Issue: Qualification – Separation from State (Unable to meet work condition); Ruling Date: November 4, 2010; Ruling #2011-2789; Agency: Department of Corrections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2011-2789
November 4, 2010

The grievant has requested a ruling on whether his July 7, 2010 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant asserts that the agency wrongfully terminated his employment. For the reasons set forth below, this grievance is not qualified for hearing.

FACTS

The agency employed the grievant as a Senior Probation and Parole Officer. On March 10, 2009, the grievant was apparently injured in a work-related automobile accident. As a result of his injuries, the grievant was absent from work for several months. By letter dated June 19, 2009, the agency advised the grievant that he had been released to return to work in a light duty status (a claim the grievant denies) and that his failure to return to work on June 24, 2009 would be deemed by the agency to be a "voluntary resignation." The grievant informed the agency that he did not believe that he had been released to return to work by his physicians and he asked the agency not to terminate his employment. Notwithstanding the grievant's request, after the grievant failed to return to work as instructed, the agency "voluntarily resigned" the grievant from his employment effective June 29, 2009.

On July 23, 2009, the grievant initiated a grievance challenging his separation from employment ("Grievance 1"). Grievance 1 was not qualified by the agency but was by this Department based on questions pertaining to whether his separation was an unwarranted informal disciplinary action. The grievance advanced to hearing and the hearing officer found that the agency had improperly terminated the grievant's employment.[1] Accordingly, the hearing officer reinstated the grievant in the November 5, 2009 Hearing Decision. A series of appeals relating to the Hearing Decision in Grievance 1 followed, none of which is germane to this case except for the March 19, 2010 Policy Ruling from the Department of Human Resource Management (DHRM), which is discussed below.[2]

[1] Decision of the Hearing Officer in Case No. 9211, issued November 5, 2009 ("Hearing Decision").
[2] This Hearing Decision was appealed on the issue of available relief, in particular, back pay. The issue of back pay has been addressed in other rulings which, again, have no direct bearing on this case, with the exception of the March 19, 2010 DHRM Policy Ruling.

On May 10, 2010, the agency ordered the grievant to return to work by Friday May 17, 2010. According to the agency, on May 19, 2010, the agency contacted the grievant who informed the agency that he was unable to return to work and that his attorney had sent an explanatory letter to the Attorney General's Office. The agency arranged a June 8, 2010 disciplinary hearing at which the grievant informed the Superintendent that he had a doctor's note excusing him from work. The doctor's note was forwarded to the state's third party administrator of the Workers' Compensation Program. Ultimately, the agency concluded that:

> Since there is some indication that you are unable to return to work now for additional reasons, you have not worked for the past year, you have no available leave, and you have no job protection under the Family Medical Leave Act, we have no option except to remove you from your position.

The grievant's status upon separation was "removal-inability to perform duties." Because he was not terminated for disciplinary reasons, he remains eligible for re-hire by the agency.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[4]

The DHRM Policy Ruling in Case 9211, issued on March 19, 2010, stated that when the grievant, who had exhausted all leave, did not return to work following release from Workers' Compensation, and the reasonable accommodations offered by the agency still would 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)

[3] *See* Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).

- 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) [5]

The four options listed above are relevant because they would appear to have been the only options available in the instant case as well. In the instant case, the grievant was again released by at least one doctor to return to work. And while the grievant contends that he still has not been cleared for work by at least one of his physicians, in truth, the issue of whether the grievant was properly cleared to return to work appears to be largely irrelevant. Based on this Department's understanding of DHRM policy, the Workers' Compensation issue of whether the grievant was properly released to return to work is essentially a red herring. That is because the grievant is challenging his removal from employment yet he had exhausted all available leave, including the FMLA, and he was, according to his physician, still unable to return to work. Given that he had no leave remaining and that he was unable to return (and there was apparently no accommodation that the agency could provide the grievant to enable him to return to work), [6] the grievant could have no further expectation of employment under state policy. Though the grievant may ultimately be entitled to Workers' Compensation benefits should he successfully appeal his Workers' Compensation claim through the Workers' Compensation Commission appeals process, he simply has no basis upon which to expect continued employment. Because the grievant had no remaining leave, and the agency could offer no accommodation that would enable him to return to work, the agency simply exercised one of the four options listed above: removing the grievant from employment based on his inability to perform his job duties. Thus, we can find no violation of policy in the agency's actions under the particular facts of this case.

We note that this case is in some respects similar to the grievant's earlier grievance, Case No. 9211. However, there is at least one significant difference. In Case No. 9211, although the hearing officer found no improper motive in doing so, the agency informed the grievant that if he did not return to work after being returned to work by a Workers' Compensation physician, he would be deemed to have voluntarily resigned. A forced "voluntary resignation" was not one of the options recognized by DHRM as available to the agency in the DHRM Policy Ruling in Case No. 9211. In contrast, the action challenged in the instant July 7, 2010 grievance, removal for inability to perform the essential functions of his job, is one of the options expressly listed as available.[7] Accordingly, this Department has no basis to qualify this grievance.[8]

---

[5] Policy Ruling of the Department of Human Resource Management, issued March 19, 2010 ("DHRM Policy Ruling ") at 6-7.

[6] By his own admission, the grievant has never been cleared to return to work by his physician.

[7] *See* DHRM Policy Ruling at 6-7. *See also* DHRM Policy 1.60, the Standards of Conduct ("SOC"). "An employee unable to meet the working conditions of his or her employment due to circumstances such as those listed below may be removed under this section. Reasons include . . . inability to perform the essential functions of the job after reasonable accommodation (if required) has been considered." DHRM Policy 1.60 § (H) (emphasis added). In this case the grievant still has not been released for work, apparently, even with any sort of potential restriction. Thus, it would appear that there is no accommodation that can be offered to the grievant.

[8] The qualification ruling in Grievance 1 (EDR Ruling No. 2010-2401) was examined under an informal discipline analysis. Here, there is no evidence that the agency's actions were intended as disciplinary. For example, contrasting the instant case to that in EDR Ruling 2010-2540, there the employee was separated for job

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

_____

Claudia T. Farr
Director

---

abandonment and was deemed ineligible for rehire, which this Department found raised a question as to whether the agency's actions were tantamount to informal discipline. In this case, however, there is no punitive measure attached to the removal nor is there any evidence that the agency did anything other than exercise one of the four options that DHRM, the sole agency charged with the promulgation and interpretation of state policy, listed as the only possible options under the present circumstances.