Issue: Administrative Review of Hearing Officer's Decision in Case No. 9211; Ruling Date: July 7, 2010; Ruling #2010-2653; Agency: Department of Corrections; Outcome: Remanded to AHO.

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

# ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2010-2653
July 7, 2010

The agency has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9211. For the reasons set forth below, this Department orders the hearing officer to clarify his decision consistent with this ruling.

## FACTS

The salient facts of this case as set forth in the Hearing Decision in Case Number 9211 are as follows:

> 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 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.

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. [1]

Based on the foregoing Findings of Fact the hearing officer reached the following 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. 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.

[1] November 5, 2009 Decision of the Hearing Officer in Case No. 9211 ("Hearing Decision"), at 2-5 (footnotes omitted).

> 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.

On March 19, 2010, the DHRM Director issued an Administrative Ruling remanding the case to the Hearing Officer which stated:

> 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.
>
> 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."

The Hearing Officer held, in pertinent part, in his April 29, 2010, Reconsideration Decision that:

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. 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. 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.[2]

## DISCUSSION

The agency's request to this Department for administrative review asserts that the hearing officer abused his discretion when he ordered the agency to restore the grievant's workers' compensation benefits from the date those benefits were terminated.

Based on the language of the Second Reconsideration Decision, the agency's concern is understandable. Under Virginia Code § 65.2-700, which describes the jurisdiction of Virginia Workers' Compensation Commission, "[a]ll questions arising under this title, if not settled by agreements of the parties interested therein with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided." In this case, the hearing officer ruled that "[t]he Agency is ordered to restore Grievant's workers' compensation benefits from the date those benefits were terminated." Thus, strictly read, we would agree with the agency that it appears that the hearing officer exceeded the scope of his authority and encroached upon the exclusive dominion of the Commission by apparently awarding workers' compensation benefits. However, we believe that this ruling was simply intended to state that whatever impediment the agency's improper termination of the grievant's employment posed to the award of Worker's Compensation benefits, any such impediment must now be considered eliminated.

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.

---

[2] April 29, 2010 Reconsideration Decision of the Hearing Officer in Case No. 9211-R2 ("Second Reconsideration Decision"), at 2-3 (footnotes omitted). (The hearing officer had upheld his original Hearing Decision in a previous reconsideration decision, and this Department did not disturb the Hearing Decision in its administrative review of that decision.) *See* EDR Ruling No. 2010-2466.

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.

## APPEAL RIGHTS AND OTHER INFORMATION

This matter is remanded to the hearing officer for action consistent with this Ruling. 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 have been decided and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.[3] 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.[4] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[5]

_____

Claudia T. Farr
Director

[3] *Grievance Procedure Manual* § 7.2(d).
[4] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[5] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).