Issue: Involuntary Resignation; Hearing Date: 10/26/09; Decision Issued: 11/05/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9211; Outcome: Full Relief; **Administrative Review: AHO Reconsideration Request received 11/18/09; Reconsideration Decision issued 11/18/09; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 11/18/09; EDR Ruling # 2010-2466 issued 02/09/10; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 11/18/09; DHRM Ruling issued 03/19/10; Outcome: Remanded to AHO; Remand Decision (R2) issued 04/29/10; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request on Remand Decision (R2) received 05/14/10; EDR Ruling #2010-2653 issued 07/07/10; Outcome: Remanded to AHO; Administrative Review: DHRM Ruling Request on Remand Decision (R2) received 05/14/10; DHRM Ruling issued 07/19/10; Outcome: Remanded to AHO: Remand Decision (R3) issued 07/27/10; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request on Remand Decision (R3) received 08/06/10; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9211

Hearing Date: October 26, 2009
Decision Issued: November 5, 2009

PROCEDURAL HISTORY

On June 30, 2009, the Agency removed Grievant from employment because he did not report to work on June 24, 2009. On July 23, 2009, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On October 6, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 26, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant resigned from his position?

2. Whether Grievant engaged in behavior constituting misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy ?

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 his removal was not a voluntary resignation. If so, the burden is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. 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 Corrections employed Grievant as a Senior Parole Officer at one of its Facilities. He had been employed by the Agency for approximately 14 years. Grievant provided services to a diversion center. Grievant was responsible for helping determine whether nonviolent offenders should be sent to the diversion center in lieu of being sent to prison.

In the 12 month period ending February 2009, Grievant did not work 1250 hours. The Agency did not consider him to be eligible for family medical leave beginning in March 2009.

On March 10, 2009, Grievant was sitting in the front passenger seat of a State vehicle driven by the Supervisor. Another vehicle moved suddenly in front of the State vehicle. The State vehicle collided with the other vehicle. The primary impact of the collision occurred at the front right of the State vehicle. Grievance suffered severe and extensive injuries. He was taken by ambulance to the emergency room at a local hospital. Grievant's right hand was swollen two times its normal size. He had a sore neck and back. Grievant was unable to return to work following the collision.

The Agency is obligated to utilize the services of the Third Party Administrator. The Third Party Administrator corresponded with Grievant's medical providers to determine when Grievant could return to work. The Agency did not review any of Grievant's medical records or speak with any of his medical providers.

On March 12, 2009, Dr. G wrote a note indicating that Grievant was advised to remain out of work until further notice.

On May 28, 2009, Dr. G wrote a note indicating that Grievant had restrictions prohibiting him from heavy gripping or pinching with his right hand.

On June 1, 2009, Dr. S wrote:

> I discussed with the patient at this time at least from his low back point of view I don't think he can return to his work requirement as probation and parole services with physical job requirements could be moderate to severe. He also has other issues with his hand and cardiac issues which are compounding factors as well. From his low back point of view I think he will probably only be able to maybe sedentary work or light-duty at most. I think to get all of these issues sorted out I would like to get a [Functional Capacity Evaluation]. At this time in my opinion he is not ready to go back to his work duties as a probation and parole services officer. [Follow Up visit] will be after his FCE.[1]

On June 4, 2009, Grievant completed a Functional Capacity Evaluation at a local rehabilitation provider's office. Grievant was not immediately notified of the results of the evaluation.

On June 11, 2009, the Superintendent wrote Grievant a letter indicating that Grievant should return to work on Monday, June 15, 2009. The Superintendent informed Grievant that the Agency would accommodate him by permitting him to work in a "sitting only" position. The Superintendent believed Grievant could sit at his desk and handle paperwork regarding offender referrals. Grievant did not receive the letter until June 15, 2009. Grievant had not yet received an MRI for his hip previously ordered by one of his doctors.

On June 16, 2009, Grievant sent an email to the Third Party Administrator asking for a copy of the Functional Capacity Evaluation. On June 17, 2009, Grievant sent a second email asking for a copy of the document. On June 17, 2009, the Third Party Administrator informed Grievant that he was entitled to copies of his medical records including the Functional Capacity Evaluation. However, the Third Party Administrator did not provide a copy of the document.

On June 19, 2009, the Human Resource Officer sent Grievant an email stating, in part:

> In accordance with DOP 5-52, Temporary Adjustments to Work Assignments, you were advised to return to work in a "light duty" capacity on June 15. You failed to do so and have continued to assert that you will not return. Unfortunately, the Department has no recourse but to advise that if you have not returned to work by June 24, 2009, you will be

[1] Grievant Exhibit 1.

> removed from payroll and we will accept your voluntary resignation effective June 25, 2009.[2]
>
> On June 22, 2009, Dr. S wrote:
>
> [Grievant] was seen at this office today as he wanted to discuss his FCE. However, as of today I have not received the FCE from physical therapy. He states that his LBP seems to have worsened a little bit with increasing numbness to his left lower extremity. Currently he is on Lorcet Plus and Flexeril. I have discussed with the patient that I cannot discuss the results of his FCE as I do not have a copy of the results. He plans to [follow up] once I receive the records.[3]

Dr. S told Grievant that he had not authorized a medical release for Grievant to return to work of any type including sedentary work.

On June 29, 2009, Grievant had an appointment with an urologist, Dr. Sz. Dr. Sz detected blood in Grievant's urine specimen and told Grievant that his symptoms were consistent with a bruised bladder from seat belt tension relating to an automobile accident. Dr. Sz told Grievant he was suffering from urinary stress incontinence, urinary urgency and urinary frequency. Dr. Sz wrote a note excusing Grievant from all work.

Grievant had an appointment with Dr. D. Dr. D advised Grievant and he was suffering from gastritis associated with perivascular hematoma and stress caused by the accident and injuries. Gastritis caused Grievant severe abdominal discomfort, just pressure, and chest pain.

On June 2, 2009, Dr. G had written a prescription for Grievant to receive an MRI of his right hip. The Third Party Administrator did not approve the MRI until September 15, 2009. Grievant received the MRI on October 6, 2009 and it showed a labral tear with his condition worsening. Dr. G never authorized Grievant to return to work.

On June 29, 2009, the Human Resource Officer wrote Grievant a letter stating, in part:

> As you did not report to work, as instructed in my letter to you dated June 19, 2009, we accept your voluntary resignation from the position of Probation Officer Senior at [Agency's Office] effect of June 29, 2009.[4]

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[2] Grievant Exhibit 1.

[3] Grievant Exhibit 1.

[4] Grievant Exhibit 1.

Grievant was under the traditional leave program and not under the Virginia Sickness and Disability Program. At the time of Grievant's removal, the Agency's records showed that he had exhausted his available leave.

Grievant continues to suffer significant medical symptoms. For example, he has severe pain in his right hand, palm, and wrist due to torn tendons. He has severe pain in his lower back that radiates from his left buttocks down to his foot. He has severe burning sensation in his left leg and severe muscle spasms and gramps in his left leg. Grievant suffers urinary urgency, urinary frequency requiring him to abruptly discontinue his activities go to the restroom. He suffers from moderate to severe right shoulder pain, moderate to severe pain in his right hip, moderate to severe pain in his left foot.

Grievant continues to take several medications that cause him to be drowsy, dizzy, and diminish his ability to concentrate and focus.

CONCLUSIONS OF POLICY

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. In this case, Grievant did not form an intent to resign. Grievant did not inform the Agency that he was resigning; indeed, Grievant informed Agency staff that he did not wish to resign. Grievant did not resign his position with the Agency.

The Agency informed Grievant that if he did not return to work on June 24, 2009, he would be deemed to have "voluntarily resign". The Agency's objective by taking this approach was to comply with the Third Party Administrator's determination that Grievant could return to work with restrictions but to protect Grievant from the stigma of receiving disciplinary action in the event he could not return to work. Receiving a Group III Written Notice would have prevented Grievant from returning to work with the Agency even if his medical condition later improved. The Agency did not act with a malicious intent towards Grievant.

Group III offenses include "absence in excess of three days without proper authorization or a satisfactory reason". Only if the Agency can show that Grievant should have returned to work as directed by the Agency can his removal be upheld.

The Agency's decision to require Grievant to return to work with restrictions on June 24, 2009 was based on the opinion expressed by the Third Party Administrator and the Agency's conclusion that it could provide Grievant with the restrictions as established by the Third Party Administrator. The Agency's decision rises and falls depending on the validity of the Third Party Administrator's conclusion. The Hearing Officer ordered the Third Party Administrator to provide documents regarding this case. The Hearing Officer ordered an employee of the Third Party Administrator to appear at

the hearing. The Third Party Administrator disregarded those orders.[5] The Third Party Administrator's failure to defend its position materially and adversely affects the Agency's ability to defend its action in this grievance.

In this case, Grievant was absent from work in excess of three days after the Agency notified him of his obligation to return to work. His absence, however, was for a satisfactory reason. Based on the evidence presented, it is clear that Grievant could not return to work to perform the light duty work with the restrictions set forth by the Agency. Grievant was suffering sufficient pain such that sitting at a workstation even with appropriate breaks would not alleviate the pain so that he could perform his duties. Side effects from his medications would prevent Grievant from focusing and performing his duties. Grievant's work area had only one single-person restroom. If that restroom was in use when Grievant needed it, he would have to walk up and down stairs to another building. This inconvenience would have prevented them from working effectively at the Facility. Grievant has not been released by all of his doctors to return to work for light duty as defined by the Agency. Because Grievant has established that he was absent for a satisfactory reason, there is no basis to take disciplinary action against him. In the absence of disciplinary action, there is no basis to remove Grievant. Accordingly, Grievant must be reinstated to his former position.

DECISION

For the reasons stated herein, the Agency's removal of Grievant is rescinded. 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.[6]

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

[5] The Agency is not in control of the Third Party Administrator and, thus, there is no basis for the Hearing Officer to draw an adverse inference against the Agency for the actions of the Third Party Administrator.

[6] Grievant may not be entitled to back pay if he was on leave without pay status.

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.[7]

[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

[7] 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: 9211-R

Reconsideration Decision Issued: November 18, 2009

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant prevailed at the hearing. The Hearing Officer granted Grievant all of the relief within the Hearing Officer's authority. There is no additional relief the Hearing Officer can grant to Grievant upon reconsideration.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied.**

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.

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Corrections
March 19, 2010

The agency and the grievant have requested administrative reviews of the hearing decision in Grievance Case No. 9211. In its challenge, the agency is requesting a review by this Agency because it feels the decision is inconsistent with state and agency policy, including DHRM Policy 4.10 – Annual Leave, and DHRM Policy 1.60 – Standards of Conduct. In his challenge, the grievant is requesting that this Agency confirm that the Virginia Department of Corrections (DOC) did not follow proper policy and procedure in its decision to wrongfully terminate his employment and order the DOC to promptly pay him full back pay under Workers' Compensation guidelines and DOC's standard practices. For the reason stated below, the Department of Human Resource Management (DHRM) will interfere with the hearing decision on the matter related to clarifying "reinstatement with backpay" only. The agency head, Ms. Sara R. Wilson, has requested that I respond to this appeal.

FACTS

In his **Findings of Fact**, in part, the hearing officer stated the following:

The Department of Corrections employed Grievant as a Senior Parole Officer at one of its Facilities. He had been employed by the Agency for approximately 14 years. Grievant provided services to a diversion center. Grievant was responsible for helping determine whether nonviolent offenders should be sent to the diversion center in lieu of being sent to prison.

In the 12-month period ending February 2009, Grievant did not work 1250 hours. The Agency did not consider him to be eligible for family medical leave beginning in March 2009.

On March 10, 2009, Grievant was sitting in the front passenger seat of a State vehicle driven by the Supervisor. Another vehicle moved suddenly in front of the State vehicle. The State vehicle collided with the other vehicle. The primary impact of the collision occurred at the front right of the State vehicle. Grievance suffered severe and extensive injuries. He was taken by ambulance to the emergency room at a local hospital. Grievant's right hand was swollen two times its normal size. He had a sore neck and back. Grievant was unable to return to work following the collision.

The Agency is obligated to utilize the services of the Third Party Administrator. The Third Party Administrator corresponded with Grievant's medical providers to determine when Grievant could return to work. The Agency did not review any of Grievant's medical records or speak with any of his medical providers.

On March 12, 2009, Dr. G wrote a note indicating that Grievant was advised to remain out of work until further notice.

On May 28, 2009, Dr. G wrote a note indicating that Grievant had restrictions prohibiting him from heavy gripping or pinching with his right hand.

On June 1, 2009, Dr. S wrote:

I discussed with the patient at this time at least from his low back point of view I don't think he can return to his work requirement as probation and parole services with physical job requirements could be moderate to severe. He also has other issues with his hand and cardiac issues which are compounding factors as well. From his low back point of view I think he will probably only be able to maybe sedentary work or light-duty at most. I think to get all of these issues sorted out I would like to get a [Functional Capacity Evaluation]. At this time in my opinion, he is not ready to go back to his work duties as a probation and parole services officer. [Follow Up visit] will be after his FCE.

On June 4, 2009, Grievant completed a Functional Capacity Evaluation at a local rehabilitation provider's office. Grievant was not immediately notified of the results of the evaluation.

On June 11, 2009, the Superintendent wrote Grievant a letter indicating that Grievant should return to work on Monday, June 15, 2009. The Superintendent informed Grievant that the Agency would accommodate him by permitting him to work in a "sitting only" position. The Superintendent believed Grievant could sit at his desk and handle paperwork regarding offender referrals. Grievant did not receive the letter until June 15, 2009. Grievant had not yet received an MRI for his hip previously ordered by one of his doctors.

On June 16, 2009, Grievant sent an email to the Third Party Administrator asking for a copy of the Functional Capacity Evaluation. On June 17, 2009, Grievant sent a second email asking for a copy of the document. On June 17, 2009, the Third Party Administrator informed Grievant that he was entitled to copies of his medical records including the Functional Capacity Evaluation. However, the Third Party Administrator did not provide a copy of the document.

On June 19, 2009, the Human Resource Officer sent Grievant an email stating, in part:

In accordance with DOP 5-52, Temporary Adjustments to Work Assignments, you were advised to return to work in a "light duty" capacity on June 15. You failed to do so and have continued to assert that you will not return. Unfortunately, the Department has no recourse but to advise that if you have not returned to work by June 24, 2009, you will be removed from payroll and we will accept your voluntary resignation effective June 25, 2009.

On June 22, 2009, Dr. S wrote:

[Grievant] was seen at this office today, as he wanted to discuss his FCE. However, as of today I have not received the FCE from physical therapy. He states that his LBP seems to have worsened a little bit with increasing numbness to his left lower extremity. Currently he is on Lorcet Plus and Flexeril. I have discussed with the patient that I cannot discuss the results of his FCE as I do not have a copy of the results. He plans to [follow up] once I receive the records.

Dr. S told Grievant that he had not authorized a medical release for Grievant to return to work of any type, including sedentary work.

On June 29, 2009, Grievant had an appointment with an urologist; Dr. Sz. Dr. Sz detected blood in Grievant's urine specimen and told Grievant that his symptoms were consistent with a bruised bladder from seat belt tension relating to an

automobile accident. Dr. Sz told Grievant he was suffering from urinary stress incontinence, urinary urgency and urinary frequency. Dr. Sz wrote a note excusing Grievant from all work.

Grievant had an appointment with Dr. D. Dr. D advised Grievant that he was suffering from gastritis associated with perivascular hematoma and stress caused by the accident and injuries. Gastritis caused Grievant severe abdominal discomfort, just pressure, and chest pain.

On June 2, 2009, Dr. G had written a prescription for Grievant to receive an MRI of his right hip. The Third Party Administrator did not approve the MRI until September 15, 2009. Grievant received the MRI on October 6, 2009 and it showed a labral tear with his condition worsening. Dr. G never authorized Grievant to return to work.

On June 29, 2009, the Human Resource Officer wrote Grievant a letter stating, in part:

As you did not report to work, as instructed in my letter to you dated June 19, 2009, we accept your voluntary resignation from the position of Probation Officer Senior at [Agency's Office] effect of June 29, 2009.

Grievant was under the traditional leave program and not under the Virginia Sickness and Disability Program. At the time of Grievant's removal, the Agency's records showed that he had exhausted his available leave.

Grievant continues to suffer significant medical symptoms. For example, he has severe pain in his right hand, palm, and wrist due to torn tendons. He has severe pain in his lower back that radiates from his left buttocks down to his foot. He has severe burning sensation in his left leg and severe muscle spasms and gramps in his left leg. Grievant suffers urinary urgency, urinary frequency requiring him to abruptly discontinue his activities to go to the restroom. He suffers from moderate to severe right shoulder pain, moderate to severe pain in his right hip, moderate to severe pain in his left foot.

Grievant continues to take several medications that cause him to be drowsy, dizzy, and diminish his ability to concentrate and focus.

DISCUSSION

The Department of Human Resource Management offers the following in response to the Department of Corrections' request for an administrative review. Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is beyond the limit of reasonableness, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or by the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's

assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states, "It is the policy of the Commonwealth to promote the well-being of its employees in the workplace by maintaining high standards of work performance and professional conduct." The policy states as its purpose, "The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness." Attachment A, Unacceptable Standards of Conduct, of this policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive. In addition, DHRM Policy No. 4.45 and Policy 1.70 apply here. Finally, the Department of Corrections has promulgated DOC Operating Procedure 135.1, Standards of Conduct, to suit specific business needs of the agency.

In his **Conclusions of Policy**, the hearing officer wrote, in part the following:

> 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. In this case, Grievant did not form an intent to resign. Grievant did not inform the Agency that he was resigning; indeed, Grievant informed Agency staff that he did not wish to resign. Grievant did not resign his position with the Agency.
>
> The Agency informed Grievant that if he did not return to work on June 24, 2009, he would be deemed to have "voluntarily resign." The Agency's objective by taking this approach was to comply with the Third Party Administrator's determination that Grievant could return to work with restrictions but to protect Grievant from the stigma of receiving disciplinary action in the event he could not return to work. Receiving a Group III Written Notice would have prevented Grievant from returning to work with the Agency even if his medical condition later improved. The Agency did not act with a malicious intent towards Grievant.
>
> Group III offenses include "absence in excess of three days without proper authorization or a satisfactory reason." Only if the Agency can show that Grievant should have returned to work as directed by the Agency can his removal be upheld.
>
> The Agency's decision to require Grievant to return to work with restrictions on June 24, 2009 was based on the opinion expressed by the Third Party Administrator and the Agency's conclusion that it could provide Grievant with the restrictions as established by the Third Party Administrator. The Agency's decision rises and falls depending on the validity of the Third Party Administrator's conclusion. The Hearing Officer ordered the Third Party Administrator to provide documents regarding this case. The Hearing Officer ordered an employee of the Third Party Administrator to appear at the hearing. The Third Party Administrator disregarded those orders. The Third Party

> Administrator's failure to defend its position materially and adversely affects the Agency's ability to defend its action in this grievance.
> In this case, Grievant was absent from work in excess of three days after the Agency notified him of his obligation to return to work. His absence, however, was for a satisfactory reason. Based on the evidence presented, it is clear that Grievant could not return to work to perform the light duty work with the restrictions set forth by the Agency. Grievant was suffering sufficient pain such that sitting at a workstation even with appropriate breaks would not alleviate the pain so that he could perform his duties. Side effects from his medications would prevent Grievant from focusing and performing his duties. Grievant's work area had only one single-person restroom. If that restroom was in use when Grievant needed it, he would have to walk up and down stairs to another building. This inconvenience would have prevented them from working effectively at the Facility. Grievant has not been released by all of his doctors to return to work for light duty as defined by the Agency. Because Grievant has established that he was absent for a satisfactory reason, there is no basis to take disciplinary action against him. In the absence of disciplinary action, there is no basis to remove Grievant. Accordingly, Grievant must be reinstated to his former position.

While the Third Party Administrator declared that the grievant was released to return to work by at least one physician, the hearing officer determined from the evidence that all of the treating physicians had not released him to return to work. In addition, the hearing officer determined that the grievant had no intent to resign from his position and had good cause to be absent from his job for more than three days. Thus, based on that evidence, the hearing officer directed that the DOC reinstate the grievant with back pay less any interim earnings that the grievant received during the period of removal and credit for leave and seniority that the grievant did not otherwise accrue.

In its appeal, the DOC contends that "…Grievant did not have any type of leave available to him at the time of his return to work date, resultantly, there would be no back pay to award. Grievant indicated at the hearing on October 26, 2009, that he was still unable to return to work." While the DHRM has no authority to rule on the hearing officer's assessment of the evidence regarding the grievant's "intent to resign" and whether the grievant had "good cause" to be absent from job for more than three days; the DHRM is remanding this decision to the hearing officer to clarify his ruling regarding "reinstatement with back pay" in consideration of Policy 4.45 – Leave Without Pay- Conditional/Unconditional.

The grievant has asked that the DHRM confirm that the DOC **did not** follow proper policy and procedure in its decision to terminate him wrongfully. He was dismissed when he did not return to work within the three-day time period as instructed by agency management. In his decision, the hearing officer ordered "reinstatement with backpay." It is the opinion of this Agency that the hearing officer's decision renders the grievant's request moot.

Please note that the grievant had exhausted all annual and traditional sick leave balances. When he did not return to work following release from WC, and after stating that the reasonable

accommodations offered by the agency would still not allow him to return, the agency had the following options under state policy:

- Place employee on conditional LWOP for up to 12 months and fill the position with no guarantee of reinstatement. (DHRM Policy No. 4.45)

- Place the employee on conditional LWOP, direct him to apply for disability and/or early retirement, and fill the position. (DHRM Policy No. 4.45)

- Terminate for failure to report to work as directed after receiving the RTW notice from Workers' Compensation (DHRM Policy No.1.60)

- Terminate based on the employee's inability to perform the essential functions of the job after reasonable accommodation was offered and rejected. (DHRM Policy No. 1.60)

Note: DHRM Policy No. 1.70, Termination/Separation from State Service states that:

"A separation that is reported as a resignation but then is found to have been involuntary shall be treated as a discharge."

In addition, the grievant requested that this Agency order the DOC to promptly pay him full back pay under Workers' Compensation guidelines and DOC's standard practices. It appears that the workers' compensation award was terminated after it was determined that the grievant was given his medical release from the injury that was covered under Workers' Compensation (right hand and thumb). Because it is disputable whether any other injuries that caused the grievant to be absent from work were compensable under Workers' Compensation, this matter should be appealed before the Workers' Compensation Commission or the courts for adjudication.

Based on the foregoing information, the DHRM is remanding the decision to the hearing officer to clarify his decision regarding "reinstatement with backpay."

_____

Ernest L. Spratley

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9211-R2

Reconsideration Decision Issued: April 29, 2010

On March 19, 2010, the DHRM Director issued an Administrative Ruling remanding the case to the Hearing Officer and stating, in part:

> In its appeal, the DOC contends that "…Grievant did not have any type of leave available to him at the time of his return to work date, resultantly, there would be no back pay to award. Grievant indicated at the hearing on October 26, 2009, that he was still unable to return to work." While the DHRM has no authority to rule on the hearing officer's assessment of the evidence regarding the grievant's "intent to resign" and whether the grievant had "good cause" to be absent from job for more than three days; the DHRM is remanding this decision to the hearing officer to clarify his ruling regarding "reinstatement with back pay" in consideration of Policy 4.45 – Leave Without Pay- Conditional/Unconditional.
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> Please note that the grievant had exhausted all annual and traditional sick leave balances. When he did not return to work following release from WC, and after stating that the reasonable accommodations offered by the agency would still not allow him to return, the agency had the following options under state policy:
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> - Place employee on conditional LWOP for up to 12 months and fill the position with no guarantee of reinstatement. (DHRM Policy No. 4.45)
>
> - Place the employee on conditional LWOP, direct him to apply for disability and/or early retirement, and fill the position. (DHRM Policy No. 4.45)

- Terminate for failure to report to work as directed after receiving the RTW notice from Workers' Compensation (DHRM Policy No.1.60)

- Terminate based on the employee's inability to perform the essential functions of the job after reasonable accommodation was offered and rejected. (DHRM Policy No. 1.60)

Note: DHRM Policy No. 1.70, Termination/Separation from State Service states that:

"A separation that is reported as a resignation but then is found to have been involuntary shall be treated as a discharge."

In addition, the grievant requested that this Agency order the DOC to promptly pay him full back pay under Workers' Compensation guidelines and DOC's standard practices. It appears that the workers' compensation award was terminated after it was determined that the grievant was given his medical release from the injury that was covered under Workers' Compensation (right hand and thumb). Because it is disputable whether any other injuries that caused the grievant to be absent from work were compensable under Workers' Compensation, this matter should be appealed before the Workers' Compensation Commission or the courts for adjudication.

Based on the foregoing information, the DHRM is remanding the decision to the hearing officer to clarify his decision regarding "reinstatement with backpay."

The EDR Director has issued a Grievance Procedure Manual and Rules for Conducting Grievance Hearings. Section VI(B)(4) of the Rules for Conducting Grievance Hearings provides:

> If a Written Notice is rescinded or reduced, and the total accumulated discipline is insufficient to support a suspension of any length, **full** back pay **must** be awarded. (Emphasis added).

Section 9 of the Grievance Procedure Manual defines back pay as:

> Retroactive payment of wages, bonuses, leave or other benefits, overtime (if a requisite of the job) and other forms of fixed compensation, as directed by the hearing officer.

The Hearing Officer lacks the authority to circumvent the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings and must comply with those policies as part of reconsideration decisions. The Agency's removal of Grievant was disciplinary and should be treated as if the Agency had issued a Group III Written Notice

with removal.[8] Grievant's removal was rescinded in the original hearing decision. Grievant did not have any accumulated disciplinary action that would have supported a suspension. Thus, the Hearing Officer must award full back pay to Grievant to comply with the Rules for Conducting Grievance Hearings. Accordingly, the award of full back pay in the original hearing decision remains in effect. The Agency is obligated to pay Grievant full back pay from the date of his removal as if he had not been removed from employment.

The question becomes what constitutes back pay. In most cases, salary is the form of back pay due to a removed employee. In this case, Grievant was not receiving a salary at the time of his removal from employment and, thus, the Agency is not obligated to pay Grievant back pay in the form of salary. At the time of Grievant's removal, he should have been receiving workers' compensation benefits. The Agency argues that Grievant "was released from Workers' Comp but failed to do so." The Agency's argument misses the point. The decision to release Grievant from workers' compensation status was erroneous. The Third Party Administrator's decision is not supported by the evidence.[9] Grievant was not capable of returning to work even with the accommodations proposed by the Agency. Grievant's workers' compensation benefits should not have been terminated. The Agency is ordered to restore Grievant's workers' compensation benefits from the date those benefits were terminated.

Grievant's back pay includes benefits in addition to workers' compensation. The Agency must restore those benefits in a manner that returns Grievant to the position he was in prior to his erroneous removal.

DHRM Policy 4.45 addressed Leave Without Pay. Unconditional Leave Without Pay is defined as:

> An employee's approved absence from work without pay that guarantees reinstatement to the position held by the employee before the leave was taken.

An agency may grant unconditional leave without pay for reasons that include:

1. educational purposes that require a longer period of absence than that permitted for educational leave with pay (see Policy 4.15, Educational Leave);
2. military purposes that require a longer period of absence than that permitted for military leave with pay (see Policy 4.50, Military Leave); and

[8] The DHRM Administrative Ruling cites four options that were available to the Agency. The Agency decided to take disciplinary action against Grievant and remove him from employment but did so without issuing a Written Notice.

[9] The Third Party Administrator refused to testify during the hearing thereby undermining the Agency's ability to establish the basis of its decision to remove Grievant from employment.

3. personal purposes, including illness for employees participating in the Traditional Sick Leave Program, and or for a FMLA covered absence to care for a family member. (also see Policy 4.20, Family and Medical Leave).

Conditional Leave Without Pay is defined as:

> An employee's approved absence from work without pay (other than for military leave) that guarantees reinstatement only if the employee's position is available when he or she desires to return from leave. If the position is not available, the employee will be separated and may be employed again only after going through the normal recruitment and selection process.

An agency may grant conditional leave without pay for reasons where a guarantee of reinstatement is not practical due to the agency's need to fill the employee's position. This leave without pay may be granted for the same reasons listed above for unconditional leave without pay, excluding military leave without pay.

Policies governing unconditional and conditional leave without pay are not controlling in this case. The Hearing Officer cannot place Grievant on leave without pay status and there was no basis for the Agency to place Grievant on leave without pay status. The Third Party Administrator's conclusion regarding Grievant's ability to return to work was not credible when compared to Grievant's evidence showing that he was not able to return to work. The Agency's evidence that it had established reasonable accommodations was not credible when compared to Grievant's credible evidence that he could not comply with those accommodations. Accordingly, DHRM Policy 4.45 does not affect the outcome of this case.

APPEAL RIGHTS

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

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. 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.

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

Policy Ruling of the Department of
Human Resource Management

In the Matter of the
Department of Corrections
July 19, 2010

The agency has requested an administrative review of the hearing officer's Second Reconsideration decision dated April 29, 2010, in Grievance Case No. 9211. Previously, the DHRM had remanded the case to the hearing officer for a clarification of his order that Grievant be reinstated "with backpay" in light of the fact that as of the date of the grievance, Grievant was on leave without pay status and further workers' compensation benefits had been suspended because of a medical release.

The hearing officer's Decision on remand was that "the Agency is not obligated to pay Grievant back pay in the form of salary," (Decision at p. 3) but he ordered DOC to restore Grievant's workers' compensation benefits from the date those benefits were terminated. The basis for this ruling is the hearing officer's determination that the Third Party Administrator's decision to release Grievant from "workers' compensation status was erroneous" and the Third Party Administrator's decision "is not supported by the evidence" (*Id*.).

The role of DHRM in the Grievance Procedure is limited by law (Va. Code § 2.2-3006) to a determination whether a hearing officer's decision is consistent with personnel policy. Accordingly, this agency cannot address strictly legal issues or questions concerning the Grievance Procedure. Such matters must be resolved by the courts and the Department of Employment Dispute Resolution ("EDR"), respectively. With regard to interpretation of personnel policies, however, the rulings of the Director of DHRM are final (Va. Code § 2.2-1201 (13)). For reasons that follow, it is our determination that the hearing officer's ruling with respect to the Grievant's entitlement to workers' compensation benefits is not consistent with personnel policy and must be reversed.

DHRM's Policy 1.60, "Standards of Conduct," which governs the hearing officer's authority as a matter of personnel policy, does not include entitlements under the Workers' Compensation Act ("WCA"). By law, the administration of the workers' compensation plan for state employees is the responsibility of DHRM (Va. Code § 2.2-1201(16) and § 2.2-2821). Funding for the payment of claims is provided by a trust fund, but neither state agency employers nor DHRM make binding awards or settlements; that lies within the sole jurisdiction of the Virginia Workers' Compensation Commission (the "Commission"). DHRM policy does not address such entitlements because they are the exclusive responsibility of the Commission (Va. Code § 65.2-700 and -701).[1]

[1] While it is beyond the scope of DHRM's authority under the Grievance Procedure to interpret state law, these laws relating to the exclusivity of DHRM's administration of the workers' compensation plan for state employees and that of the Commission with regard to WCA awards explain why state personnel policy does not authorize state agencies to make binding determinations of WCA entitlements.

As a participant in the Commonwealth's Traditional Sick Leave Program, Grievant is entitled to benefits which are supplemental to those under the WCA pursuant to DHRM Policy 4.60 ("Worker's Compensation"). Such supplemental benefits under that policy are awarded only to employees who have been deemed eligible to an award of benefits under the WCA. Again, DHRM policy does not purport to otherwise set standards or procedures for approving such awards because of the exclusivity of the Commission's jurisdiction in such matters.

Under the Grievance Procedure, hearing officers are given broad authority to order "appropriate remedies, but may not grant relief that is inconsistent with law or policy…." (Grievance Procedure Manual at § 5.9). Absent from the listing of examples of relief which may be available are awards of workers' compensation (*Id*. at §5.9(a)). For purposes of this ruling, the significance of the omission of workers' compensation awards from the Grievance Procedure Manual is only to demonstrate that there is no apparent conflict between personnel policy and the Grievance Procedure with respect to awards under the WCA.[2]

Because it is not consistent with the Commonwealth's personnel policy for a hearing officer to overrule either the Third Party Administrator's decisions or to make binding determinations of an employee's entitlements to workers' compensation awards, this matter is remanded to the hearing officer with the direction that he amend his decision to conform it to this ruling.

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Ernest L. Spratley

[2] This ruling does not purport to interpret the Grievance Procedure, but merely to note that the omission of workers' compensation payments or awards from the types of relief specifically available under that Procedure is consistent with personnel policy.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9211-R3

Reconsideration Decision Issued: July 27, 2010

On July 7, 2010, the EDR Director issued Administrative Review Ruling No. 2010-2653 remanding the case to the Hearing Officer and stating, in part:

> The hearing officer recognized that back pay in a case such as this poses a unique challenge. Because the grievant was not working nor drawing a salary at the time of his termination, he was not entitled to traditional back pay. In an apparent attempt to make the grievant whole, the hearing officer seems to have essentially ruled that to the extent that any denial of workers' compensation benefits was linked to the agency's termination of the grievant's employment, because the dismissal was improper, it cannot serve as a basis for a denial of benefits. The ultimate award or denial of workers' compensation benefits is a function reserved solely with the Workers' Compensation Commission. But, a hearing officer does not err by expressing in a ruling that, to the extent that benefits were impacted by an improper dismissal, that dismissal may not serve as a basis for the denial of workers' compensation benefits to which he was otherwise entitled.
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> In sum, as a result of the hearing decision, the agency may not rely upon the grievant's termination as a basis to deny him workers' compensation benefits. To the extent workers' compensation benefits are denied by the agency on any basis other than the improper termination, the Workers' Compensation Commission appeals process is the proper venue for resolution of those issues. We are remanding this decision to the hearing officer to confirm that his intention was merely to note that any impediment that the grievant's termination posed to any otherwise entitled award of workers' compensation benefits has now been removed by his decision's finding that the termination was improper.

This Hearing Officer confirms that it was his intention "to note that any impediment that the grievant's termination posed to any otherwise entitled award of workers' compensation benefits has now been removed by his decision's finding that the termination was improper."

The DHRM Director issued a Policy Ruling on July 19, 2010 stating:

> With regard to interpretation of personnel policies, however, the rulings of the Director of DHRM are final (Va. Code § 2.2-1201 (13)). For reasons that follow, it is our determination that the hearing officer's ruling with respect to the Grievant's entitlement to workers' compensation benefits is not consistent with personnel policy and must be reversed.

The Hearing Officer is not making an initial award or determination of Workers' Compensation benefits.[10] The Agency determined that Grievant should receive workers' compensation benefits and began paying them to Grievant. The Agency subsequently determined that Grievant should no longer receive workers' compensation benefits based on the conclusions of the Third Party Administrator. The Agency erroneously removed Grievant from employment. The Hearing Officer found that the conclusion of the Third Party Administrator and the Agency to terminate Grievant's workers' compensation benefits and employment was erroneous. Because the Agency's decision to terminate Grievant's workers' compensation benefits and employment was erroneous, that decision was reversed by the Hearing Officer. The effect of reversing the Agency's decision to remove Grievant from employment is to restore the back pay and benefits Grievant was receiving prior to his removal. Those benefits included workers' compensation benefits. By restoring Grievant's workers' compensation benefits, the Hearing Officer is not making a determination regarding Grievant's eligibility for workers' compensation benefits.[11] The Hearing Officer is not interpreting State Human Resource policies. The Hearing Officer is ordering the Agency to continue paying an amount of money equaling workers' compensation benefits until such time as the Agency properly determines that Grievant is no longer eligible for those benefits.

The authority for the Hearing Officer to order the Agency to make payment to Grievant derives from the Grievant Procedure Manual. The Grievance Procedure Manual is drafted by and interpreted solely by the EDR Director. The Hearing Officer's authority to order the Agency to make payment to Grievant does not derive from State

[10] In addition, the Hearing Officer is not making any determination as to the mechanics of how the Agency is reimbursed for money it pays as workers' compensation benefits. Whether the Agency is able to seek and obtain reimbursement for money it pays to Grievant as a form of relief in this case is irrelevant as to the nature of the Hearing Officer's authority to grant relief under the Grievance Procedure Manual.

[11] The Hearing Officer is also not making a determination that the Agency must be reimbursed for money it pays to Grievant from its own funding sources.

personnel policies drafted by the DHRM Director. The Hearing Officer's order that the Agency restore Grievant to the position he was in prior to the erroneous removal of workers' compensation benefits and employment is based on the Grievance Procedure Manual. The Hearing Officer's order is not based on State Personnel policies drafted by the DHRM Director and, thus, the DHRM Director's July 19, 2010 ruling does not affect the Hearing Officer's order.

Accordingly, the Hearing Officer **orders** as follows:

1. the Agency's removal of Grievant is rescinded.

2. Grievant is reinstated to his former position or if occupied, to an objectively similar position.

3. the Agency is <u>not</u> obligated to pay Grievant back pay in the form of salary.

4. the Agency is obligated to pay Grievant back pay in an amount equaling the workers' compensation benefits he was receiving prior to the ending of those workers' compensation benefits by the Agency.

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6. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

<u>Judicial Review of Final Hearing Decision</u>

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.

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer