

Issue: Access to the Grievance Procedure; Ruling Date: August 18, 2017; Ruling No. 2018-4585; Agency: Department of Corrections; 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 Department of Corrections
Ruling Number 2018-4585
August 18, 2017

On July 11, 2017, 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 Department of Corrections (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

The agency received a notice of resignation from the grievant on June 23, 2017, which stated that the grievant’s resignation would be effective on July 5, 2017. The grievant subsequently submitted a letter attempting to withdraw her resignation that was received by the agency on June 27, 2017, before her resignation became effective. On July 5, 2017, her final day of work, the grievant was notified by her human resources office that her request to withdraw her resignation had been denied by the appointing authority. The grievant submitted a dismissal grievance to EEDR on July 11, 2017, alleging that the appointing authority’s refusal to allow her to withdraw her resignation was “an act of retaliation” because she had previously filed a grievance to dispute the issuance of a Written Notice. The agency has requested an access ruling from EEDR, arguing that the grievant voluntarily resigned from employment and does not have access to the grievance procedure to file her grievance.

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

¹ Va. Code § 2.2-3001(A).

² *Grievance Procedure Manual* § 2.3.

³ *E.g.*, EDR Ruling No. 2005-1043.

To have access to the grievance procedure to challenge her separation, the grievant must show that her resignation was involuntary⁴ 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 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 Here, the grievant does not directly allege that her resignation was either obtained by misrepresentation or deception, that it was forced by the agency's duress or coercion, or that she was constructively discharged; she instead claims that she attempted to withdraw her resignation before it became effective, but was denied the ability to do so in retaliation for her previous use of the grievance procedure. In response, the agency asserts that the grievant voluntarily resigned effective July 5, 2017, and, therefore, she does not have access to the grievance procedure.

Courts in many jurisdictions have held that, once an employee submits notice of her resignation, the employer's refusal to accept her request to rescind the resignation does not render the separation involuntary.⁸ EEDR finds this approach persuasive and consistent with the relevant provisions of the agency's Operating Procedure 175.1, *Employee Separations*, which provides that "[a]n employee who has submitted a resignation notice may, with the approval of the appointing authority, withdraw the resignation and be continued in their position as though the resignation had not been filed."⁹ In this case, there appears to be no dispute that the grievant voluntarily submitted a notice of resignation to the agency and that the agency actually received the resignation. The appointing authority's decision to approve a withdrawal is discretionary. Thus, the agency's choice not to accept the grievant's request to rescind her resignation in this case is not, by itself, a violation of the policy. If, however, the appointing authority refused the grievant's request to rescind her resignation for a discriminatory or retaliatory reason, or on some other basis that is prohibited by policy and/or law, such a separation could be considered involuntary for purposes of access to the grievance procedure.

Here, the grievant asserts that the appointing authority's refusal to allow her to rescind her resignation was retaliatory. In support of her position, the grievant states that she filed a grievance on June 14, 2017 to challenge the issuance of a Written Notice, and argues that the agency did not accept her request to rescind her resignation because of this grievance activity. In evaluating a claim of retaliation, EEDR must assess whether the evidence demonstrates that (1)

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

⁸ *See* *Cunliffe v. Industrial Claim Appeals Office*, 51 P.3d 1088, 1089-90 (Colo. App. 2002), and *Cohen v. City of Pierre*, 651 N.W.2d 265, 267-68 (S.D. 2002), which collect cases and discuss the issue in detail in the analogous situation of receipt of unemployment benefits. Some courts have determined that an employee may rescind her resignation unilaterally only before it has been accepted by her employer, as with any other contract. *E.g.*, *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 975-76 (9th Cir. 2002).

⁹ Department of Corrections Operating Procedure 175.1, *Employee Separations*, § IV(A)(3)(a). Similarly, DHRM Policy 1.70, *Termination/Separation from State Service*, allows—but does not require—an agency to "accept an employee's request to rescind his or her resignation within 30 calendar days of separation."⁹

the employee engaged in a protected activity;¹⁰ (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the employee's claim may not proceed unless she presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.¹¹ Ultimately, to support a finding of retaliation, EDR must find that the protected activity was a but-for cause of the alleged adverse action by the employer.¹²

While the grievant's concerns are understandable, the grievance does not raise a sufficient question as to whether the agency's actions were retaliatory in nature. Although the grievant engaged in protected activity by filing a grievance to dispute her receipt of a Written Notice and a causal connection may be inferred from the temporal proximity between the grievant's protected activity and the appointing authority's decision not to accept her withdrawal of her resignation,¹³ the agency has provided legitimate, nonretaliatory business reasons for its decision. The agency states that the appointing authority chose not to allow the grievant to rescind her resignation due to issues with her work performance, and specifically notes that the grievant had an active Group III Written Notice at the time of her separation. Furthermore, to the extent there was any retaliatory motive, there is nothing to suggest that such a motive was the but-for cause of the agency's action.

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.¹⁴



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¹⁰ See Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).

¹¹ See, e.g., *Felt v. MEI Techs., Inc.*, 584 Fed. App'x 139, 139-40 (4th Cir. 2014).

¹² See *id.* (citing *Univ. Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013)).

¹³ See *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 443 (4th Cir. Va. 1998) (stating that "merely the closeness in time between" an employee's exercise of protected activity and the adverse action is sufficient to establish a causal connection for a claim of retaliation under Title VII (citing *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989))).

¹⁴ Va. Code § 2.2-1202.1(5).