Issues: Qualification – Discipline (Pending Investigation), Work Conditions (Supervisor/ Employee Conflict), Discrimination (Race), and Separation from State (Involuntary Resignation); Ruling Date: September 26, 2011; Ruling No. 2012-3095, 2012-3096, 2012-3097, 2012-3098, 2012-3099, 2012-3100, 2012-3101, 2012-3104; Agency: Virginia Commonwealth University; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Commonwealth University
Ruling Numbers 2012-3095, 2012-3096, 2012-3097, 2012-3098, 2012-3099, 2012-3100, 2012-3101, 2012-3104
September 26, 2011

The grievant has requested a qualification ruling in his seven May 17, 2011 and one June 8, 2011 grievances with Virginia Commonwealth University (the University). For the reasons discussed below, these grievances do not qualify for a hearing.

FACTS

On or about May 4, 2011, the grievant was placed on pre-disciplinary leave with pay pending an investigation into his work performance and/or conduct. Before the University notified the grievant whether or to what extent it would be disciplining him, the grievant submitted seven grievances on May 17, 2011. These grievances raise many of the same factual allegations and generally challenge: the removal of certain duties as a result of his placement on pre-disciplinary leave, his placement on pre-disciplinary leave with pay, discrimination, harassment, retaliation, disparate treatment, lack of support, and a failure to provide the opportunity to succeed. Around the same time, the grievant also submitted a letter of resignation, effective May 17, 2011 at 12:30 p.m. The University has accepted the grievant's resignation. On or about June 8, 2011, the grievant submitted an eighth grievance to challenge his alleged involuntary separation. The grievant asserts that the work environment to which he was subjected, including the allegations detailed in his seven May 17, 2011 grievances, forced him to resign. The agency declined to qualify any of the grievances for a hearing, relying on the fact that the grievant resigned.

DISCUSSION

Constructive Discharge (June 8, 2011 grievance)

The grievant asserts that his resignation was an involuntary separation by the University due to the intolerability of the grievant's working conditions. Such a claim is essentially alleging constructive discharge. To prove constructive discharge, an employee must at the outset show that the employer "deliberately made [his] working conditions intolerable in an effort to induce

[him] to quit."[1] The employee must therefore demonstrate: (1) that the employer's actions were deliberate, and (2) that working conditions were intolerable.[2] An employer's actions are deliberate only if they "were intended by the employer as an effort to force the [employee] to quit."[3] Whether an employment environment is intolerable is determined from the objective perspective of a reasonable person.[4]

The grievant has not provided sufficient evidence to show that University management deliberately made his working conditions intolerable in an effort to induce him to quit. Moreover, assuming for purposes of this ruling only the truth of the grievant's allegations, the alleged conduct in this case was not so extreme as to make the grievant's working conditions objectively intolerable. "[D]issatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign."[5] Thus, while if true the actions here were regrettable, they cannot support a claim of constructive discharge. Therefore, the grievant's June 8, 2011 grievance alleging constructive discharge does not qualify for hearing. The grievant's resignation was voluntary.[6]

No Effectual Relief (May 17, 2011 grievances)

Although state employees with access to the grievance procedure may grieve anything related to their employment, only certain grievances qualify for a hearing.[7] Furthermore, this Department has recognized that even if a grievant's allegations are true there are still some cases when qualification is inappropriate even if law and/or policy may have been violated or misapplied. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

It appears that this is a case in which the requested relief (and indeed any relief) that might be available is not relief that a hearing officer has the authority to order. For instance,

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[1] Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 272 (4th Cir. 2001) (internal quotation marks omitted).
[2] *See* Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 186-87 (4th Cir. 2004); Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 244 (4th Cir. 1997).
[3] *Matvia*, 259 F.3d at 272.
[4] *See* Williams v. Giant Food Inc., 370 F.3d 423, 434 (4th Cir. 2004).
[5] James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 378 (4th Cir. 2004)(citations omitted)); *see also*, Williams 370 F.3d at 434 (not intolerable working condition where "supervisors yelled at [employee], told her she was a poor manager, and gave her poor [performance] evaluations, chastised her in front of customers, and once required her to work with an injured back").
[6] Generally, the voluntariness of an employee's resignation is presumed. *See* Staats v. U.S. Postal Serv., 99 F.3d 1120, 1123 (Fed. Cir. 1996). In the past, this Department has addressed "resign or be fired" situations in other grievances to determine whether a resignation was involuntary due to duress or coercion by the agency or procured through misrepresentation. *See, e.g.*, EDR Ruling No. 2010-2571. However, none of the grievant's allegations implicate such a situation because the grievant resigned before even being notified about the University's intended disciplinary action, if any. As such, the grievant's resignation is analyzed under a constructive discharge theory.
[7] *See Grievance Procedure Manual* § 4.1.

hearing officers cannot order agencies to take corrective action against employees.[8] While upon any finding of past discrimination, retaliation, or harassment, a hearing officer could order an agency to cease such conduct and comply with policy and applicable law going forward, such an order is ineffectual in this case because the grievant no longer works with the agency; further, there is no way to go back and undo the alleged conduct in and related to the work environment. Similarly, when there has been a misapplication of policy, a hearing officer could order that the agency reapply policy correctly. However, as a practical matter, "reapplying policy" would have no effect on the incidents at issue in these grievances because the grievant has left the agency.

The grievant's requested relief in his May 17, 2011 grievances generally seeks better treatment and opportunities at work. However, even if the May 17, 2011 grievances were qualified for a hearing, the hearing officer would have no authority to put the grievant back to work with the agency where such relief could be provided. Because a hearing officer would be unable to provide any remedy to the grievant in these grievances, they do not qualify for a hearing. This ruling does not mean that EDR deems the alleged conduct at issue, if true, to be appropriate, only that the grievances do not qualify for a hearing because the grievance procedure cannot provide this grievant any effectual relief. Accordingly, this ruling does not address the underlying merits of the grievant's claims in his seven May 17, 2011 grievances.

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 this Department's 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 notifies the agency that she wishes to conclude the grievance.

Claudia Farr
EDR Director

[8] *See Grievance Procedure Manual* § 5.9(b).