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In the matter of the Department of Corrections  
Ruling Number 2023-5489  
January 26, 2023

On or about November 4, 2022, the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management received a dismissal grievance submitted by the grievant. Because the grievant had resigned prior to initiating her grievance, the grievant’s former employer, the Department of Corrections (the “agency”), challenges whether she has access to the grievance procedure to initiate this grievance. For the reasons discussed below, EDR concludes that the grievant does not have access to the grievance process to initiate this grievance.

FACTS

The grievant has claimed that a series of events created a hostile work environment in her workplace, mostly centered around her supervisor, Captain C, leaving her no option other than to resign. In particular, on October 26, 2022, she states that while on break, she felt she was being harassed because Sergeant R was following her from one work station to the watch office, which is where Captain C was located. She confronted Sergeant R who she claimed then responded in a hostile manner, but the two ultimately talked it over and agreed there was no animosity. The grievant states that a dialogue occurred with Captain H to discuss the situation. The grievant later told Captain C she was upset because whenever she called the watch office to speak with her, there were multiple people in the room so she could never speak to her privately.

Later that day, the grievant received a call from her babysitter regarding her son’s health, but this news took a while to reach her because the babysitter told the grievant that the grievant’s supervisor was hanging up on her. Captain C eventually referred the call to the grievant, but considerable time had passed before the grievant managed to connect with the babysitter. According to the grievant, Lieutenant O ultimately told her that she had a home emergency and had to leave, but before she could do so, they gave her documents for her to review regarding the prior incident with Sergeant R. In these emails, the grievant claimed that the dates were wrong and they mentioned things that never happened, such as claiming the grievant stated she would never work for Sergeant R again.

The grievant later returned to work after a period of leave related to her son’s health, providing doctors’ notes for a referral appointment on October 28 and an appointment at a hospital on October 29. The grievant was told that Captain C had a picture of the grievant and the grievant’s daughter on her computer, which was allegedly taken earlier that afternoon. According to the

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agency, this picture was taken from the grievant's public social media page, and was not requested in any manner by Captain C. Since the photo was taken at the time the grievant was on leave to care for her son, Sergeant W and Captain H felt the photo was significant and both decided to forward the photo to Captain C. The agency states that Captain C initiated no discipline regarding this photo, nor used it against the grievant in any way.

Considering all these incidents, on October 30, 2022, the grievant stated in an email to Captain C that she no longer felt comfortable working on her shift. She asked to sit down and discuss her options regarding her schedule, such as coming in a different day or taking leave without pay until the matter is resolved. The grievant appears to have been seeking to be transferred to a different shift entirely. Captain C responded by saying they needed to get "the Major" involved to discuss this issue, but the grievant claimed they had already tried unsuccessfully to reach him. On that same day, the grievant later emailed Captain C with a resignation, stating that "[t]his will be my last shift." However, the grievant participated in an in-service class on November 1, and clocked in for another in-service class on November 2.

Prior to a November 3 meeting between the grievant and human resources, the grievant requested that she be switched to a different schedule because "[she had] already made appointments" and had "functions for the next couple of months." At the meeting on November 3, human resources determined that there was no hostile work environment as the grievant claimed. The grievant was also told that a shift change would not be granted. According to the grievant, the issue regarding the picture of her and her daughter was "totally disregarded."<sup>1</sup> Later on November 3, the grievant sent another email detailing that she felt she was forced to resign. She asked for a waiver of the customary two-week notice period, which was approved that same day.

The grievant filed her grievance on November 4, asking for compensation for the time and pay missed due to being forced to resign, as well as to be reinstated with around the same pay and position in non-security anywhere in the eastern region. On November 7, human resources confirmed that the grievant was eligible for rehire at the agency. On November 9, an agency recruiter reached out to the grievant to attend a hiring event on November 10, which she did not attend. She was later invited to two more hiring events, of which one included an interview, but she did not attend either (one due to child care issues).

Because of her resignation, the agency argues that the grievant has lost access to the grievance procedure. The grievant appeals this finding to EDR.

### DISCUSSION

The General Assembly has provided that "[u]nless exempted by law, all nonprobationary state employees shall be covered by the grievance procedure . . . ."<sup>2</sup> 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 their employment with the Commonwealth prior to initiating the grievance."<sup>3</sup> EDR has long held that

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<sup>1</sup> The agency has affirmed that the meeting involved the grievant arguing her case that there was a hostile work environment and that she was "uncomfortable" working with Captain C, but the agency determined that since there was no evidence regarding a hostile work environment, "there was no basis for further investigation."

<sup>2</sup> Va. Code § 2.2-3001(A).

<sup>3</sup> *Grievance Procedure Manual* § 2.3.

once an employee's voluntary resignation becomes effective, they are not covered by the grievance procedure and accordingly may not initiate a grievance.<sup>4</sup> In this case, the grievant initiated her grievance after resigning, raising a question of access.

To have access to the grievance procedure to challenge her separation, the grievant must show that the resignation was involuntary<sup>5</sup> or that she was otherwise constructively discharged.<sup>6</sup> 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.<sup>7</sup> 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."<sup>8</sup> There is no allegation that the grievant's resignation was procured by misrepresentation or deception, or that it was due to duress or coercion.<sup>9</sup> As such, only the issue of constructive discharge will be addressed in this ruling.

Constructive discharge occurs when "an employer deliberately makes an employee's working conditions intolerable and thereby forces [her] to quit [her] job."<sup>10</sup> When the grievant is making the claim that a hostile work environment led to a forced resignation, they "must show the requirements of both a hostile work environment and a constructive discharge claim."<sup>11</sup> Finally, while "deliberateness" was at one point a requirement for constructive discharge, as is stated in the definition provided by *Bristow*, courts now hold that intent is no longer necessary for a constructive discharge claim.<sup>12</sup> That leaves the primary factor of "intolerability," which is evaluated by "whether there is sufficient evidence that as a result of [the agency's] . . . conduct, [the grievant] was subjected to circumstances 'so intolerable that a reasonable person would resign.'"<sup>13</sup> Here, the grievant is alleging that there is a hostile work environment where she works, and because of this environment, along with her request for a transfer not being granted, she feels she had no other option except to resign. Thus, for the grievant to prevail in this matter, they must show that there was a hostile work environment, and also show that because of this hostile work environment, there was a constructive discharge that led to the resignation.

EDR has reviewed the information submitted by the grievant and cannot find that there is a sufficient question raised of a hostile work environment. The grievant expressed concern over her discomfort with her supervisor, some hostile encounters with other staff, the lack of promptness in receiving the call from her babysitter, and for her supervisor having a picture of the

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<sup>4</sup> *E.g.*, EDR Ruling No. 2005-1043.

<sup>5</sup> *E.g.*, EDR Ruling No. 2010-2510.

<sup>6</sup> 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.

<sup>7</sup> *See* *Rosario-Fabregas v. Merit Sys. Prot. Bd.*, 833 F.3d 1342, 1346 (Fed. Cir. 2016).

<sup>8</sup> *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 174 (4th Cir. 1988) (citations omitted).

<sup>9</sup> *Id.* (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. 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 [she] was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether [she] was permitted to select the effective date of resignation.") (citation omitted).

<sup>10</sup> *Bristow v. Daily Press, Inc.* 770 F.2d 1251, 1255 (4th Cir. 1985) (internal citations omitted).

<sup>11</sup> *Evans v. Int'l Paper Co.*, 936 F.3d 183, 192 (4th Cir. 2019).

<sup>12</sup> *United States EEOC v. Consol Energy, Inc.*, 860 F.3d 131, 144 (4th Cir. 2017).

<sup>13</sup> *Id.* at 144-45 (quoting *Green v. Brennan*, 578 U.S. 547, 560 (2016)).

grievant and her daughter from her public social media account.<sup>14</sup> The grievant emailed Captain C on October 30, 2022 in regards to these issues and asked to sit down to discuss the ability to transfer to a different shift. After Captain C responded by saying they had to first get the Major involved, the grievant replied back that same day that “this will be [her] last shift.” A meeting was then held between the grievant and human resources on November 3, where the grievant argued that she was being subjected to a hostile work environment. Human resources determined that there was no evidence of a hostile work environment, and for that reason, determined that a subsequent investigation was not necessary. EDR has not reviewed any information that would support a different conclusion as to whether a hostile work environment existed.

Because there is insufficient evidence of a hostile work environment, there is, by extension, insufficient evidence to support a constructive discharge claim. The incidents that the grievant claimed led to a constructive discharge, while certainly not ideal for the grievant, cannot be seen as causing a reasonable person to resign. The agency had made several accommodations for the grievant in the past such as approving transfers, temporary transfers, and leave. After the grievant’s request for another transfer was denied, nothing suggests that the environment was so toxic as to require a subsequent resignation. Given all of this, EDR cannot find that a reasonable person would find these conditions so intolerable to be forced to resign.

Having considered the totality of the circumstances in this particular case, EDR finds that the evidence is insufficient to demonstrate that the agency created working conditions so intolerable as to amount to a constructive discharge of the grievant. Accordingly, we conclude that the grievant’s separation from employment was based on a voluntary resignation, and thus she does not have access to the grievance procedure. The dismissal grievance will not proceed to hearing and EDR’s file will be closed.

EDR’s rulings on access are final and nonappealable.<sup>15</sup>

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<sup>14</sup> While the supervisor’s possession of a picture of the grievant and her daughter might be concerning on its face, the agency made clear that the supervisor did not request that photo nor did she seek it out, and the photo was taken from the grievant’s public social media page.

<sup>15</sup> Va. Code § 2.2-1202.1(5).