

Issue: Administrative Review of Hearing Officer's decision in Case No. 9105; Ruling Date: October 14, 2009; Ruling #2009-2342; Agency: University of Virginia Health System; Outcome: Remanded to AHO.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the University of Virginia
Ruling No. 2009-2342
October 14, 2009

The agency has requested that this Department administratively review the hearing officer's decision in Case Number 9105. For the reasons set forth below, this case is remanded for further consideration.

FACTS

The grievant in this case was offered a choice between resigning her employment with the University or being terminated for attendance problems.¹ On April 29, 2008, a representative from the University's Human Resources Department advised the grievant that she could grieve her separation from employment even if she opted to resign, after which the grievant chose to resign her employment.² The grievant then timely grieved her separation.³ After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing.⁴ The agency head denied the grievant's request, on the basis that she had voluntarily resigned her employment with the University.⁵ She appealed to this Department.⁶

This Department subsequently qualified the grievance for hearing.⁷ In our qualification ruling, we found that the grievant had raised a sufficient question as to whether her resignation was involuntary for her grievance to qualify for hearing.⁸ The Ruling further explained, 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

¹ Decision of Hearing Officer in Case No. 9105, issued May 27, 2009 ("Hearing Decision"), at 2.

² *Id.*

³ *Id.*

⁴ *Id.* at 1.

⁵ *Id.*

⁶ See EDR Ruling No. 2008-2052.

⁷ *Id.*

⁸ *Id.*

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 a 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.⁹

In an effort to avoid two hearings, the University reversed its decision not to qualify the grievance, an act with which the grievant apparently concurred.¹⁰ The parties then advised this Department that they would like to have a single hearing.¹¹ In response to the University's request for the appointment of a hearing officer, this Department issued Ruling No. 2009-2162. In that ruling, we advised the parties of the differences between having a single hearing or two hearings, including the possibility of reinstatement with "full, partial or no backpay" in the two-hearing model.¹² This Department then agreed to accept the one-hearing scenario, so long as both parties continued to be in mutual agreement with that approach.¹³

After the parties failed to agree to utilize the one-hearing model,¹⁴ a hearing officer was appointed to hear the sole issue of whether the grievant's resignation was voluntary.¹⁵ In a hearing decision dated May 27, 2009, the hearing officer found that the misstatement by Human Resources—that the grievant could grieve a resignation—rendered the resignation involuntary.¹⁶ He reversed the grievant's resignation as of the date of the hearing decision and awarded her back pay for the full period from her involuntary resignation to the date of reinstatement.¹⁷

The University has now requested an administrative review of the hearing officer's decision. While the University does not dispute the hearing officer's finding that the grievant's resignation was involuntary, the University asserts that the relief awarded by the hearing officer was unwarranted and inappropriate.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions ...

⁹ *Id.* at 3 (footnote from cited text omitted).

¹⁰ See EDR Ruling No. 2009-2162.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See EDR Ruling No. 2009-2283.

¹⁵ Hearing Decision at 1.

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 3-4.

on all matters related to procedural compliance with the grievance procedure.”¹⁸ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.¹⁹

The University asserts that the order of full back pay in this case was unjustified under the circumstances, as it provided an award to the grievant in excess of the harm caused by the University’s erroneous representation regarding her grievance rights. The University notes that in the absence of the April 29, 2008 misrepresentation, the grievant would nevertheless have ceased employment that same day, as the University had already decided to terminate her. Moreover, the University argues, even if the grievant were entitled to any back pay following her resignation, the hearing officer should have taken evidence on her alleged December 4, 2008 posting of confidential medical information, which rendered her ineligible for rehire by the University, and reduced her back pay award accordingly.

At their core, these arguments both assert the principle that the grievant should not receive back pay for any period when she would not otherwise have been a University employee because of her own alleged actions. Whether such an action, if proven, may be considered by the hearing officer in ordering full, partial or no back pay is a question of first impression for this Department.²⁰

As the University appears to concede, for the grievant to be allowed to “re-do” her resignation decision and the University then to be able to terminate the grievant, the grievant had to be reinstated as of the date of her involuntary resignation. Once this reinstatement occurred, the grievant became eligible for back pay under the grievance procedure.²¹ Simply because the grievant is eligible for back pay, however, does not automatically entitle her to full back pay for the entirety of the reinstatement period.²² To the contrary, under the Rules, the hearing officer may award full, partial, or no back pay.²³

As a general rule, full back pay (less interim earnings) should be awarded when an employee is reinstated after prevailing at hearing. In some cases, however, an agency may be able to show, by a preponderance of the evidence, that the grievant would not have been employed by the agency for all or part of the reinstatement period, regardless of any agency action such as termination. In such cases, an award of full back pay may constitute an

¹⁸ Va. Code § 2.2-1001(2), (3), and (5).

¹⁹ See *Grievance Procedure Manual* § 6.4.

²⁰ Consistent with our usual practice and preference, we allowed the hearing officer to address this question first.

²¹ See *Grievance Procedure Manual* at § 5.9(a) and *Rules for Conducting Grievance Hearings* at VI.B.4. While we freely concede that EDR Ruling No. 2009-2162 could have articulated this point more clearly, in stating that the hearing officer would be able to award full, partial, or no back pay upon reinstatement in the two-hearing model, we were only reiterating the fundamental principle under the *Grievance Procedure Manual* and *Rules* that when an employee is reinstated by a hearing officer, the hearing officer may order full, partial or no back pay, as appropriate under the particular facts and circumstances of the case.

²² For purposes of this Ruling, the term “reinstatement period” means the period from the grievant’s involuntary resignation to her reinstatement following the hearing officer’s May 27, 2009 decision in Case No. 9105.

²³ *Rules for Conducting Grievance Hearings* at VI.B.4.

inappropriate windfall to the grievant and an inappropriate punitive action against the agency. The amount of back pay, if any, to be awarded in such a situation is within the hearing officer's discretion, taking into consideration these general principles as applied to the particular facts and circumstances of the case.²⁴

Accordingly, this case is remanded to the hearing officer to reopen the hearing to address whether full back pay is appropriate in light of the University's arguments regarding the grievant's alleged misconduct (both the misconduct which would have apparently resulted in her being disciplined and terminated on April 29, 2008, as well as her ineligibility for rehire due to the alleged posting of confidential medical information on December 4, 2008). For a limitation of back pay to be appropriate, the University must bear the burden of proving terminable misconduct such as would be required in a disciplinary case (and the grievant must be provided the same opportunity to prove mitigating circumstances). If the University prevails on these issues, the hearing officer may elect *not* to award back pay for all or part of the reinstatement period, as appropriate under the facts and circumstances.

APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review and any reconsidered hearing decisions following such review have been decided.²⁵ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.²⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁷ This Department's rulings on matters of procedural compliance are final and nonappealable.²⁸

Claudia T. Farr
Director

²⁴ Because the University's arguments go only to the remedy to be granted, rather than the management acts or omissions being grieved, they do not need to be "qualified" for hearing to be considered by the hearing officer.

²⁵ *Grievance Procedure Manual*, § 7.2(d).

²⁶ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

²⁷ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

²⁸ See Va. Code § 2.2-1001 (5), § 2.2-3003 (G).