Issues: Involuntary Resignation and Discrimination; Hearing Date: 11/03/08; Decision Issued: 11/11/08; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 8936; Outcome: Involuntary Resignation – Full Relief, Discrimination – No Relief.

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

RE: DEDR CASE NO.: 8936 (DEPARTMENT OF CORRECTIONS)

DECISION OF HEARING OFFICER

HEARING DATE: November 3, 2008
DECISION ISSUED: November 11, 2008

PROCEDURAL BACKGROUND

The Director of the Department of Employment Dispute Resolution qualified this matter for hearing on July 24, 2008. I was appointed as hearing officer on August 28, 2008 and received the Notice of Appointment on September 3. I scheduled a prehearing telephone conference call but was unable to conduct that call due to unavailability of counsel for the grievant. Being unable to confirm satisfactory hearing dates with counsel, I set the matter for a hearing to be held on October 1, 2008. On September 18, for good cause shown by the grievant, I rescheduled the hearing. The hearing was held on November 3 and lasted approximately three and one-half hours.

APPEARANCES

Grievant

Counsel for Grievant

One Additional Witness for Grievant

Agency Advocate

Two Witnesses for the Agency

ISSUE

1. Whether the grievant submitted an involuntary resignation from employment?

2. Whether the agency discriminated against the grievant in her separation from employment?

BURDEN OF PROOF

Section 5.8 (2) of the Grievance Procedure Manual for employees of the Commonwealth of Virginia provides that "in disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances." The next subsection specifies that in all other grievable actions the employee has the burden of going forward with his evidence and the burden of proof by a preponderance of the evidence. I find that, for purposes of this hearing, the employee/grievant has the burden of proving her claim regarding the involuntary nature of her resignation and discrimination. This conclusion is based on the strict wording of the sections cited.

FINDINGS OF FACT

The grievant was employed by the Department of Corrections as a Senior Probation and Parole Officer in 2007. She had been with the agency for approximately ten years. During the first half of 2007 she handled a full caseload of supervision of probationers and parolees, performed case reviews on other probation officers, and performed pre-sentence investigations and reports. In June or July of 2007 she began conducting group counseling sessions for offenders with substance abuse issues.

On October 30, 2007 the Chief probation and parole officer for the district gave the grievant her employee evaluation for the preceding year. The evaluation showed the grievant as

a non-contributor. Before she received this evaluation the grievant had indicated that she was considering resigning from the agency due to the stress of her workload. The finding by the evaluator that she was a non-contributor caused her to reconsider her plans.

Shortly thereafter, on November 5, the Chief had a meeting with the grievant. He discussed with her what he felt were the shortcomings of the grievant in promptly dealing with the transfer of supervision of two offenders to other counties. These cases had come to the attention of the Chief after the evaluation had been prepared. The grievant felt that she had not been neglectful in her handling of those transfers and that her notification of the other jurisdictions was done as expeditiously as possible, given her workload. The Chief was concerned that these particular cases should have been given more attention by the grievant because of the nature of the charges or allegations against the offenders. He told the grievant that he wanted her to take the rest of that day off, with pay, to think about her handling of the particular cases.

The next day the chief and his deputy met again with the grievant. The subject of the meeting was the same cases discussed on November 5. This meeting lasted approximately thirty minutes. At its conclusion the grievant was told that they would reconvene in an hour to discuss how the situation would be handled. Nothing was said to the grievant in this meeting regarding possible disciplinary action or termination of employment. The Chief also made no such statements on November 5. At approximately 3:00 p.m. on November 6 the grievant again met with the Chief and his Deputy. The Chief had a Group III Written Notice for the grievant. He read part of the document to the grievant. The Chief then told the grievant that she was being terminated for her improper handling of these two cases.

After the grievant had received the poor evaluation on October 30 she had spoken with one or more attorneys with expertise in the area of employment law. In this second November 6 meeting the chief told the grievant that she could either accept the termination or voluntarily resign. The grievant asked for time to make a telephone call, intending to again speak with an attorney. The Chief told the grievant that she could not, that "we need to take care of this now." The grievant then asked if she could return to her office to type her resignation. The grievant intended to take that opportunity to place a call to an attorney. The Chief refused to allow her to return to her office and made her write out her resignation on a sheet of notebook paper. At that point, the grievant was escorted by the Deputy Chief and an administrative assistant to her office where she retrieved her personal belongings. She was then escorted from the building.

The grievant did file a grievance to the Written Notice that called for her termination. A few months later when she inquired about leave issues she learned for the first time that the Chief had submitted a Personnel Action Transmittal Form that stated "resignation in lieu of termination-NOT ELIGIBLE FOR REHIRE." The grievant was surprised to find that this document bore that notation as she had not previously been told that the record would reflect anything other than her resignation. The Chief had also submitted, to be included as part of the file on the grievant, the Written Notice. The grievant had filed her Grievance Form A on November 15, 2007 alleging that she had been wrongfully terminated, forced to resign, and that she had been treated differently from other employees and discriminated against. After lengthy delays (for reasons unclear from the record). On May 15, 2008 the Director ruled the grievance not qualified for a hearing. That agency decision was appealed to the Department of Employment Dispute Resolution, as noted above, and the matter was found to be qualified for hearing on July 24, 2008.

ANALYSIS AND OPINION

The Virginia Personnel Act, Chapter 29 of Title 2.2 of the Code of Virginia provides a procedure for employees of the Commonwealth, or former employees, to challenge certain actions by the agency which employees or employed the grievant. Under normal circumstances, an employee who resigns from an agency is not entitled to a grievance hearing. In this case the only matters qualified for hearing are: (1) whether the resignation of the grievant was voluntary; and (2) whether the agency treated the grievant differently from other employees with regard to her separation from employment.

An employee of the Commonwealth has a legitimate property interest in continued employment. Accordingly, the grievant could only be removed from public employment by the action of the agency for good cause. The question revolves around whether the resignation by the grievant was involuntary to the extent that it was essentially a constructive discharge by the agency. Stone v. University of Maryland Medical System Corp., 855 F. 2d 167, 1988 U. S. App. LEXIS 11273 (4th Circ., 1988).

The Stone decision sets out a useful and appropriate analytical framework for resolving this question. The Federal Appeals Court found that a resignation can be involuntary if it is the result of a material misrepresentation by the employer or is forced by duress or coercion. Although somewhat inter-related these matters can be addressed separately.

I. MISREPRESENTATION

To establish that a resignation is not voluntary, a grievant must show a reasonable reliance on a material fact or the omission of a material fact. Two key facts were never mentioned to the grievant prior to her submitting her resignation. First, she was not made aware

that the Written Notice would be retained in her personnel file with the agency. The second and more important fact is that the transmittal sheet submitted by the supervisor to the Human Resources Department for the agency would contain the notation that the grievant had resigned in lieu of termination and was not eligible for rehire. The grievant reasonably assumed that when she resigned, that fact would be what was reflected in her file. She relied on the omission by the supervisor of these material facts in making her decision to submit her resignation. In short, she believed that she was resigning with a "clean record" with the exception of a prior active disciplinary notice.

I find these omissions to be extremely material. I do not find that the agency intentionally mislead the grievant. The absence of such a finding is not relevant, however. The key issue is what a reasonable person would have believed. In this case, a reasonable person would not have come to a conclusion any different from that reached by the grievant.

II. DURESS OR COERCION

In looking at this aspect, the Stone framework requires a consideration of:

1. Whether the employee was given an alternative to resignation;

2. Whether the employee understood the nature of the choice given;

3. Whether the employee was given a reasonable time in which to choose between the alternatives; and

4. Whether the employee had any input as to the effective date of resignation.

The grievant had the options of resigning or being terminated pursuant to the Written Notice. If she had accepted the termination, she would have been entitled to grieve the termination and require the agency to establish its good cause for the action. The Court in Stone

followed and adopted the reasoning of other courts that merely because an employee is faced with a tough choice, the choice between resignation and termination, that, by itself, does not constitute duress. Only in circumstances where the employer knows that there is not good cause for the termination does the employee have a less than meaningful alternative.

The Chief clearly believed that the handling by the grievant to transfer cases constituted good cause. These cases must also be viewed in light of the evaluation given the grievant only a few days prior. He did not learn of these cases until after the evaluation had been prepared. I find that the grievant did have a legally sufficient alternative to resignation. I am not stating, however, that the agency had sufficient reason to terminate the grievant as that issue was not fully litigated in this hearing.

Did the grievant understand her choices? The Chief viewed the choices open to the grievant as termination or resignation in lieu of termination with the designation that she would not be eligible to be rehired by the agency. The Chief had treated other employees in this same manner but did not apprise the grievant of his view of the options. Those options were not those as understood by the grievant. Certainly, a supervisor is not to be expected to set forth all the choices and consequences to an employee with perfect clarity at the time of giving a choice between termination and resignation. In this case I cannot find that there was a meeting of the minds between the chief and the grievant (to analogize to a contract law situation.) The grievant essentially gained nothing from her resignation and (potentially) lost valuable rights.

Even had she understood the choices the agency clearly did not give the grievant sufficient time to consider them. She was forced to make a decision when the chief told her that it had to be made right then and there. She was denied the opportunity to speak, even briefly, with counsel. There is no evidence that the grievant knew, or even suspected, when she met with

the chief on November 6 that a disciplinary action and termination was a real possibility. Also, she was given no chance to choose, or even suggest the effective date of the separation from employment. Instead, she was unceremoniously forced to clean out her office and escorted from the building on November 6.

Because of the misrepresentation by omission by the Chief and upon the application of the factors relevant to duress or coercion, I find that the resignation submitted by the grievant was not voluntary.

III. DISCRIMINATION

As stated above, the Chief treated the resignations of other employees in a similar manner in regard to the transmittal sheets. No evidence was otherwise submitted to establish that the grievant was treated differently from any other employee in terms of her being terminated. Therefore, I reject her claim as to this aspect of her termination.

DECISION

I hereby order the agency to return the grievant to employee status, as it existed at the time of her submitting her resignation. The agency is entitled to offer the grievant the opportunity to submit an unconditional resignation, a resignation in lieu of termination, or discipline with termination.

APPEAL RIGHTS

As the Grievant Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director=s authority is limited to ordering the hearing officer to review the decision to conform it to written policy. Requests should be sent to the Director of Human Resources Management, 101 N. 14th St., 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director=s authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capital Square, 830 E. Main St., Suite 400, Richmond, VA 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. A copy of each appeal must be provided to the other party.

A hearing officer=s original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,

2. All timely requests for administrative review have been decided and, if ordered by DEDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The court shall award reasonable attorneys= fees and costs to the employee if the employee substantially prevails on the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code ' 17.1-405.

ENTERED this November 11, 2008.

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Thomas P. Walk, Hearing Officer