Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date: April 7, 2009; Ruling #2009-2162; Agency: University of Virginia; Outcome: Agency in Compliance / Grievant in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the University of Virginia
Ruling No. 2009-2162
April 7, 2009

The grievant and the University of Virginia (UVA or the University) have requested a ruling on whether or not all issues related to the grievant's May 13, 2008 grievance with the University may be addressed in a single hearing.

FACTS

The grievant was previously employed by the University as an OR Scrub Tech/Massage Therapist. On or about April 29, 2008, the grievant was informed that she was facing termination of her employment for attendance issues and that she could resign in lieu of being terminated. The grievant subsequently resigned her employment and on May 13, 2008, initiated a grievance challenging what she characterizes as an involuntary resignation.

After the University denied the grievant's request to qualify the May 13th grievance for hearing, the grievant appealed to this Department. In EDR Ruling No. 2008-2052, this Department found that the grievant had raised a sufficient question as to whether her resignation was involuntary for her grievance to qualify for hearing. This Department further explained in its Ruling, however,

> 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. If the grievant chooses the resignation offer after full disclosure of the resignation terms and adequate time to consider her options, then such resignation would likely be considered voluntary and she would have no further access to grieve her resignation. If, on the other hand, she elects to reject the resignation offer and instead opts for a disciplinary termination, she may grieve the discipline within 30 **calendar** days of receipt of the formal discipline. Because formal discipline automatically qualifies for hearing, the grievant would have an

opportunity to present her case to an impartial hearing officer who would decide whether the disciplinary action was warranted.

In an effort to avoid the potential outcome of two grievance hearings, the University has advised this Department that it now wishes to qualify the grievant's May 13th grievance for hearing, although it states that this decision does not represent an admission that the grievant's resignation was improperly obtained. The grievant, through counsel, has agreed to the University's request to qualify the grievance for hearing.

DISCUSSION

From their requests to this Department, both parties clearly seek to avoid having two separate grievance hearings regarding the grievant's separation from employment with the University. The University's decision to qualify the grievance does not in itself eliminate the need for two hearings, however, because the only action grieved by the grievant was her allegedly involuntary resignation. The grievant could not grieve, and therefore the University cannot qualify, whether the University's intended disciplinary action was warranted, because such discipline was never issued by the University.

Although the grievant has not yet been issued or grieved any disciplinary action, this Department nevertheless understands the parties' apparent sentiment that it would be more efficient to address all issues regarding the grievant's separation from employment in a single hearing. The parties' choice for a single hearing, however, must be an informed one, with sufficient knowledge of how such a procedure would work.

In a single hearing, a hearing officer would adjudicate the involuntary resignation claim, and if the grievant prevails on that claim, the issue of whether the University's intended disciplinary action in this case would have been warranted. For purposes of due process, the University would be directed to provide the grievant with written notice of the specific charges and conduct that it contends would have supported her termination. This notice must be given sufficiently in advance of the hearing to allow the grievant to prepare her case. At the hearing, both parties may present evidence regarding whether the grievant's resignation was involuntary and whether the grievant's alleged conduct would otherwise have supported her termination under the applicable policies. The grievant will first present her evidence in support of her claim that her resignation was involuntary. The University will follow with evidence in support of its claim that the resignation was voluntary, and then its evidence in support of its position that its intended discipline was warranted. The grievant will then be able to present her evidence to support her position that the intended discipline was not warranted.

In his or her decision, the hearing officer will first consider whether the grievant's resignation was in fact involuntary, under the criteria discussed in EDR Ruling No. 2008-2052. The grievant bears the burden of proof on this issue. If the grievant fails to meet this burden, her resignation shall stand as voluntary, and the issue of discipline will not be addressed in the hearing decision. If, however, the grievant establishes by a preponderance of the evidence that her resignation was involuntary, the hearing officer

will treat the involuntary resignation as an involuntary termination, and will consider and determine in his or her decision, whether the agency has demonstrated, by a preponderance of the evidence, that the discharge was warranted and appropriate under the circumstances. If the University fails to meet this burden, the hearing officer shall direct that the grievant be reinstated. If the University meets this burden, the involuntary termination shall stand.

With the one-hearing model, the grievant would only be reinstated if she prevailed on both issues. 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.

In the interests of efficiency, and under the unique circumstances of this case, this Department is willing to accept the one-hearing scenario, so long as both parties continue to be in mutual agreement that a single hearing should be held. If one or both parties objects to the one-hearing approach, the two-hearing approach set forth in Ruling No. 2008-2052 will be utilized. The parties must advise this Department of their election within 10 calendar days of this Ruling, including, if they agree to elect the single-hearing option, their agreement as to the number of days prior to hearing that the University must provide the grievant with written notice of the specific charges and conduct it contends would have supported her termination.

This Department's rulings on compliance are final and nonappealable.[1]

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Claudia T. Farr
Director

[1] Va. Code § 2.2-1001 (5).