

Issues: Access to the Grievance Procedure and Qualification – Separation from State (voluntary resignation); Ruling Date: September 7, 2010; Ruling #2011-2699; Agency: Department of Behavioral Health and Developmental Services; Outcome: Access granted and 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. 2010-2699  
September 7, 2010

The grievant has requested a ruling on whether her May 18, 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 or about Friday, April 30, 2010, the grievant had a discussion with her supervisor, a discussion the two characterize very differently. The grievant's supervisor asserts that the grievant verbally resigned her position with the agency. The grievant, on the other hand, states that while she was upset and is not quite sure of her exact words, she did not resign. (Her recollection was that she said was something to the effect "I know you'd be happy if I'd resign," to which her supervisor purportedly replied "Don't tell me how I feel.") The grievant asserts that her supervisor said something about a "verbal resignation" but because she was admittedly "hysterical," she has no clear recollection of how the term was used or in what context. After their conversation, the grievant told her supervisor that she needed to leave work and required Family Medical Leave Act leave for her anxiety. She filled out a leave slip and left the workplace.

When the grievant arrived home, she called an employee relations manager at the agency's central office. The grievant told the employee relations manager that "I may have quit my job." The grievant asserts that she said this because she had recalled her supervisor's "verbal resignation" comment and she believed that her supervisor would say that she had indeed resigned. The grievant and employee relations manager purportedly discussed whether a written document was necessary to effectuate a resignation. The employee relations manager asserts that she was not led to believe that the grievant had any question as to whether she had verbally resigned. Rather, she was led to believe that the grievant questioned only whether a written document was needed to effectuate a resignation. The employee relations manager asserts that at no time did the grievant attempt to clarify that she had not verbally resigned.

The grievant asserts that the following day, Saturday, a co-worker called her to inform that it was reported that she had quit her job. The next workday, Monday, she called the workplace to make it clear that she had not resigned.

## DISCUSSION

### *Access*

To have access to the grievance procedure, an employee “must have been employed by the Commonwealth at the time the grievance is initiated (unless the *action grieved* is a termination or involuntary separation).”<sup>1</sup> 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 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 separation, for purposes of access, is involuntary.<sup>2</sup> Here, the grievant asserts that she never resigned. Even if she had given a verbal notice of resignation on Friday, April 30<sup>th</sup>, there is insufficient evidence as to the effective date of such a purported resignation. It apparently was not immediate, and she requested and was granted a leave of absence that afternoon. Moreover, her May 3<sup>rd</sup> call to the facility evinced an intent to continue working. That intent was expressed prior to any clearly established effective date for resignation. This Department therefore finds, for purposes of access only, that the grievant’s separation from state employment was involuntary. Thus, under the particular circumstances presented in this case, the grievant has access to the grievance procedure to pursue the claims raised in her May 18, 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

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<sup>1</sup> *Grievance Procedure Manual* § 2.3 (emphasis added). In addition, the employee must satisfy the other requirements for access to the grievance procedure, such as non-probationary status. *Id.*

<sup>2</sup> See EDR Ruling Nos. 2007-1458; 2006-1151.

discipline, or a misapplication or unfair application of policy.<sup>3</sup> This grievance raises the issue of whether the agency misapplied or unfairly applied the 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.<sup>4</sup>

The threshold question in this grievance is whether the grievant voluntarily resigned her employment, and if so, when the voluntary resignation took effect. DHRM Policy 1.70 defines resignation as "an employee's voluntary separation from state service."<sup>5</sup> 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.<sup>6</sup> 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. (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.) Moreover, state policy does not expressly state when a proffer of resignation becomes effective.

Here, the grievant asserts that she never quit her position. The agency disagrees. The central question in this case of whether the grievant voluntarily resigned her employment will turn on the factual determinations. "A hearing officer, as a fact finder, is in a better position to determine questions of fact, motive and credibility."<sup>7</sup> Because resolution of this grievance will depend largely on questions of fact and credibility, we deem it appropriate to send it to hearing. We note, however, that this qualification ruling in no way determines that the grievant did (or did not) resign, only that a further exploration of the facts by a hearing officer is appropriate.

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<sup>3</sup> Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

<sup>4</sup> 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.

<sup>5</sup> DHRM Policy No. 1.70

<sup>6</sup> *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."

<sup>7</sup> EDR Ruling No. 2007-1727.

CONCLUSION AND OTHER INFORMATION

For the reasons set forth above, the grievant's May 18<sup>th</sup> 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