice for failure to follow a supervisor's instructions.

The Agency does not employ a Human Resource Director or Manager. Instead, it receives services from an employee, Mr. S, of the Department of Human Resources. Mr. S provides human resource advice to the Agency and its employees. He also provides assistance to approximately nine other State agencies. Mr. S began working for DHRM in February 2007. He had been the Director of Human Resources at a State mental health facility. He has 30 years of experience in State human resources.

On December 18, 2007, Grievant left work during her lunch break because her mother was being discharged from the hospital. Grievant expected to return a short time later. Grievant was unaware that her mother and her mother's doctor disagreed on whether the mother should be discharged from the hospital. The doctor finally agreed to the discharge conditioned on Grievant immediately obtaining necessary prescription medications for her mother. Grievant was overwhelmed with emotion given her mother's life threatening illness. Grievant focused on her expectation to obtain medication for her mother and failed to notify the Agency that she would not be returning for the rest of the day.

Because of Grievant's failure to return to work or obtain approval for her absence, the Agency decided to initiate disciplinary action against Grievant.

On December 26, 2007, the Manager met with Grievant in a conference room located at the Department of Minority Business Enterprise. Mr. S was also present in the meeting and he introduced himself to Grievant. The Manager told Grievant that the meeting was regarding her not returning to work on December 18, 2007. He said he planned on issuing Grievant a Group II Written Notice that would result in her removal from employment. He told her she would have the opportunity to explain in writing why

she should not receive the Group II Written Notice. The Manager told Grievant to have the memorandum ready at 8:30 a.m. the next morning. Mr. S asked Grievant why she did not return to work on December 18, 2007. Grievant explained her reasons for failing to do so.

On December 27, 2007, Grievant reported to the scheduled meeting at the Department of Human Resource Management conference room. Mr. S greeted her and spoke with her about the matter. The Manager had not yet arrived for the meeting. Mr. S recalled that Grievant had expressed dissatisfaction with working for the Agency. He wanted to advise her of the option of resigning instead of filing a grievance to challenge the disciplinary action he expected the Manager would issue shortly to Grievant. Mr. S explained several items to consider in the event she elected to resign. Grievant said she wanted to see how it "played out" with the Manager rather than deciding what to do at that point.

During the meeting with the Manager and Mr. S, Grievant presented her memorandum explaining her special circumstances and her mother's hospital discharge paperwork. After reading the memo, the Manager said that the memorandum did not provide a reason for him to refrain from issuing a Group II Written Notice. He told Grievant he was issuing the Group II Written Notice. Grievant then asked the Manager about the possibility of educational leave or resignation as options. The Manager said he did not have the authority to grant educational leave and that only the Agency's Director had such authority. The Manager added that he doubted the Agency Director would grant Grievant's request for educational leave. Grievant decided she should resign. The Manager said that the Agency would not challenge Grievant's request for unemployment benefits and that she would be given the opportunity to write a letter of resignation. Mr. S suggested Grievant resign effective January 4, 2008 so that she could remain eligible for health insurance benefits until January 31, 2008.

On December 27, 2007, Grievant wrote and signed a letter addressed to the Manager stating:

Please accept this letter as my formal resignation from the Virginia Department of Minority Business Enterprise effective January 4, 2008. I would like to thank you for the opportunity to work for the Virginia Department of Minority Business Enterprise. It was an honor to be a part of increasing opportunities for small, women and minority-owned businesses.<sup>7</sup>

### **CONCLUSIONS OF POLICY**

Grievant contends that her resignation was involuntary. The determination of whether a resignation is voluntary is based on an employee's ability to exercise a free

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<sup>7</sup> Grievant Exhibit 3.

and informed choice in making a decision to resign. Thus, a resignation may be involuntary “(1) where [the resignation was] obtained by the employer’s misrepresentation or deception ... and (2) where forced by the employer’s duress or coercion.”<sup>8</sup>

Grievant alleges that the Agency misrepresented the consequences of her resignation and that she relied upon this misrepresentation in resigning her position with DMBE.

Under the ‘misrepresentation’ theory, a resignation may be found involuntary if induced by an employee’s reasonable reliance upon an employer’s misrepresentation of a material fact concerning the resignation. A misrepresentation is material if it concerns either the consequences of the resignation or the alternative to resignation. A resignation or retirement is involuntary if it is obtained by agency misinformation or deception. An objective test applies to such situations and a court in applying this test will not inquire into the subjective perceptions of the employee or the subjective intentions of the agency. Unlike a resignation which is induced through duress, there is no requirement that an employee be *intentionally* deceived about her employment options, it being sufficient that “the employee shows that a reasonable person would have been misled by the agency’s statements. The misleading information can be negligently or even innocently provided. If the employee materially relies on the misinformation to her detriment, her resignation is considered involuntary.”<sup>9</sup>

Mr. S is not an employee of the Agency. He is employed by another Agency, DHRM. Mr. S acted independently of the Manager. The Hearing Officer will assume for the sake of argument that Mr. S’s actions are binding on the Agency because doing so does not affect the outcome of this case.

If the Manager had issued the Group II Written Notice with removal, Grievant could have filed a grievance challenging that that action. Whether Grievant would have prevailed on that grievance is not a material fact for the Hearing Officer to consider. It is clear that the Agency intended to issue the Group II Written Notice because it believed Grievant had engaged in behavior giving rise to disciplinary action. The Agency’s proposed disciplinary action was not frivolous or considered for an improper purpose.

Grievant contends Mr. S told her that her personnel file would not “travel” with her to another agency if she resigned from the Department of Minority Business Enterprise and then sought and received employment with another State agency. It was important to Grievant that her personnel file not go to another State agency because she believed it contained an inappropriate request for medical documentation of her fitness for duty. She did not want any future State employer to know that the Agency had asked her to obtain such an assessment. Grievant also testified that Mr. S

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<sup>8</sup> Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 174 (4<sup>th</sup> Cir. 1988).

<sup>9</sup> See EDR Ruling 2008-2011.

advised her that if she resigned, the Agency would not challenge her request for unemployment benefits and that she would be giving up her right to file a grievance regarding her resignation. Grievant testified that because of the representations of Mr. S she chose to resign instead of receiving the Group II Written Notice and challenging that disciplinary action.

Mr. S testified that he met with Grievant in order to provide her with options as to what she should do. He did not attempt to persuade Grievant that one option was better than another. Mr. S told Grievant he understood she was dissatisfied with the Agency as a place to work. He asked her if she thought she might want to work for the Commonwealth again at another agency. Grievant said she would consider that as a possibility. He told Grievant that if she resigned and then filed a grievance, the Agency would argue she had resigned voluntarily. He told her since he did not know the merits of the Agency's case against her, she should consider how strong her case was with respect to challenging the disciplinary action. He told Grievant that if she filed for unemployment benefits, the Agency could argue that she was not eligible for benefits because her resignation was voluntary. Mr. S told Grievant that if she resigned, then the State's computer database would show the last transaction as a resignation. If she was terminated, then the last transaction would show a termination.<sup>10</sup> Mr. S told Grievant she was the only one who knew what she would present to the Manager. Grievant responded that she wanted to see how things "played out" with the Manager. When the Manager came into the meeting with Grievant and Mr. S, Grievant presented her position and negotiated with the Agency. Grievant concluded she wanted to resign rather than receive the disciplinary action. The Manager agreed not to challenge Grievant's request for unemployment benefits.

Based on the evidence presented, Grievant has not established that Mr. S made a misrepresentation of material fact regarding her resignation. His testimony was credible. Based on his years of experience in State human resources, it is unlikely he made the statements Grievant contends he made. Grievant has the burden of proof in this matter. At best, she has only established that it is equally as likely that her version of the conversation occurred as it is likely that Mr. S's version of the conversation occurred. Her burden of proof is to show that her version of the conversation is more probable than Mr. S's version. Grievant has not met that burden.

A resignation may also arise from duress or coercion and, thus, be involuntary if in the totality of circumstances it appears that the employer's conduct effectively deprived the employee of free choice in the matter. Factors to be considered are: (1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice he or she was given; (3) whether the

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<sup>10</sup> This significant of an employee's status in the State's database is that prospective State agency employers have access to the database prior to making hiring decisions. They do not have access to the personnel files of prospective employees until after the employee is hired and then the former agency employer is supposed to send that personnel file to the new agency employer. Mr. S testified that he told Grievant that sometimes the former employer sends the personnel file to the new State employer and sometimes the former employer does not send the file.

employee was given a reasonable time in which to choose; and (4) whether he or she was permitted to select the effective date of resignation.<sup>11</sup>

Based on the totality of the circumstances in this case, it does not appear that Grievant resigned under duress or coercion. Grievant was given an alternative to resignation, namely receiving a Group II Written Notice and challenging that disciplinary action through the grievance process. Grievant understood most of the material aspects of her choice of resignation. Grievant was given a reasonable time to choose whether to resign. She told Mr. S that she wanted to see how it “played out” with the Manager before deciding whether to resign. After she informed the Manager of her position regarding the disciplinary action and his response, Grievant decided to resign. Grievant selected the date of resignation several days later in order to enhance her available benefits following resignation.

### DECISION

For the reasons stated herein, Grievant’s request for relief is **denied**.

### APPEAL RIGHTS

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

4. 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.
5. 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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

6. If you believe that 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. Please address your request to:

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<sup>11</sup> See EDR Ruling 2007-1496.

Director  
Department of Employment Dispute Resolution  
600 East Main St. STE 301  
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 a copy of all of your appeals to the other party and to the EDR Director. 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. 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.<sup>12</sup>

[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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>12</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8960-R**

Reconsideration Decision Issued: February 23, 2009

**RECONSIDERATION DECISION**

In the EDR Director's Decision 2009-2219, the EDR Director stated:

Based on the hearing decision, it is unclear how the hearing officer determined that the grievant had a reasonable time to consider her options. If it is assumed that the grievant's time for consideration of her options occurred only from the beginning of the final meeting to the time she resigned, which is not necessarily clear, there may be some basis to the grievant's argument that this period was not reasonable. Because the grievant raises a potentially valid point in her request for administrative review, and the basis of the hearing officer's decision is not clear, the matter must be remanded for further clarification. This Department cannot determine how this one element might affect the hearing officer's ultimate determination of the totality of the circumstances as to duress or coercion. Therefore, the hearing officer must reconsider his decision on these issues. (Footnotes omitted).

There is no specific time period which must be given in order to conclude that a resignation is voluntary. For example, some individuals may need only a few seconds to decide to resign whereas others may require several days of weighing all options and consulting with friends and family. The question is not the amount of time that has passed; the question is the firmness of the employee's decision to resign. In other words, a reasonable amount of time to decide to resign varies from person to person.

Grievant did not like working for the Agency, according to Mr. S. Her resignation was consistent with someone who no longer wanted to work for the Agency. Grievant knew before she entered the meeting with the Manager on December 27, 2007 that he



intended to issue her a Group II Written Notice with removal unless she could show some basis for him to refrain from taking disciplinary action. Grievant attempted to negotiate the terms of her resignation by including such things as educational leave. Even though not all of her requests were granted, she concluded that resignation was a better outcome than removal by written notice. Her decision to resign in light of not being granted some of her requests is consistent with someone who had decided firmly to resign. Grievant drafted the wording of her resignation herself rather than having the Agency draft the resignation. Grievant did not waffle in her decision-making. She was given the opportunity to delay the effective date of her resignation, yet she did not express any regret during that time period. Indeed, Grievant did not express any regret regarding her decision until she subsequently applied to other State agencies and realized some of her assumptions about her resignation may not have been true. Several days after Grievant decided to resign, she contacted, Mr. S, the DHRM Human Resource Representative and thanked him for helping her leave the Agency. Merely because Grievant now regrets her decision, this does not show that Grievant lacked a sufficient period of time to form that decision. In this case, Grievant has the burden of proving the Agency failed to provide her with a reasonable time to decide to resign. She has not met that burden.

### **APPEAL RIGHTS**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.  
Hearing Officer