

Issue: Access to the Grievance Procedure; Ruling Date: March 17, 2017; Ruling No. 2017-4501; Agency: Department of Corrections; Outcome: Access Denied.



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

ACCESS RULING

In the matter of the Department of Corrections
Ruling Number 2017-4501
March 17, 2017

On or about February 10, 2017, the grievant submitted two grievances to the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”). The Department of Corrections (the “agency”) alleges that the grievant voluntarily resigned prior to initiating the grievances and has requested a ruling from EDR on whether he has access to the grievance procedure to challenge his separation from employment. For the reasons set forth below, EDR concludes that the grievant does not have access to the grievance process to initiate these grievances.

FACTS

The grievant was employed by the agency as a Buildings and Grounds Supervisor. At approximately 6:50 a.m. on January 12, 2017, the grievant sent an email to management at his facility, expressing concern about his ability to perform certain work tasks and stating the following: “[y]esterday I give [sic] a two notice because I can no longer be treated this way and must leave in fear of my safety.” It is unclear whether the grievant actually gave a notice of resignation to anyone, verbally or otherwise, on January 11. The grievant met with agency management on January 12 shortly after sending the email. At the meeting, the grievant wrote and submitted a notice of resignation. At some point on January 12 after the grievant’s resignation notice was submitted, the two-week notice period was waived by the agency. The grievant was not issued a due process notice, Written Notice, or informal disciplinary action prior to his resignation, and the agency has indicated that it is unaware of anything to suggest that disciplinary action was being considered at the time of the grievant’s separation.

On February 10, 2017, the grievant submitted two grievances directly to EDR. In the first grievance, the grievant challenges his “dismissal” from employment and alleges that he was forced to resign. In the second grievance, the grievant alleges that a manager at the facility engaged in “misconduct and abuse of power” that constituted workplace harassment. The agency has requested an access ruling from EDR, arguing that the grievant voluntarily resigned from employment and does not have access to the grievance procedure to file the two grievances.

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

¹ Va. Code § 2.2-3001(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.”² 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.³ In this case, the grievant asserts that he was forced to resign by agency management and initiated the grievances at issue here to challenge his separation and allegedly improper behavior by a manager at the facility. The agency asserts that the grievant voluntarily resigned on January 12, 2017 and, therefore, he does not have access to the grievance procedure.

To have access to the grievance procedure to challenge his separation, the grievant must show that his resignation was involuntary⁴ or that he was otherwise constructively discharged.⁵ 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.⁶ As a result, an employee’s resignation ordinarily may not be challenged using the grievance process absent some indication that the resignation was “obtained by the employer’s misrepresentation or deception” or was “forced by the employer’s duress or coercion.”⁷ There is no allegation that the grievant’s resignation was procured by misrepresentation or deception in this case. While the grievant argues that he resigned under duress, his description of the events that led to his separation could also be characterized as a claim of constructive discharge. Accordingly, this ruling will consider whether the grievant’s resignation was the result of duress or whether he was constructively discharged.

Involuntary Resignation

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.”⁸ “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.”⁹

Cases that ordinarily implicate the *Stone* analysis involve situations where the employer presents the employee with the option that they can resign or be fired. In this case, however, the grievant resigned after sending an email to agency management citing alleged issues with his ability to perform his job. There are no facts to indicate that the agency had taken steps to issue disciplinary action, or that the grievant had engaged in conduct that might have justified the issuance of discipline. Indeed, the topic of the grievant’s resignation was not raised by the agency at all, but was instead first mentioned by the grievant in his January 12, 2017 email.

² *Grievance Procedure Manual* § 2.3.

³ *E.g.*, EDR Ruling No. 2005-1043.

⁴ *E.g.*, EDR Ruling No. 2010-2510.

⁵ 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.

⁶ *See* *Staats v. U.S. Postal Serv.*, 99 F.3d 1120, 1123-24 (Fed. Cir. 1996).

⁷ *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 174 (4th Cir. 1988).

⁸ *Id.*

⁹ *Id.* (citation omitted).

While the *Stone* factors are thus not directly applicable to the facts of this case, they are helpful as a guide in assessing claims of involuntary resignation generally.

The grievant's explanation of his intent to resign, as set forth in the January 12 email, is somewhat confusing. The email states that the grievant had given two weeks' notice on the preceding day. However, the grievant also describes the email in one of the grievances as stating that he "would be giving a two week notice" It is undisputed that agency management met with the grievant after he sent the email. At the meeting, the grievant submitted written notice of resignation concluding his employment.

Having considered the facts as described by the parties, EDR is not persuaded that the facts support finding the grievant's resignation was procured through duress or coercion. EDR has reviewed nothing to indicate that the grievant was threatened with disciplinary action or other punishment as an alternative to resignation. Likewise, while it appears the grievant made his decision to resign quickly and, perhaps, hastily, there is no indication that it was the agency's conduct that forced his choice to resign.¹⁰ While the ruling was pending, EDR attempted to contact the grievant for additional facts to support his claim that he resigned under duress, and the grievant has not responded. Based on the information provided in the grievance, there is no basis for EDR to conclude that agency management ordered the grievant to resign at the meeting. It appears instead that he was directed to provide a written notice of resignation based on his stated intent to resign from the email. There is nothing to show that the grievant was prevented from declining that request. While it is unclear whether the grievant fully understood the consequences of his actions or had adequately considered the options available to him, EDR cannot conclude that the agency's actions deprived the grievant of free choice in resigning his employment with the agency.

Constructive Discharge

Before submitting his resignation, the grievant informed the agency via email that he was given an unsafe work assignment and denied assistance from offenders at the facility, which he appears to claim would have allowed him to do his job more effectively. Though not stated as such in the grievance, these allegations could represent a claim that the grievant was constructively discharged. 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 [him] to quit."¹¹ The employee must therefore demonstrate: (1) that the employer's actions were deliberate, and (2) that working conditions were intolerable.¹² An employer's actions are deliberate only if they "were intended by the employer as an effort to force the [employee] to quit."¹³ Whether an employment environment is intolerable is determined from the objective perspective of a reasonable person.¹⁴

¹⁰ "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*, 99 F.3d at 1126 (citations omitted).

¹¹ *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 272 (4th Cir. 2001) (internal quotation marks omitted).

¹² 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).

¹³ *Matvia*, 259 F.3d at 272.

¹⁴ See *Williams v. Giant Food Inc.*, 370 F.3d 423, 434 (4th Cir. 2004).

In this case, the grievant has not provided sufficient evidence to show that agency management deliberately made his working conditions intolerable in an effort to induce him to quit.¹⁵ Moreover, assuming for purposes of this ruling only the truth of the grievant's allegations regarding his work assignments, the alleged conduct in this case was 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."¹⁶ Thus, while the actions cited in the grievance, if true, are understandable areas of concern, they cannot support a claim of constructive discharge.

CONCLUSION

EDR is the finder of fact on questions of access.¹⁷ In considering the totality of the circumstances in this case, the grievant's separation is properly characterized as a voluntary resignation. As such, the grievant was not an employee of the Commonwealth of Virginia when he initiated his two grievances and, thus, does not have access to the grievance procedure. Because the grievant did not have access to initiate the grievance, EDR will not process the grievances further and the file will be closed.

EDR's rulings on access are final and nonappealable.¹⁸



Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁵ As discussed above, EDR attempted to contact the grievant for additional information and the grievant has not responded.

¹⁶ 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").

¹⁷ *See* Va. Code § 2.2-1202.1(5); *see also Grievance Procedure Manual* § 2.3.

¹⁸ Va. Code § 2.2-1202.1(5).