Issue: Access to the Grievance Procedure; Ruling Date: April 19, 2017; Ruling No. 2017-4514; Agency: Department of Game and Inland Fisheries; Outcome: Access Granted.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

ACCESS RULING

In the matter of the Department of Game and Inland Fisheries
Ruling Number 2017-4514
April 19, 2017

On February 21, 2017, the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") received a dismissal grievance initiated by the grievant to challenge his separation from employment. Because the grievant had submitted a resignation at the same time he initiated his grievance, the grievant's former employer, the Department of Game and Inland Fisheries (the "agency"), subsequently sought to challenge whether he has access to the grievance procedure to initiate this grievance. EDR concludes that the grievance may proceed as outlined below.

FACTS

On February 13, 2017, the agency verbally informed the grievant at an in-person meeting that a Group III Written Notice with termination was the recommended discipline for specified alleged misconduct that his supervisor had observed. The grievant was placed on pre-disciplinary leave with pay and given until February 15, 2017 to respond to the charges if he chose to do so. At a meeting on February 15, 2017, the agency presented the grievant with the Group III Written Notice. At that time, the grievant indicates that he was given the option by his supervisor to either resign or be terminated pursuant to the proposed Group III Written Notice. The grievant provided the agency with a completed Grievance Form A,[1] as well as a letter of resignation, before leaving.

DISCUSSION

The General Assembly has provided that "[u]nless exempted by law, all nonprobationary state employees shall be covered by the grievance procedure . . . ."[2] Upon the effective date of a voluntary resignation from state service, a person is no longer a state employee. Thus, to have access to the grievance procedure, the employee "[m]ust not have voluntarily concluded his/her employment with the Commonwealth prior to initiating the grievance."[3] EDR has long held that once an employee's voluntary resignation becomes effective, he or she is not covered by the grievance procedure and accordingly may not initiate a grievance.[4] In this case, the grievant

[1] The Grievance Form A is dated February 13, 2017; however, the parties agree it was submitted on February 15, 2017.
[2] Va. Code § 2.2-3001(A).
[3] *Grievance Procedure Manual* § 2.3.
[4] *E.g.*, EDR Ruling No. 2005-1043.

initiated his grievance along with a resignation letter on February 15, 2017, raising questions of access.

To have access to the grievance procedure to challenge his separation as a result of the resignation, the grievant must show that his resignation was involuntary[5] or that he was otherwise constructively discharged.[6] The determination of whether a resignation is voluntary is based on an employee's ability to exercise a free and informed choice in making a decision to resign. Generally, the voluntariness of an employee's resignation is presumed.[7] A resignation may be viewed as involuntary only (1) "where [the resignation was] obtained by the employer's misrepresentation or deception" or (2) "where forced by the employer's duress or coercion."[8] Fairly read, while this grievance challenges the treatment the grievant allegedly received from his supervisor rather than his actual separation, the grievance still raises questions of duress or coercion and constructive discharge.

Constructive Discharge

To prove constructive discharge, an employee must at the outset show that the employer "deliberately made her working conditions intolerable in an effort to induce her to quit."[9] The employee must therefore demonstrate: (1) that the employer's actions were deliberate, and (2) that working conditions were intolerable.[10] An employer's actions are deliberate only if they "were intended by the employer as an effort to force the [employee] to quit."[11] Whether an employment environment is intolerable is determined from the objective perspective of a reasonable person.[12]

Based upon a review of the situation as presented in his grievance, the grievant has not provided sufficient indication that 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 is 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."[13] While the grievant may have perceived his situation as unbearable, EDR has not reviewed anything that would suggest the

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[5] *E.g.*, EDR Ruling No. 2010-2510.
[6] EDR is the finder of fact on questions of access. *See* Va. Code § 2.2-1202.1(5); *see also Grievance Procedure Manual* § 2.3.
[7] *See* Staats v. U.S. Postal Serv., 99 F.3d 1120, 1123-24 (Fed. Cir. 1996).
[8] Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 174 (4th Cir. 1988) (citations omitted).
[9] Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 272 (4th Cir. 2001) (internal quotation marks omitted).
[10] *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).
[11] *Matvia*, 259 F.3d at 272.
[12] *See* Williams v. Giant Food Inc., 370 F.3d 423, 434 (4th Cir. 2004).
[13] James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 378 (4th Cir. 2004)(citations omitted)); *see also*, Williams 370 F.3d at 434 (holding that working conditions were not intolerable 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").

grievant's only choice was to resign. Thus, the actions here cannot support a claim of constructive discharge.

Duress or Coercion

A resignation can be viewed as forced by the employer's duress or coercion, if "it appears that the employer's conduct effectively deprived the employee of free choice in the matter."[14] "Factors to be considered are (1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice he was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether he was permitted to select the effective date of resignation."[15]

Alternative Choice

That the choice facing an employee is resignation or disciplinary termination does not in itself demonstrate duress or coercion, unless the agency "actually lacked good cause to believe that grounds for termination existed."[16] "[W]here an employee is faced merely with the unpleasant alternatives of resigning or being subject to removal for cause, such limited choices do not make the resulting resignation an involuntary act. On the other hand, inherent in that proposition is that the agency has reasonable grounds for threatening to take an adverse action. If an employee can show that the agency knew that the reason for the threatened removal could not be substantiated, the threatened action by the agency is purely coercive."[17]

The grievant could have arguments to support the position that the agency's contemplated disciplinary action was improper.[18] However, this does not appear to be a case where the agency *knew* that its threatened disciplinary action could not be substantiated. There is evidence of some level of reasonably alleged misconduct. Thus, while the grievant may have perceived his choice as between two unpleasant alternatives (resignation or termination), that alone does not indicate that his resignation was induced by duress or coercion.[19] However, one additional factor that needs to be considered in this regard is that, even assuming that the grievant intended to resign, it

[14] *Id.*
[15] *Id.* (citation omitted).
[16] *Id.* at 174-75 (citations omitted).
[17] Schultz v. U.S. Navy, 810 F.2d 1133, 1136 (Fed. Cir. 1987) (citations omitted); *see also Staats*, 99 F.3d at 1124 ("An example of an involuntary resignation based on coercion is a resignation that is induced by a threat to take disciplinary action that the agency knows could not be substantiated. The Board has also found retirements or resignations to be involuntary based on coercion when the agency has taken steps against an employee, not for any legitimate agency purpose but simply to force the employee to quit." (citations omitted)); Braun v. Dept. of Veterans Affairs, 50 F.3d 1005, 1007-08 (Fed. Cir. 1995) (finding that an employee had made a "non-frivolous allegation" of coercion where he had been subjected to eleven allegedly unwarranted disciplinary actions in seventeen months); Murphy v. United States, 69 Fed. Cl. 593, 605 (Fed. Cl. 2006) ("If a plaintiff decides to resign or retire rather than face a justified government action, the decision is held to be voluntary. But when a plaintiff's decision to retire or resign was the result of government action which was unjustified or contrary to its own regulations, rules or procedures, the decision was found to be involuntary." (citations omitted)).
[18] EDR has carefully reviewed the grievance and the arguments outlined within. However, this ruling only addresses the question of access to the grievance procedure, not whether the agency's disciplinary action was appropriate.
[19] *See Stone*, 855 F.2d at 174.

does not appear that the grievant received the benefit of such a resignation. The agency states that the grievant's record reflects that he was removed from employment as a result of the issued Written Notice.

Understanding of the Choice

Here, the grievant does not assert that he was unclear on the reasons he was presented with the proposed discipline, though he states his disagreement. However, the grievant did not receive a written notice of due process detailing the acts of alleged misconduct prior to the meeting on February 15, 2017. Further, it does not appear that any conversations between the grievant and agency occurred to clarify whether the grievant truly intended to resign or accept the disciplinary action and be terminated. Given these circumstances, it is doubtful that the grievant was fully able to understand the choice he was making, to the extent the grievant's choice can even be understood here given the conflicting message of presenting both a grievance and a resignation.

Time to Decide

In this case, it appears that the grievant had approximately two days in which to make a decision regarding the proposed discipline. The grievant had been verbally notified of the issues surrounding the contemplated discipline on February 13, 2017. However, on February 15, 2017, the grievant provided the agency with a letter of resignation when presented with the option to resign on the same day. "Time pressure to make a decision has, on occasion, provided the basis for a finding of involuntariness, but only when the agency has demanded that the employee make an immediate decision."[20] It is unclear whether the option presented to the grievant on February 15 was a choice only available at that meeting. For instance, there is no indication of what would have happened if the grievant had asked for more time to make his choice. Thus, while we cannot find that the grievant was forced to make an immediate decision, there certainly was a short window of time before the grievant's resignation was submitted, which contributed to the confusion and lack of clarification of the grievant's intent discussed in the section above.

Taking all of the factors surrounding this situation together, EDR finds that the grievant has presented sufficient evidence to raise a question of whether his resignation was voluntary and, perhaps, even intended. Therefore, the appropriate remedy is to allow the grievant to make his decision again, with the benefit of reasonably adequate time to consider the charges against him (i.e., the equivalent of pre-disciplinary due process) and his options.[21] If the grievant wishes

[20] *Staats*, 99 F.3d at 1126 (citations omitted); *see also* Shealy v. Winston, 929 F.2d 1009, 1013 (4th Cir. 1991) (holding that one to two days after the initial meeting was a reasonable time in which to make a decision to resign); *Stone*, 855 F.2d at 177-78 (finding that, in considering the other surrounding circumstances, the fact that plaintiff had several hours to consider his options was not sufficient to raise a genuine issue as to the voluntariness of his resignation); Herron v. Va. Commw. Univ., 366 F. Supp. 2d 355, 365-66 (E.D. Va. 2004) (holding that twenty-four hours was a reasonable time in which to decide); Fox v. Experiment in Int'l Living, Inc., No. 92-1448-LFO, 1993 U.S. Dist. LEXIS 7043, at *11-12 (D.D.C. May 26, 1993) (holding that two to three days was a reasonable time to make a decision); *cf.* Wolford v. Angelone, 38 F. Supp. 2d 452, 459 (W.D. Va. 1999) (holding that it was unclear whether a resignation tendered on the same day as an interview with management was reasonable).

[21] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985).

to revoke his resignation, the grievant must understand the impact this will have on his employment record. Assuming the agency still wishes to maintain the grievant's separation from employment, the revocation of his resignation will mean that the grievant's separation would then be classified as termination. From that point, this grievance and subsequent hearing will be about the Written Notice and the grievant's resulting termination.

As such, by proceeding with this grievance, the grievant's record will reflect that he was terminated, not that he resigned, on February 15, 2017. The agency confirms that is the present status of the grievant's personnel file, as the Written Notice was presented to him on February 15, 2017. The grievant would only succeed in being reinstated to his job (i.e., reversing the termination) if he prevails at hearing in his challenge to the Written Notice. To sustain his termination at hearing, the agency would have to provide sufficient evidence to support the issuance of the Group III Written Notice with termination. Mitigating and aggravating circumstances will also be considered.[22]

However, if the grievant does not wish to proceed with this process, he can choose to withdraw his grievance and at that point, his resignation would be considered a voluntary separation.[23] The grievant must notify EDR of his choice in writing within **ten workdays of the date of this ruling**. If the grievant chooses to proceed with the grievance, EDR will proceed with the appointment of a hearing officer for the dismissal grievance. Otherwise, if the grievant chooses to withdraw his grievance, no further action is necessary.[24] The agency will be notified of the grievant's decision by EDR if it is not sent to the agency by the grievant.

EDR's access rulings are final and nonappealable.[25]

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[22] The grievance will essentially proceed as if it were originally initiated to challenge the Written Notice and termination.
[23] Should the grievant elect not to proceed with the grievance, he may file a formal complaint regarding the discrimination alleged in his grievance with the Office of Equal Employment Services ("OEES") at DHRM. OEES has the authority to investigate complaints of employment discrimination in accordance with applicable Governor's Executive Order(s) and state and federal laws.
[24] However, should the grievant choose to not pursue the grievance and opt for a resignation, the agency's files must be updated to reflect that the grievant resigned and the Written Notice removed from his file if it was placed there.
[25] Va. Code § 2.2-1202.1(5).