JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

ACCESS RULING

In the matter of the Department of Fire Programs
Ruling Number 2023-5431
August 26, 2022

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) on whether she has access to the grievance procedure to initiate a grievance dated June 30, 2022 with the Department of Fire Programs.

FACTS

On March 31, 2022, the agency notified the grievant that she was being placed on administrative leave in connection with potential misconduct. On April 26, 2022, the agency head provided a due process memorandum to the grievant, which advised her that he was considering issuing a Group III Written Notice to her for falsifying records. However, according to the grievant, the agency head also indicated verbally that her employment would not be terminated and that she should return to work. The grievant submitted a response to the due process memorandum, dated May 6, 2022. Shortly thereafter, the agency head apparently resigned from his position.

A new agency head was hired effective May 23, 2022. On Friday, June 3, 2022, the new (current) agency head allegedly called a meeting with the grievant and presented her with a Group III Written Notice with termination. The grievant was surprised by this development, as it was her first meeting with the new agency head and she believed she would have an opportunity to discuss the issue with him before he made a decision. The grievant requested to use her available leave time before her separation date; agency management denied her request. The grievant then asked if she could consider a resignation during the upcoming weekend, in lieu of termination. According to the grievant, the agency head said she could resign, but would have to do so "right then." In an email to the agency head dated June 3, 2022, the grievant wrote: "Please find this email to be my resignation from employment with the [agency.] If policy is permissible to resign on July 1, 2022 so that I can use my pre-approved leave for prior approved medical procedures, I am requesting that my resignation date be July 1, 2022." The agency head responded that he was accepting her resignation as of June 3, 2022.

On or about June 30, 2022, the grievant initiated an expedited grievance challenging her separation from employment. The grievant alleged that the agency had violated her rights under multiple anti-discrimination laws, retaliated against her for complaining about those issues, and ultimately caused her to resign from her employment under duress. The agency administratively closed the grievance on grounds that the grievant had voluntarily concluded her employment prior to initiating the grievance and, thus, did not have access to the grievance procedure. The grievant now appeals the agency's action 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 . . . ."[1] 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."[2] EDR has long held that once an employee's voluntary resignation becomes effective, they are not covered by the grievance procedure and accordingly may not initiate a grievance.[3] In this case, the grievant has alleged that her resignation was tendered under duress and thus was not voluntary.

EDR is the finder of fact on questions of access.[4] 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.[5] A resignation may be viewed as involuntary only where it was (1) "obtained by the employer's misrepresentation or deception" or (2) "forced by the employer's duress or coercion."[6] In this case, the grievant has not alleged that her resignation was procured by misrepresentation or deception. As such, this ruling will address only the issue of 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."[7] Factors to consider 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."[8]

Cases that ordinarily implicate this analysis involve situations where the employer presents the employee with the options that they can resign or be dismissed, as apparently occurred in this case. "[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

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[1] Va. Code § 2.2-3001(A).
[2] *Grievance Procedure Manual* § 2.3.
[3] *E.g.*, EDR Ruling No. 2005-1043.
[4] *See* Va. Code § 2.2-1202.1(5); *see also Grievance Procedure Manual* § 2.3.
[5] *See* Rosario-Fabregas v. Merit Sys. Prot. Bd., 833 F.3d 1342, 1346 (Fed. Cir. 2016).
[6] Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 174 (4th Cir. 1988).
[7] *Id*.
[8] Benjamin v. Sparks, 986 F.3d 332, 349 (4th Cir. 2021) (citing *Stone*, F.2d at 174) (noting that no single one of the four recognized factors is dispositive of voluntariness); *see, e.g.*, EDR Ruling No. 2013-3564.

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."[9] Here, although the grievant has challenged the agency's proposed disciplinary action on a number of grounds, this case does not appear to be one where the agency *knew* that its threatened disciplinary action could not be substantiated. There is evidence of some level of reasonably alleged misconduct. Therefore, considering the first *Stone* factor, the alternatives apparently available to the grievant in this case do not support her claim of duress.[10]

However, analysis of the other three *Stone* factors undermines the standard presumption of voluntary resignation. The grievant has alleged that, during a disciplinary meeting she had not anticipated, she was required to make a decision about resignation "right then."[11] During the meeting, she posed questions about her entitlement to use pre-approved leave before the end of her employment, and she claims she was not permitted to place a call to her attorney, or even to leave the meeting, before making a decision to resign.[12] Finally, the grievant's resignation letter expressed a desire for her resignation to be effective July 1, 2022. The agency head responded: "I accept your resignation as of today, June 3, 2022."

EDR concludes that these circumstances effectively deprived the grievant of free choice between resignation and termination. Although the grievant had previously received a due process notice of the possibility of a Group III Written Notice with termination, she alleges that agency representatives had subsequently advised her that removal was not "on the table" in her situation, and that she would have the opportunity to discuss the charges against her with the new agency head. As a result, she was "in complete shock" when her first meeting with the new agency head turned out to be for the purpose of terminating her employment. According to the grievant, she was essentially required to make her decision immediately, and her requests to consider her options over the weekend and to seek counsel from her attorney or other resources were denied. Finally, the grievant clearly expressed that she would prefer to resign as of July 1, 2022, or even after the weekend; yet it appears that the agency was unwilling to accept her resignation on any future date.[13]

Accordingly, the totality of the circumstances in this case in light of the *Stone* factors effectively rebuts the presumption of voluntariness, such that the grievant's written resignation on June 3, 2022 does not appear to have been an exercise of her free choice. The grievant had only a

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[9] Schultz v. U.S. Navy, 810 F.2d 1133, 1136 (Fed. Cir. 1987).
[10] *See Stone,* 855 F.2d at 174.
[11] "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." Staats v. U.S. Postal Serv., 99 F.3d 1120, 1126 (Fed. Cir. 1996).
[12] *See, e.g.*, Wolford v. Angelone, 38 F. Supp. 2d 452, 459 (W.D. Va. 1999) (an employee offered the choice to "quit or be discharged" did not necessarily resign voluntarily when she did so on the same day, without representation by counsel or "the opportunity to avail herself of that benefit"); *cf. Stone*, 855 F.2d at 177 (citing Paroczay v. Hodges, 297 F.2d 439 (D.C. Cir. 1961) (although a decision made "under some time pressure and . . . without the advice of counsel" could be viewed as involuntary, "those facts lose their significance" when the plaintiff "had several hours to contact an attorney"); Herron v. Va. Commonwealth Univ., 366 F. Supp. 2d 355, 365-66 (E.D. Va. 2004) (24 hours provided "time and opportunity to confer with at least another administrative source than the decisionmaker before making [a] decision").
[13] The agency has reasonably asserted the potential liability for allowing a resignation date nearly a month later. We agree that the agency was under no duty to allow the grievant's resignation to be effective so far into the future. However, where an employee expresses an intent to resign at some future date, but the employer accepts the resignation to be effective immediately, it is additionally reasonable to view the action that separates the employee from employment as an action by the employer (i.e., termination), rather than a voluntary resignation of the employee.

short opportunity to consider the resignation option she sought[14] and to seek guidance on its implications, and ultimately her choice was limited to a same-day resignation. These circumstances indicate an involuntary resignation under the *Stone* factors. As such, the grievant has access to the grievance procedure to challenge her involuntary separation via her grievance dated June 30, 2022.

Procedural Guidance

This ruling essentially finds that the circumstances under which the grievant had to decide whether to resign or be terminated effectively denied her a voluntary choice. Therefore, the appropriate remedy is to allow the grievant to make her decision again, with the benefit of reasonably adequate time to consider her options.[15] If the grievant now wishes to rescind her resignation, the grievant's separation would then be classified as a termination. If the agency wishes to maintain the grievant's separation, the agency would then issue the grievant the Group III Written Notice it had apparently prepared on June 3, 2022. From that point, this grievance and subsequent hearing would proceed as if the grievant had initiated a dismissal grievance on June 30, 2022, challenging the Written Notice and associated termination.

As such, if she proceeds with this grievance, the grievant's record will reflect that she was terminated, not that she resigned, on June 3, 2022. Moving forward, the grievant would succeed in reversing the termination only if she prevails at a hearing in her challenge to the Written Notice. However, if the grievant does not wish to proceed with this grievance, she can choose to withdraw her grievance and remain resigned, which would, at that point, be considered a voluntary separation.

The grievant must notify EDR of her choice in writing within **ten workdays of the date of this ruling**. If the grievant chooses to proceed with the grievance, EDR will solicit a completed Grievance Form B from the agency, requesting the appointment of a hearing officer, as we would upon receipt of a dismissal grievance. If the grievant chooses to withdraw her grievance, no further action is necessary.

EDR's rulings on access are final and nonappealable.[16]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[14] The agency also points out that the topic of resignation was not offered by the agency, but rather was brought up by the grievant. That is indeed the case, but it does not affect the outcome in this ruling. Had the grievant said nothing about resignation, the grievant would have been terminated and could then challenge the termination through the grievance procedure, which was originally the agency's plan and the position the parties will return to if the grievant elects to proceed.
[15] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); *see, e.g.*, EDR Ruling No. 2013-3564.
[16] Va. Code § 2.2-1202.1(5).