

Issues: Voluntary resignation and Discrimination (disability); Hearing Date: 09/21/10;  
Decision Issued: 09/23/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;  
Case No. 9406; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9406**

Hearing Date: September 21, 2010  
Decision Issued: September 23, 2010

**PROCEDURAL HISTORY**

Grievant resigned her position with the Agency on April 1, 2010 and then sought to rescind her resignation. The Agency refused to grant Grievant's request to rescind her resignation. On April 14, 2010, Grievant timely filed a grievance to challenge the Agency's conclusion that she had resigned. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. The Agency refused to qualify the matter for hearing and the matter was brought before the EDR Director. On August 3, 2010, the EDR Director issued Ruling No. 2010-2673 qualifying the matter for hearing. On August 23, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 21, 2010, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

1. Whether Grievant voluntarily resigned her employment?

2. Whether the Agency's refusal to accept Grievant's request to rescind her resignation was improper or otherwise contrary to State policy?
3. Whether the Agency discriminated against Grievant based upon a disability?

### **BURDEN OF PROOF**

The burden of proof is on the Grievant to show by a preponderance of the evidence 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 Behavioral Health and Developmental Services employed Grievant as a Leave Coordinator/Fiscal Technician at one of its Facilities. She had been employed by the Agency for approximately 16 years. Grievant's work performance was satisfactory to the Agency. She received an overall rating of Contributor on her 2009 annual performance evaluation.

In the morning of April 1, 2010, Grievant came into the office where the Supervisor and two co-workers, Ms. J and Ms. P, were working. Grievant said, "Considered today as my two weeks notice." The Supervisor asked Grievant if she was serious. Grievant responded that she was serious. Ms. P then looked at her calendar and said, "So April 15 will be your last day?" Ms. J said, "You don't even have another job." Grievant said that she did not care.

Later in the day, the Assistant Director called the Supervisor and said "I heard about [Grievant] giving her two week notice." The Supervisor responded "yes she had made that statement." The Assistant Director asked the Supervisor to come to his office to discuss the matter. The Supervisor told the Assistant Director that Grievant had made the statement about resigning but she was not sure if Grievant meant it. The Supervisor told the Assistant Director that Grievant had a lot of stress at her home. The Assistant Director told the Supervisor to go back and find out if Grievant was "putting in her notice" and that the Agency would need Grievant to document her decision in writing. The Supervisor returned to the office where Grievant was located and asked Grievant if she was serious about quitting and said that if Grievant was serious, Grievant needed to "put it in writing." Grievant answered "probably". Grievant said that she did not have to put it in writing because "no one else followed the rules around here."

Grievant was absent from work on April 2, 2010 due to illness. She went to her doctor's office for treatment. She was released to return to work on April 5, 2010.<sup>1</sup>

On April 5, 2010, the Facility Director sent Grievant a letter stating, in part:

I am writing to acknowledge your resignation, effective April 15, 2010. On April 1, 2010, you announced to your supervisor, coworkers, and a member of Human Resources, that you are leaving your position and that they should consider your announcement as a two-week notice. Your supervisor later asked you if you intended to resign and you responded "probably." She then informed you that she would need you to submit a written resignation if that was indeed your intent. You responded that you did not have to put anything in writing because, "no one else is required to follow policies." Since you never provided your supervisor with any further response, I must conclude that your statement did serve as your verbal resignation.<sup>2</sup>

On April 7, 2010, Grievant sent the Director of the Facility a letter stating:

I would like to resend my verbal resignation. In the last few weeks I was suffering from severe pain for which I sought medical attention on March 31, 2010. I have been taking prescribed medication for the pain which interfered with my ability to take other prescribed medications for my treated medical disability.

My co-workers and supervisor are aware of this disability and know I have been in treatment for this for several years. I have been a long-standing employee with excellent yearly reviews. I would appreciate you reinstating me as an employee because I never gave a written resignation. As per [Mr. W's] letter, my last date of employment would be April 15, 2010 and I would appreciate a response by that date. I appreciate your cooperation.<sup>3</sup>

Grievant had been receiving treatment from a License Clinical Social Worker since 2001.

On June 11, 2010, the License Clinical Social Worker wrote:

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<sup>1</sup> Grievant Exhibit 2.

<sup>2</sup> Grievant Exhibit 3.

<sup>3</sup> Grievant Exhibit 4.

I saw [Grievant] on March 30, 2010<sup>4</sup> at which time she informed me she had told her employer that she quit her job. In a "perfect storm" of factors, [Grievant] was given conflicting information regarding the future of her job from two different supervisors, was on pain medication for severe pain from bursitis, and had missed some doses of Zoloft that treats her mood swings. She came in for seven therapy sessions in the three-week period following quitting. She followed all recommendations and started taking her medications regularly again. By the end of April, [Grievant] had returned to normal functioning except for some anxiety related to not being reinstated at her job. I have seen her for several sessions since and she remains stable.<sup>5</sup>

### **CONCLUSIONS OF POLICY**

DHRM Policy 1.70 addresses Termination/Separation from State Service. Under this policy, "[r]esignation is an employee's voluntary separation from State service. A resignation occurs when an employee has made a decision that he or she no longer wishes to be employed by a State agency and the employee has conveyed that decision to the Agency. DHRM Policy 1.70 does not require that an employee's decision be in writing. An employee's resignation is effective even if it only is communicated verbally.

On April 1, 2010, Grievant decided that she no longer wished to be employed by the Agency and expressed that decision to her Supervisor. She gave her "two weeks notice." Grievant's resignation was voluntary. No one forced Grievant to resign. Grievant's resignation on April 1, 2010 was unconditional. Although Grievant had expressed frustration in the past that if she did not receive a pay raise she would quit, on April 1, 2010 she made a clear declaration of resignation without it being conditioned on future events. Grievant's resignation was unambiguous. Grievant announced her resignation to three coworkers and all three coworkers understood Grievant's words to mean she was resigning.

There is a difference between a decision to resign and making the wrong decision to resign. Evidence that shows an employee made the wrong decision to resign does not necessarily show that the employee did not resign. Much of the evidence in this case shows the Grievant's decision to resign was in error and one that she now regrets. That evidence, however, does not negate the fact that she decided she no longer wished to be employed by the Agency and communicated that decision to the Agency.

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<sup>4</sup> The correct date was April 1, 2010.

<sup>5</sup> Grievant Exhibit 1.

Several reasons showed that Grievant resigned her position with the Agency on April 1, 2010. First, Grievant told the Supervisor, Ms. J, and Ms. P that she was giving her a notice of resignation. All three of these people understood Grievant's words to mean that Grievant intended to resign. Second, Grievant was given several opportunities to retract her resignation. The Supervisor asked Grievant if she was serious. Instead of saying that she was merely expressing frustration, Grievant replied that she was serious about her decision to resign. Ms. J expressed concern that Grievant's decision might not be wise because Grievant did not have another job. Grievant replied that she did not care. Later in the day, when the Supervisor again asked Grievant if she intended to resign, Grievant said "probably" instead of saying she did not intend to resign. Third, on April 1, 2010, Grievant met with the License Clinical Social Worker and told the License Clinical Social Worker that she had "quit her job." Fourth, on April 7, 2010, Grievant wrote the Facility Director and asked to "rescind my verbal resignation." In order to rescind a resignation there must first be a resignation. Grievant's statement acknowledges that a resignation had occurred.

Grievant presented evidence showing that on April 1, 2010 she was under a great deal of stress. She was experiencing stressful events at her home. She was experiencing stress resulting from decisions of her coworkers. For example, one coworker announced that she was leaving the Agency to take a job with another employer. This created stress because the workload of the departing employee would have to be addressed by other employees in the office. Grievant also presented evidence that she might not be making decisions in her best interest because of her medical condition. Grievant suffered from depression and bipolar disorder. She had not been taking her medication on a regular basis and this affected her judgment.

When Grievant's defenses are considered, they show that her resignation was a mistake. Grievant had not obtained another job to provide her with a source of income before she quit her job with the Agency. Grievant regretted her decision and sought to rescind her resignation. The fact that Grievant made a poor decision to resign does not show that she did not make the decision to resign. Grievant's mental health concerns explain how she made the mistake but they are not sufficient to show that Grievant lacked the capacity or ability to decide to resign. The Hearing Officer is not a "Super Personnel Officer" and does not have the authority to fix an employee's mistakes even though the Hearing Officer might have made a different decision from the decision made by the Agency.

DHRM Policy 1.70 provides that an "agency may choose to accept an employee's request to rescind his or her resignation within 30 calendar days of separation." The Agency has discretion as to whether to accept an employee's request to rescind a resignation. In this case, the Agency chose not to permit Grievant to undo her resignation. The Agency chose to deny Grievant's request because the Agency intended to reduce number of individuals residing at the Facility and fewer staff would be needed to provide services to those individuals. The Agency's decision was not for an improper purpose or otherwise prohibited by State policy.

Grievant argued that the Agency discriminated against her because of her disability relating to her depression and bipolar disorder. To establish a *prima facie* claim of disability discrimination under the Americans with Disabilities Act, the Grievant must show that: (1) she is within the ADA's protected class (i.e., a "qualified individual with a disability"); (2) she experienced an adverse employment action; (3) and the adverse employment action occurred "in circumstances that give rise to an inference of unlawful discrimination based on disability." Grievant experienced an adverse employment action because she was removed from employment. If the Hearing Officer assumes for the sake of argument that Grievant is a qualified individual with a disability and that there are circumstances which give rise to an inference of unlawful discrimination based disability, the outcome of this case does not change. The Agency is not obligated to permit Grievant to rescind her resignation as a form of reasonable accommodation. Grievant has not presented any policy or law that would require the Agency to do so.

### **DECISION**

For the reasons stated herein, the Grievant's request for relief is denied. The Agency has not violated State policy with respect to Grievant's resignation.

### **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 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.