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ACCESS RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2024-5612
September 25, 2023

The Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) has received a dismissal grievance challenging the grievant's separation from the Virginia Department of Transportation (the "agency"). The agency has requested a ruling on whether the grievant has access to the grievance procedure.

FACTS

On or about August 1, 2023, the agency held a pre-disciplinary due process meeting with the grievant. At the meeting, managers present advised the grievant of their intention to issue a Group II Written Notice for excessive internet use during work hours. Due to a prior active Group II Written Notice, the agency expressed the intention to terminate the grievant's employment. However, management offered the grievant the option to resign in lieu of termination. On or about August 2, 2023, the grievant submitted in writing his decision to resign. As a result, the agency did not ultimately issue its intended disciplinary action.

On or about August 27, 2023, the grievant submitted a dismissal grievance to EDR. As an attachment, the grievant included a letter from his physician, dated July 31, 2023, explaining that the grievant had recently been diagnosed with a mental health disorder and had begun appropriate treatment that was expected to improve his symptoms. According to the grievant, he presented this letter to management during the due process meeting. Moreover, the grievant asserts that his prior active disciplinary action was issued in June 2023 and cited conduct that resulted from his then-undiagnosed health condition. He contends that agency management initiated an internet-use investigation against him in retaliation for his response to the June written notice.

The agency has objected to the grievant's dismissal grievance on grounds that the grievant voluntarily resigned from employment as of August 2, 2023, and thus lacked access to the grievance procedure after that date.

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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 maintains that his resignation was not voluntary, on grounds that his mental health condition did not allow him to adequately consider his options under the circumstances.

EDR is the finder of fact on questions of access.⁴ Generally, the voluntariness of an employee’s resignation is presumed.⁵ Ultimately, however, 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.⁶ This analysis considers the totality of the circumstances, including “(1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice [they were] given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether [they were] permitted to select the effective date of resignation.”⁷

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 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.”⁸ Here, although the grievant has challenged the agency’s proposed disciplinary action on a number of grounds, there is nothing to indicate that the agency knew that its allegations of misconduct could not be substantiated. Therefore, considering the first factor above, the alternatives apparently available to the grievant in this case do not support a finding that his selection of one alternative – resignation – was involuntary.⁹

However, analysis of the other three factors undermines the standard presumption of voluntary resignation. The grievant asserts that, at the due process meeting, he presented the agency with a doctor’s letter confirming that he had been suffering from a significant mental health disorder. According to the grievant, this disorder caused him to experience symptoms including

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 *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.

⁸ *Schultz v. U.S. Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987).

⁹ *See Stone*, 855 F.2d at 174.

“[d]isordered thoughts,” “[d]isordered speech,” “[i]nability to interact and communicate with others appropriately,” and “[t]ime perception issues,” all of which, he states, “directly impacted [his] interactions with [agency management] during the last 2 months of [his] employment.” The doctor’s letter explained that the grievant’s “decline has been slow and insidious” but that treatment was expected to “make a major difference in his professional and interpersonal interactions.”

EDR concludes that the evidence presented by the grievant is sufficient to rebut the presumption that he was not able to make a voluntary decision to resign on August 2, 2023. According to the grievant, in the weeks preceding the due process meeting, his mental health condition sharply declined to the point that he experienced a “psychiatric break.” It appears he was then diagnosed with a mental health disorder that affected his perceptions and interactions at the time of the due process meeting. There is no indication that the grievant had assistance from counsel (legal or otherwise) in deciding to resign, and under the circumstances we cannot conclude that he had a reasonable opportunity to seek such assistance.

We note that an assertion of mental health challenges does not, without more, negate the presumption of voluntariness in this context. Instead, the grievant must present evidence demonstrating a mental impairment that diminished his ability to understand the choice before him at the time.¹⁰ In this case, the grievant has met that standard by substantiating the effects and timing of his diagnosis, such that we cannot conclude he was able to understand the nature of his choice or make an informed decision on August 2, 2023.¹¹

Because the totality of the circumstances in this case effectively rebuts the presumption of voluntariness, the grievant has access to the grievance procedure to challenge his involuntary separation via his dismissal grievance dated August 27, 2023.

Procedural Guidance

This ruling finds that the circumstances under which the grievant had to decide whether to resign or be terminated effectively denied him a voluntary choice. Therefore, the appropriate remedy is to allow the grievant to make his decision again.¹² If the grievant now wishes to rescind his resignation, his 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 II Written Notice it had apparently prepared on or about August 2, 2023. From that point, this grievance and subsequent hearing would proceed as if the grievant had initiated a dismissal grievance on August 27, 2023, challenging the August 2 Group II Written Notice and associated termination.

¹⁰ Although not binding, analogous decisions by the federal Merit Systems Protection Board are instructive for EDR’s analysis in the state employment context. For example, the Board may reinstate an employee’s withdrawn complaint if the employee shows that “withdrawal was involuntary because of mental distress.” *Auyong v. Dep’t of the Navy*, 97 M.S.P.R. 267, 269 (2004). In doing so, the Board considers whether the employee withdrew the complaint without representation, was mentally impaired at the time of withdrawal, and was unable to fully understand the nature of the action. *Id.*

¹¹ The grievant also asserts that, during the due process meeting, management advised him that it would be better for him to resign in lieu of termination.

¹² See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985); see, e.g., EDR Ruling No. 2013-3564. The grievant has indicated to EDR that the symptoms of his health condition are now being effectively managed through treatment.

As such, if he proceeds with this grievance, the grievant's record will reflect that he was terminated, not that he resigned, as of August 2, 2023. Moving forward, the grievant would succeed in reversing the termination only if he prevails at a hearing in his challenge to the Written Notice. However, if the grievant does not wish to proceed with this grievance, he can choose to withdraw the grievance and remain resigned, which would, at that point, be considered a voluntary separation.

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 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 his grievance, no further action will be necessary.

EDR's rulings on access are final and nonappealable.¹³

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¹³ Va. Code § 2.2-1202.1(5).