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ACCESS RULING

In the matter of the College of William and Mary
Ruling Number 2019-4925
May 21, 2019

On April 29, 2019, the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management[1] received a dismissal grievance submitted by the grievant. The grievant's former employer, the College of William and Mary (the "College" or the "agency"), alleges that the grievant voluntarily resigned prior to initiating the grievance and has requested a ruling from EDR on whether she has access to the grievance procedure to challenge her separation from employment. For the reasons set forth below, EDR concludes that the grievant does not have access to the grievance process to initiate this grievance.

FACTS

On March 22, 2019, College management met with the grievant to deliver a memorandum of Advance Notice of Proposed Disciplinary Action. The memorandum explained that that College intended to issue disciplinary action to the grievant due to several instances of alleged misconduct, including "failing/refusing to follow [her] supervisor's instructions, disruptive behavior, use of obscene language, and Attendance/excessive tardiness." In the memorandum, management further advised the grievant that this type of misconduct was considered a Group II offense under the *Standards of Conduct* policy, and that, because she had an active Group II Written Notice in her file, this disciplinary action could result in her termination. The College gave the grievant the opportunity to respond in writing to the charges against her by March 25. The grievant verbally responded to the charges on March 22. Management typed the grievant's verbal response into a written document, which the grievant then signed.

College management met with the grievant a second time on April 9, 2019. At the meeting, management intended to issue the grievant a Group II Written Notice for the misconduct identified in the March 22 memorandum and terminate her employment. After explaining this to the grievant, management offered her the option to resign in lieu of

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

termination. The grievant completed a standardized resignation notice stating that she was resigning effective April 9, 2019 for a "personal reason." The grievant signed and dated the resignation form. On or about April 29, 2019, the grievant submitted a dismissal grievance directly to EDR, apparently challenging her separation from employment with the College.

DISCUSSION

The General Assembly has provided that "[u]nless exempted by law, all nonprobationary state employees shall be covered by the grievance procedure . . . ."[2] 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."[3] 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.[4] In this case, the grievant initiated her grievance after submitting a notice of resignation on April 9, 2019, raising questions of access.

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

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."[10] "[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

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[2] Va. Code § 2.2-3001(A).
[3] *Grievance Procedure Manual* § 2.3.
[4] *E.g.*, EDR Ruling No. 2005-1043.
[5] *E.g.*, EDR Ruling No. 2010-2510.
[6] 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.
[7] *See* Rosario-Fabregas v. Merit Sys. Prot. Bd., 833 F.3d 1342, 1346 (Fed. Cir. 2016).
[8] Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 174 (4th Cir. 1988) (citations omitted).
[9] Constructive discharge occurs when "an employer deliberately makes an employee's working conditions intolerable and thereby forces [her] to quit [her] job." Bristow v. Daily Press, Inc. 770 F.2d 1251, 1255 (4th Cir. 1985) (internal citations omitted). Here, no evidence suggests that the grievant resigned in order to avoid intolerable working conditions, rather than to avoid dismissal for cause.
[10] *Stone*, 855 F.2d at 174-75 (citations omitted).

be substantiated, the threatened action by the agency is purely coercive."[11] In this case, the grievant could have good arguments to support the position that the College's contemplated disciplinary action was improper. However, this does not appear to be a case where the College *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.[12]

In addition, the grievant has not asserted that she did not understand the reasons the College was considering issuing disciplinary action, though she disagrees with the College's characterization of her behavior. The grievant received a written memorandum of Advance Notice of Proposed Disciplinary Action on March 22, 2019. The memorandum made her aware of the College's basis for the disciplinary action, and the grievant responded to the allegations against her. At the second meeting on April 9, management offered the grievant the option of resigning in lieu of termination. Based on the information provided to EDR, the College appears to have explained the differences between these two choices to the grievant, with the result that she believed resignation was more beneficial to her at the time. Most importantly, the grievant has not offered any information to indicate that she did not understand the nature of the choice before her at the April 9 meeting. While she may now regret her decision, the facts of this case indicate that the grievant, having been informed of the College's intention to terminate her employment, accepted its offer to resign 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* policy.

Finally, it appears that the grievant may have been given a limited amount of time to make the 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."[13] According to the

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[11] Schultz v. U.S. Navy, 810 F.2d 1133, 1136 (Fed. Cir. 1987) (citations omitted); *see also* Staats v. U.S. Postal Serv., 99 F.3d 1120, 1124 (Fed. Cir. 1996) ("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. Dep't 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 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)).

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

[13] *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).

College, management offered her the option to resign at the April 9, 2019 meeting where she would have received the Group II Written Notice with termination. It is unclear what would have happened if the grievant had asked for more time to make a decision; she does not appear to have made that request, and the College has not provided any information about how it would have responded had the grievant done so.

Having considered the totality of the circumstances in this particular case, EDR finds that the evidence is insufficient to demonstrate that the College procured the grievant's resignation by duress or coercion, without her exercise of free choice. The grievant was advised via the March 22 memorandum that the College was considering terminating her employment. She had until April 9 to consider the proposed disciplinary action and seek the advice of counsel, should she have chosen to do so. When College management offered the grievant the opportunity to resign in lieu of termination at the April 9 meeting, she accepted its offer. These facts do not support a finding of involuntariness in view of the general presumption of a voluntary resignation. It is certainly true that the grievant appears to have had a limited time 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, EDR 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, EDR 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 EDR's file will be closed.

EDR's rulings on access are final and nonappealable.[14]

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[14] Va. Code § 2.2-1202.1(5).