

Issue: Involuntary Resignation; Hearing Date: 05/26/09; Decision Issued: 05/27/09;
Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 9105;
Outcome: Full Relief; **Administrative Review: EDR Ruling Request received
06/11/09; Outcome pending; Administrative Review: DHRM Ruling Request
received 06/11/09; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9105

Hearing Date: May 26, 2009

Decision Issued: May 27, 2009

PROCEDURAL HISTORY

On May 13, 2008, Grievant filed a grievance to challenge the Agency's intent to remove her from employment prior to her resignation. Her grievance proceeded through the Second Step. Grievant sought qualification of her grievance for hearing but her request was denied by the Third Step Respondent because Grievant had resigned her position. The EDR Director issued Ruling 2008-2052 on September 24, 2008, Ruling 2009-2162 on April 7, 2009, and Ruling 2009-2283 on April 29, 2009.

On May 12, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 26, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Counsel

ISSUES

1. Whether Grievant's resignation was voluntary?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of 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 University of Virginia Health System employed Grievant an OR Scrub Tech/Massage Therapist.

On April 29, 2008, Grievant was informed by the Nurse Manger that she would receive disciplinary action and be removed from employment based on the number of times Grievant was absent from work. The Nurse Manager told Grievant she could resign or be terminated from employment. Grievant contacted an employee with the Employee Assistance Program who advised Grievant not to say anything else to the Nurse Manager and not to sign anything. The employee advised Grievant to immediately contact the Human Resource Officer to discuss Grievant’s options. Grievant told the Nurse Manager she could not give her a decision quickly. Grievant contacted the Human Resource Officer and arranged to meet. When they met, Grievant told the Human Resource Officer that the Nurse Manager intended to terminate Grievant’s employment and that Grievant considered this to be a “forced resignation.” Grievant asked the Human Resource Officer what were her options and rights. The Human Resource Officer told Grievant of the availability of the grievance process and that Grievant would be able to use the grievance process if she was terminated or resigned. Grievant sought clarification from the Human Resource Officer and asked if she choose to resign instead of being terminated by the Nurse Manager, would Grievant be able to use the grievance procedure to challenge the forced resignation. The Human Resource Officer said “yes.” Based on the Human Resource Officer’s comments, Grievant resigned from her position and filed a grievance challenging the Nurse Manager’s assertion that Grievant could be terminated from employment due to absences.

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."¹

In this case, the Human Resource Officer misrepresented to Grievant that Grievant could file a grievance even after she resigned from employment. An employee cannot file a grievance to challenge proposed disciplinary action once that employee has resigned from employment.² The Human Resource Officer's misrepresentation was material and resulted in Grievant choosing to resign instead of being terminated. Accordingly, Grievant's resignation was involuntary and is reversed as of the date of this decision.

When Grievant resigned, she was no longer an employee of the Agency. Neither party disputes this conclusion. The question becomes whether Grievant is entitled to back pay and attorney's fees upon reinstatement. The answer depends on whether the Hearing Officer has the authority to grant Grievant's requests.

In EDR Ruling 2008-2052, the EDR Director writes:

Should the hearing officer find that the grievant's separation was involuntary, the hearing officer may offer only limited relief. The hearing officer can return grievant to work and the parties to the point at which the agency notified the grievant of its intent to terminate the grievant for her absences and presented the grievant with the option of resigning her position or being terminated.

In EDR Ruling 2009-2162, the EDR Director writes:

With the two-hearing framework, if the grievant prevailed on the issue of involuntary resignation, she would be reinstated with the possibility of attorney's fees and full, partial or no backpay from the date of her resignation to the date of her reinstatement, even if she ultimately did not later prevail in the second hearing involving her formal disciplinary termination by the University.

These EDR Rulings may conflict. To the extent they do, the Hearing Officer considers the latter one to be controlling since it was issued with knowledge of the prior ruling. Ruling 2009-2162, does not explain, however, the authority for the conclusion that the Hearing Officer may issue attorney's fees and back pay.

Va. Code § 2.2-3005.1(A) provides:

¹ Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 174 (4th Cir. 1988).

² See Grievance Procedure Manual section 2.3.

For those issues qualified for a hearing, the hearing officer may order appropriate remedies. Relief may include (i) reinstatement, (ii) back pay, (iii) full reinstatement of fringe benefits and seniority rights, (iv) mitigation or reduction of the agency disciplinary action, or (v) any combination of these remedies. In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust. All awards of relief, including attorneys' fees, by a hearing officer must be in accordance with rules established by the Department of Employment Dispute Resolution.

Va. Code § 2.2-3005.1 appears to authorize the Hearing Officer to award back pay. The *Rules for Conducting Grievance Hearings* do not appear to prohibit back pay in this case. Accordingly, the Hearing Officer will award Grievant back pay from the date of her resignation to the date of reinstatement.

Va. Code § 2.2-3005.1 refers to grievances challenging discharge as those grievances in which attorney's fees may be awarded. Grievant was not discharged; she resigned. Accordingly, the Hearing Officer will not award attorney's fees.

DECISION

For the reasons stated herein, Grievant's resignation is **reversed** as of the date of this decision. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. Grievant's request for attorney's fees 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:

Director
Department of Human Resource Management
101 North 14th St., 12th 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.³

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.