

Issue: Qualification – Separation from State (voluntary resignation); Ruling
Date: April 25, 2008; Ruling #2008-1983; Agency: Department of Health;
Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Health
Ruling No. 2008-1983
April 25, 2008

The grievant has requested a ruling on whether his October 2, 2007 grievance with the Department of Health (the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant was formerly employed by the agency before he submitted his resignation on September 4, 2007, which became effective September 18, 2007. However, after the grievant's resignation took effect, he sought to return to his former position. He contacted his former supervisor who was allegedly receptive to his return. On September 24, 2007, the grievant's former supervisor requested that the grievant provide written notification that he wanted to rescind his resignation. The grievant brought such a document to his former supervisor on September 25, 2007, around 1:00 p.m. According to the grievant, he was welcomed back and discussed a work-related matter with his former supervisor. It was apparently understood that the grievant would begin work the following day, as the grievant's former supervisor contemporaneously sent an e-mail to that effect.

However, later in the day on September 25, the grievant was notified by telephone that the agency would not allow him to rescind his resignation and return to his former position. Though the grievant's former supervisor had allegedly approved the grievant's request to rescind, the District Director determined that the agency would not offer the grievant his position back. The agency asserts that the grievant's former supervisor did not have the authority to approve the grievant's rescission of his resignation, but rather that the decision was the District Director's. The grievant has now challenged the agency's actions in his October 2, 2007 grievance. He seeks qualification of the grievance for hearing.

DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out,

as well as hiring, promotion, transfer, assignment, and retention of employees within the agency “shall not proceed to hearing” unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.¹ This grievance raises the issue of whether the agency misapplied or unfairly applied DHRM Policy 1.70 (Termination/Separation from State Service) when the District Director decided not to accept the grievant’s request to rescind his resignation, hours after the grievant’s former supervisor had allegedly approved his rescission request.

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. For example, this Department has repeatedly held that qualification is warranted to determine whether policy was misapplied or unfairly applied where evidence presented by the grievant raises a sufficient question as to whether the agency’s determination was plainly inconsistent with other similar decisions within the agency or was otherwise arbitrary or capricious.²

DHRM Policy 1.70 provides that “[a]n agency may choose to accept an employee’s request to rescind his or her resignation within 30 calendar days of separation,” but does not specify who in the agency has the authority to accept or reject such a request.³

Whether Former Supervisor Had Authority to Approve Rescission Request

If the grievant’s former supervisor had the authority to accept his request to rescind his resignation pursuant to DHRM Policy 1.70, and did so, the grievant would have returned to state employment. Consequently, his subsequent separation from service by the District Director would have been improper, because that separation would not have been effectuated under DHRM Policy 1.40 (Performance Planning and Evaluation), DHRM Policy 1.60 (Standards of Conduct), or as otherwise provided by state policy. As discussed below, however, the former supervisor did not have the requisite authority to approve the grievant’s rescission request under Policy 1.70.

While the facts are in dispute about whether the grievant’s former supervisor offered him his position back, for purposes of this ruling only, it will be assumed that she did. The agency, however, states that the grievant’s former supervisor did not have the authority to accept the grievant’s request to rescind his resignation. During this Department’s investigation, the agency stated that the authority ultimately rested with the

¹ Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

² See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made “[i]n disregard of the facts or without a reasoned basis”); see also, e.g., EDR Ruling 2008-1879; EDR Ruling 2007-1651.

³ DHRM Policy 1.70, *Termination/Separation From State Service*.

District Director, and provided supporting evidence.⁴ As such, it does not appear, and the grievant has presented no evidence to the contrary, that the grievant's former supervisor had actual authority to agree to the rescission of the resignation. Even though the grievant's former supervisor might have believed she had the authority to do so, and allegedly indicated as much to the grievant, acting consistently with that belief does not bind the state to the alleged agreement.⁵

Nor is there any indication that the District Director affirmatively ratified or approved the former supervisor's unauthorized act, or somehow acquiesced to it, which could have bound the agency to allowing a rescission of the resignation.⁶ To the contrary, within a matter of hours the District Director expressly repudiated the former supervisor's unauthorized acceptance of the grievant's rescission request.

Whether District Director's Rejection of Grievant's Rescission Request was Inconsistent with Other Decisions, Arbitrary or Capricious, or So Unfair as to Amount to a Disregard of the Intent of the Applicable Policies

While the grievant has stated that the agency has accepted other employees' requests to rescind their resignations in the past, there is no evidence that the agency's decision in the grievant's case was inconsistent with any of these alleged situations. The agency states that it decided to decline the grievant's request to withdraw his resignation because of issues with his driving record. There has been no evidence submitted that would indicate the agency had ever accepted another employee back in a similar situation. Further, it cannot be said that the agency's decision disregarded the facts or was without a reasoned basis. The District Director appears to have reasonably acted upon concerns she had with the grievant's driving record. Nor is this a case in which there is evidence that the agency's actions were so unfair as to amount to a disregard of the intent of DHRM Policy 1.70 or any other applicable state policies. The grievant was notified within a matter of hours after his meeting with his former supervisor that the agency would not allow him to rescind his resignation.

⁴ This assertion would appear to be supported by the inclusion of signature lines for the Business Manager and the District Director on the agency's Classified Employee Transaction Request form. In addition, it appears that the hiring of employees required the approval of the District Director.

⁵ It is well settled that "[t]hose who deal with public officials must at their peril take cognizance of their power and its limits." *Richard L. Deal & Assocs., Inc. v. Commonwealth*, 224 Va. 618, 623, 299 S.E.2d 346, 349 (1983) (quoting *Bristol v. Dominion Nat. Bank*, 153 Va. 71, 83, 149 S.E. 632, 636 (1929)).

⁶ *See, e.g., Kilby v. Pickurel*, 240 Va. 271, 275, 396 S.E.2d 666, 668-69 (1990) ("A principal is bound by his agent's previously unauthorized act if he ratifies the act by accepting its benefits with full knowledge of the relevant facts, or, if upon learning of the act, he fails promptly to disavow it.") (citations omitted). It should also be noted that whether the grievant's former supervisor possessed apparent authority is not considered here because it does not appear that the doctrine would apply. Although this Department is unaware of any Virginia case specifically addressing whether an agency of the Commonwealth can be bound by the acts of an employee who possesses only apparent authority, the weight of authority seems to support the proposition that such acts do not bind the government. *E.g., Restatement (Third) of Agency* § 2.03 cmt. g. (2006).

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, he should notify the human resources office, in writing, within five workdays of receipt of this ruling and initiate an appeal pursuant to Virginia Code § 2.2-3004(E). If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that he does not wish to proceed.

Claudia Farr
Director