Issue: Access to the Grievance Procedure; Ruling Date: May 25, 2018; Ruling No. 2018-4726; Agency: Virginia School for the Deaf and Blind; Outcome: Access Denied.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

ACCESS RULING

In the matter of the Virginia School for the Deaf and Blind
Ruling Number 2018-4726
May 25, 2018

On May 2, 2018, the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") received a dismissal grievance submitted by the grievant. The grievant's former employer, the Virginia School for the Deaf and Blind (the "agency"), alleges that the grievant voluntarily resigned prior to initiating the grievance and has requested a ruling from EEDR on whether she has access to the grievance procedure to challenge her separation from employment. For the reasons set forth below, EEDR concludes that the grievant does not have access to the grievance process to initiate this grievance.

FACTS

On April 13, 2018, agency management issued a memorandum to the grievant, advising her that disciplinary action was being considered following an investigation regarding her alleged failure to follow a supervisor's instruction. The agency indicated that this behavior could constitute a Group II offense under the *Standards of Conduct*, and because the grievant had an active Group II Written Notice in her file, this disciplinary action could result in discharge. The agency provided the grievant the opportunity to respond in writing to the charges against her by April 16, 2018, and asked that she meet in the Office of Human Resources on April 17, 2018.

The grievant submitted a written response to the agency on April 16, 2018. At the meeting on April 17, 2018, the grievant was told that a Group II Written Notice with termination would be issued against her, but she was provided with the opportunity to resign in lieu of termination. At that time, the grievant requested to place phone calls to this Office and her representative at the Virginia Education Association, which she did. Upon returning to the meeting, the grievant requested more time to consider a resignation, which the agency denied. The grievant then wrote a letter of resignation that indicated she felt "pushed" into making a decision and that she was "not able to get [her] information together in time to support [her] case." The agency accepted the resignation and confirms that no disciplinary action was issued to the grievant. However, the grievant submitted a dismissal grievance directly to EEDR on or about May 2, 2018, challenging these actions and alleging that she felt forced to resign.

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 his/her employment with the Commonwealth prior to initiating the grievance."[2] EEDR 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 initiated her grievance after submitting a resignation letter on April 17, 2018, raising questions of access.

To have access to the grievance procedure to challenge her separation as a result of the resignation, the grievant must show that her resignation was involuntary[4] or that she 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] 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."[7] There is no allegation that the grievant's resignation was procured by misrepresentation or deception or that she was constructively discharged. As such, only the question of duress or coercion is addressed by this ruling.

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."[8] "[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."[9]

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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] *E.g.*, EDR Ruling No. 2010-2510.
[5] EEDR 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) (citations omitted).
[8] *Id.* at 174-75 (citations omitted).
[9] 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

The grievant could have good arguments to support the position that the agency's contemplated disciplinary action was improper. 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 her choice as between two unpleasant alternatives (resignation or potential termination), that alone does not indicate that her resignation was induced by duress or coercion.[10]

Understanding of the Choice

Here, the grievant does not assert that she was unclear on the reasons she was presented with the proposed discipline, though she states her disagreement. The grievant was provided with a written notice of due process detailing the acts of alleged misconduct prior to the meeting on April 17, 2018. This memorandum made her aware of the basis for the disciplinary action, and the grievant did respond in writing to the allegations against her. Therefore, the facts of this case indicate that the grievant, having been informed of the agency's intention to terminate her employment, decided to submit a resignation instead. She elected to secure a certain outcome, a voluntary resignation, rather than risk the unpredictable result of a grievance hearing to which she was automatically entitled under the *Standards of Conduct*. Accordingly, it appears the grievant understood the nature of the choice given. The grievant has not presented any other indication that she did not understand the nature of this choice.

Time to Decide

In this case, the grievant was given an extremely limited amount of time to make an unpalatable choice between resignation and termination. "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."[11] However, the totality of the circumstances in this particular case do not suggest that the agency procured the grievant's resignation without her exercise of free choice. The grievant had been advised via the April 13 memorandum that the agency was considering terminating her employment. She was provided with four days before the meeting on April 17 to consider the proposed disciplinary action and seek the advice of counsel, should she so choose. During the meeting, the grievant requested and was provided with time to contact her representative for advice. Though the grievant's request for additional time during the April 17, 2018 meeting was denied, the facts here do not support a finding of involuntariness in view of the general presumption of a volunatary resignation. It is

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)).

[10] *See Stone*, 855 F.2d at 174.

[11] *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).

certainly true that the grievant had a small window in which to decide if she wanted to opt for the certainty of a resignation rather than accept termination with the ability to grieve. However, EEDR must consider the facts of the particular case and determine whether the grievant's resignation was involuntary on the merits. In this instance, we cannot so conclude.

Accordingly, EEDR finds that the grievant's separation from employment was voluntary, and she does not have access to the grievance procedure. As such, the dismissal grievance will not proceed to hearing and EEDR's file will be closed.

EEDR's rulings on access are final and nonappealable.[12]

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[12] Va. Code § 2.2-1202.1(5).