

Issue: Access to the Grievance Procedure; Ruling Date: August 17, 2017; Ruling No. 2018-4596; Agency: Department of Corrections; Outcome: Access Denied.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Equal Employment and Dispute Resolution<sup>1</sup>**

**ACCESS RULING**

In the matter of the Department of Corrections  
Ruling Number 2018-4596  
August 17, 2017

On July 21, 2017, the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) received a dismissal grievance initiated by the grievant to challenge his separation from employment.<sup>2</sup> Because the grievant had submitted a resignation prior to initiating his grievance, the grievant’s former employer, the Department of Corrections (the “agency”), challenges whether he has access to the grievance procedure to initiate this grievance. For the reasons set forth below, EEDR concludes that the grievant does not have access to the grievance procedure and, therefore, the grievance does not qualify for a hearing.

FACTS

On July 12, 2017, agency management met with the grievant following an investigation into a potential threat against him made by an inmate. During this meeting, the agency advised the grievant that the investigation had produced allegations that the grievant had fraternized with inmates and introduced contraband into the facility. The agency indicated that this behavior, if substantiated, could constitute a Group III offense under the Standards of Conduct, and told the grievant that he would be placed on pre-disciplinary leave until the investigation concluded. The agency asserts that the grievant became agitated upon hearing this information, and stated “I quit” and “[y]ou all are just going to fire me anyway.”

The grievant’s supervisor told him to advise the Human Resource Department of his decision, and the grievant subsequently submitted a letter of resignation to that office, dated July 12, 2017. The agency confirms that no disciplinary action was ever issued to the grievant as a result of the allegations against him. However, the grievant submitted a dismissal grievance directly to EEDR on or about July 21, 2017, challenging these actions and alleging that he felt forced to resign.

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<sup>1</sup> Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. The *Grievance Procedure Manual* has now been updated to reflect this Office’s name post-merger as the Office of Equal Employment and Dispute Resolution.

<sup>2</sup> EEDR subsequently received a second dismissal grievance from the grievant, dated July 27, 2017, which appears to challenge the same action. The *Grievance Procedure Manual* states that a grievance may not “challeng[e] the same management action or omission challenged by another grievance. *Grievance Procedure Manual* § 2.4. Thus, EEDR will consider the July 27, 2017 grievance as administratively closed.

## DISCUSSION

The General Assembly has provided that “[u]nless exempted by law, all nonprobationary state employees shall be covered by the grievance procedure . . . .”<sup>3</sup> 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.”<sup>4</sup> 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.<sup>5</sup> In this case, the grievant initiated his grievance after submitting a resignation letter on July 12, 2017, raising questions of access.

To have access to the grievance procedure to challenge his separation as a result of the resignation, the grievant must show that his resignation was involuntary<sup>6</sup> or that he was otherwise constructively discharged.<sup>7</sup> 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.<sup>8</sup> 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.”<sup>9</sup> There is no allegation that the grievant’s resignation was procured by misrepresentation or deception or that he was constructively discharged. As such, only the question of duress or coercion is addressed by this ruling.

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.”<sup>10</sup> “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.”<sup>11</sup>

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.”<sup>12</sup> “[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

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<sup>3</sup> Va. Code § 2.2-3001(A).

<sup>4</sup> *Grievance Procedure Manual* § 2.3.

<sup>5</sup> *E.g.*, EDR Ruling No. 2005-1043.

<sup>6</sup> *E.g.*, EDR Ruling No. 2010-2510.

<sup>7</sup> 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.

<sup>8</sup> *See* *Staats v. U.S. Postal Serv.*, 99 F.3d 1120, 1123-24 (Fed. Cir. 1996).

<sup>9</sup> *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 174 (4th Cir. 1988) (citations omitted).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (citation omitted).

<sup>12</sup> *Id.* at 174-75 (citations omitted).

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.”<sup>13</sup>

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. Importantly, the agency had not completed its investigation at the time of the meeting with the grievant and proposed only to place the grievant on pre-disciplinary leave. It is possible that no disciplinary action would ultimately have been proposed. Thus, while the grievant may have perceived his choice as between two unpleasant alternatives (resignation or potential termination), that alone does not indicate that his resignation was induced by duress or coercion.<sup>14</sup>

Because EEDR cannot conclude that the grievant resigned involuntarily, the grievant had voluntarily concluded his employment with the Commonwealth of Virginia when he initiated this grievance and, thus, did not have access to the grievance procedure.<sup>15</sup> The grievance will be closed and not proceed to hearing.

EDR’s access rulings are final and nonappealable.<sup>16</sup>



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<sup>13</sup> *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 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)).

<sup>14</sup> *See Stone*, 855 F.2d at 174.

<sup>15</sup> *Grievance Procedure Manual* § 2.3.

<sup>16</sup> Va. Code § 2.2-1202.1(5).