Issues: Access to the Grievance Procedure, and Qualification – Separation from State (Involuntary Resignation); Ruling Date: August 3, 2010; Ruling #2010-2673; Agency: Department of Behavioral Health and Developmental Services; Outcome: Access Granted, Qualified for Hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS and QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Behavioral Health and Developmental Services
Ruling No. 2010-2673
August 3, 2010

The grievant has requested a ruling on whether her April 15, 2010 grievance with the Department of Behavioral Health and Development Services (the agency) qualifies for a hearing. For the following reasons, we find, as a threshold matter, that the grievant has access to the grievance procedure. Furthermore, for the reasons set forth below, this grievance qualifies for hearing.

FACTS

On April 1, 2010, the grievant apparently made the statement that she was giving her advance two-week notice that she was quitting her job. The grievant's supervisor met with the Director of Administration to discuss the grievant's statement. The Director apparently told the grievant's supervisor that "we need to find out if she's serious" and "we need it in writing." The grievant's supervisor went back to the grievant to ask her if she truly intended to resign, to which the grievant responded "probably." The grievant's supervisor informed the grievant that if she intended to resign, she needed to submit a written resignation, to which the grievant allegedly responded "that [she] did not have to put anything in writing because, 'no one else is required to follow polices.'"

The following day, Friday April 2nd, the grievant was out on personal sick leave. On the following Monday, the Facility Director prepared a letter stating that the agency had accepted her resignation, effective April 15, 2010. The Director stated that because the grievant "never provided [her] supervisor with any further response, I must conclude that your statement did serve as your verbal resignation." The April 5th letter further informed the grievant that she was being placed on administrative leave effective immediately. On April 7, 2010, the grievant wrote the Facility Director requesting that the agency allow her to rescind her resignation. The agency refused. The grievant challenged the agency's actions through the April 15, 2010 grievance that is the subject of this ruling.

DISCUSSION

Access

As an initial matter, although the agency has not expressly challenged the grievant's access to the grievance process, we will address the subject here as we have viewed access as a jurisdictional matter.

To have access to the grievance procedure, an employee "[m]ust have been employed by the Commonwealth at the time the grievance is initiated (unless the action grieved is a termination or involuntary separation)."[1] Thus, once an employee separates from state employment, the only claim for which he or she may have access to the grievance procedure is a challenge to a termination or an involuntary separation. Employees who voluntarily resign their employment may or may not have access to the grievance process, depending upon the surrounding circumstances such as the nature of their claim or when the grievance is initiated. For example, this Department has long held that any grievance initiated by an employee *prior* to the effective date of a voluntary resignation may, at the employee's option, continue through the grievance process, assuming it otherwise complied with the 30-day calendar rule. On the other hand, this Department has also long held that once an employee's voluntary resignation becomes effective, he or she may not file a grievance.

When an employee's attempt to rescind a voluntary resignation comes *after* the resignation's effective date, the action directly resulting in the separation of employment is the grievant's own voluntary decision to resign. In contrast, when an agency refuses to allow an employee to rescind his or her resignation *prior to* the effective date, the actual separation from state service, for purposes of access, is involuntary.[2] As the grievance procedure specifically allows access for post-termination grievances challenging an involuntary separation, under the particular circumstances presented in this case, we find that the grievant has access to the grievance procedure to pursue the claims raised in her April 15, 2010 grievance.

Qualification

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.[3] This grievance raises the issue of whether the agency misapplied or unfairly applied the

[1] *Grievance Procedure Manual* § 2.3. In addition, the employee must satisfy the other requirements for access to the grievance procedure, such as non-probationary status. *Id.*
[2] *See* EDR Ruling Nos. 2007-1458; 2006-1151.
[3] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

Department of Human Resource Management (DHRM) Policy 1.70 (Termination/Separation from State Service).

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.[4]

The threshold question in this grievance is whether the grievant voluntarily resigned her employment. The grievant asserts that her verbal two weeks notice was made due to stress and a medical disability, and was not intended to have any effect. DHRM Policy 1.70 defines resignation as "an employee's voluntary separation from state service."[5] The policy further states that an employee is "asked to give reasonable notice to his or her agency (preferably at least two weeks), along with a written explanation for the resignation" and that failure to give appropriate notice may be documented on the employee's termination report.[6] Although an employee is "asked" to give notice and a written explanation, policy does not expressly indicate that a written resignation is required or whether a different method of resignation, such as a verbal resignation, would be equally effective.[7] Moreover, state policy does not expressly state when a proffer of resignation becomes effective.

The first issue is whether the grievant's verbal statement to the effect that "I am leaving my position and you should consider this my two week notice" alone, constituted an effectuated resignation. Virginia law, like state policy, is minimally instructive as to when a proffered resignation becomes effective. Thus, we have looked to other jurisdictions for guidance. As a starting point, we find persuasive those courts holding that "[a] resignation must be voluntary, unconditional, and unambiguous."[8] Some courts add the additional requirement that a statement of resignation must also be given with the "intent to operate immediately as such."[9] In this case, while the statement "consider this to

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[4] *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.
[5] DHRM Policy No. 1.70
[6] *Id.* Policy 1.70 further 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."
[7] We find it difficult to imagine, however, that a deliberate and unequivocal resignation delivered verbally rather than by writing would not be considered a valid proffer of an intent to resign.
[8] Leach v. Ford Motor Co. 299 F. Supp. 2d 763, 769; (E.D. Mich. 2004) citing to See Schultz v. Oakland County, 187 Mich. App. 96, 102-03, 466 N.W.2d 374 (1991).
[9] Poland v. Glover, 111 F. Supp. 675, 676 (W.D.N.Y. 1953). ("To constitute a resignation, it must be unconditional and with the intent to operate immediately as such.")

be my two weeks notice" is seemingly unambiguous, it does not necessarily show "intent to operate immediately as such."

Other potential issues relate to the agency's response to the grievant's two week notice announcement. First, the agency sent the grievant's supervisor back to find out if she was serious. Thus, it would appear that there may have been some ambiguity (or other lack of clarity) as to the grievant's actual intentions. Similarly, the Facility Director's April 5, 2010 statement that "[s]ince you never provided your supervisor with any further response, I must conclude that your [original] statement did serve as your verbal resignation," could be viewed as evidence of the agency's lack of clarity regarding the grievant's true intent concerning her original two week notice statement. More importantly, when the agency sought clarification as to her intent, the grievant provided the somewhat ambiguous "probably" response.

Still other issues relate to the agency's delay in accepting the grievant's apparent proffer of resignation. In some jurisdictions, courts have held that if a public officer submits a resignation that, by its terms, is effective *immediately* or on a *future date*, the resignation is an "unalterable fact" and the officer cannot withdraw the resignation and cannot negate it by continuing to perform the job.[10] Other jurisdictions hold that an employee has a right to rescind a resignation unilaterally but only prior to its acceptance.[11] Further complicating matters in this case are questions relating to the grievant's potential modification of her apparent proffer of resignation when she stated that she "probably" intended to resign, and whether that potential modification should be viewed as tantamount to an attempt to rescind her earlier seemingly unambiguous statement of resignation.

Based upon the totality of the circumstances in the case, the unanswered questions remaining are best resolved through the grievance hearing process. Accordingly, the grievance qualifies for hearing. We note, however, that this qualification ruling in no way determines that the grievant did (or did not) resign or that the agency's refusal to accept the grievant's request to rescind any such resignation was improper, but only that a further exploration of the facts by a hearing officer is appropriate. Because this grievance is qualified on the basis of questions regarding the grievant's intention to resign, we need not address the second question of whether the agency's refusal to accept the grievant's request to rescind was improper in any manner. Only if the hearing officer were to find that the grievant did in fact resign, would he or she be required to reach a determination on the issue of rescission.

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[10] Rohrback v. Illinois Department Of Employment Security, 361 Ill. App. 3d 298; 835 N.E.2d 955; (2005). We note that the notion that a resignation is an "unalterable fact" seems contrary to DHRM Policy 1.70's express provision allowing an employee to rescind her resignation, with the approval of management. Policy 1.70 states that "[a]n agency may choose to accept an employee's request to rescind his or her resignation within 30 calendar days of separation."

[11] Ulrich v. City and County of San Francisco, 308 F.3d 968, 975; (9th Cir. 2002).

CONCLUSION AND OTHER INFORMATION

For the reasons set forth above, the grievant's April 15, 2010 grievance is qualified for hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B.

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Claudia Farr
Director