

Issue: Access to the Grievance Procedure; Ruling Date: January 2, 2013; Ruling No. 2013-3472; Agency: Department of Behavioral Health and Developmental Services; 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 Behavioral Health & Developmental Services
Ruling Number 2013-3472
January 2, 2013

The grievant has attempted to initiate a dismissal grievance to challenge his separation from a facility of the Department of Behavioral Health & Developmental Services (the agency). For the reasons set forth below, EDR concludes that the grievant does not have access to the grievance process to initiate this grievance.

FACTS

The grievant was issued a memorandum on August 8, 2012, indicating that an investigation regarding his workplace behavior had resulted in a finding of patient abuse. On or about August 9, 2012, the grievant met with the facility's Director, Assistant Director, and Regional Human Resource Manager as part of the pre-disciplinary due process procedure. At the meeting, the grievant questioned certain aspects of the investigation against him, and the facility Director agreed to further review statements with certain witnesses. After he did so, it was determined by the agency that the pending discipline was appropriate, and a subsequent meeting was scheduled between the grievant, the Assistant Director, and the Regional Human Resource Manager for August 24, 2012. At this meeting, the grievant was given a Group III Written Notice with termination. The grievant asked whether he might be permitted to resign in lieu of being terminated, and was told that the facility Director would have to provide him with that answer.

A few days later, another agency human resource employee, Ms. T., was given the task to call the grievant and advise him that the facility Director would permit him to resign in lieu of termination. The grievant alleges that he told Ms. T. that he would resign as long as it did not affect his ability to appeal the disciplinary action. The grievant then provided a written resignation to the agency as of August 30, 2012.¹ In response, the agency states that the grievant did ask Ms. T. about his ability to file a grievance, but that Ms. T. indicated she was unsure, that she thought he might be able to do so, but that he needed to ask the Regional Human Resource Manager. The agency asserts that the grievant never contacted the Regional Human Resource Manager with questions but simply filed the grievance thereafter. On September 19, 2012, the

¹ The resignation was actually effective August 10, 2012. This date is not material to the outcome of this ruling.

Regional Human Resource Manager wrote a letter to the grievant, advising him that he did not have access to the grievance procedure since he voluntarily resigned prior to its initiation. The grievant sought to appeal this decision to the facility Director, who on October 10, 2012, sent the grievant a letter denying him access to the grievance procedure. The grievant now appeals to EDR, seeking access to the grievance procedure to challenge the disciplinary action.

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, EDR has long held that any grievance timely initiated by an employee *prior to* the effective date of his or her voluntary resignation may, at the employee’s option, continue through the grievance process. However, EDR has also 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 employee initiated his September 12, 2012 grievance after the effective date of his resignation. Thus, to have access to the grievance procedure, he must show that his resignation was involuntary.⁴

The voluntariness of an employee’s resignation is presumed.⁵ To determine whether a grievant has rebutted this presumption, EDR has long followed the Fourth Circuit decision in *Stone v. University of Maryland Medical System Corporation*.⁶ In a “quit or be fired” fact situation, the court in *Stone* determined that a resignation may be involuntary “(1) where [the resignation was] obtained by the employer’s misrepresentation or deception... and (2) where forced by the employer’s duress or coercion.”⁷ In his appeal to EDR, the grievant essentially contends that his resignation was rendered involuntary by an alleged misrepresentation by the agency indicating that his resignation would not affect his ability to file a grievance.

The court in *Stone* recognized that “[u]nder the ‘misrepresentation’ theory, a resignation may be found involuntary if induced by an employee’s reasonable reliance upon an employer’s misrepresentation of a material fact concerning the resignation.⁸ A misrepresentation is material if it concerns either the consequences of the resignation...or the alternative to resignation.”⁹ A resignation is involuntary if it is obtained by agency misinformation or deception.¹⁰ Moreover, this objective test will not inquire into the “subjective perceptions of the employee” or “the subjective intentions of the agency.”¹¹ Also, “there is no requirement that an employee be

² Va. Code § 2.2-3001(A); Grievance Procedure Manual § 2.3.

³ *E.g.*, EDR Ruling No. 2005-1043.

⁴ *E.g.*, EDR Ruling No. 2010-2510 (concluding that EDR is the finder of fact on questions of access); *see also* Va. Code § 2.2-1202.1(5)(iv); *Grievance Procedure Manual* § 2.3.

⁵ *See* *Staats v. U.S. Postal Serv.*, 99 F.3d 1120, 1123 (Fed. Cir. 1996).

⁶ *Stone v. Univ. of Maryland Medical System Corp.*, 855 F.2d 167 (4th Cir. 1988).

⁷ *Id.* at 174.

⁸ *Id.*

⁹ *Id.*


¹⁰ *Covington v. Dep’t of Health and Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984).

¹¹ *Id.* (quoting *Scharf v. Dep’t of the Air Force*, 710 F.2d. 1572, 1575 (Fed. Cir. 1983)).

intentionally deceived about his employment options, it being sufficient that ‘the employee shows that a reasonable person would have been misled by the agency’s statements.’¹² The misleading information can be negligently or even innocently provided; if the employee materially relies on the misinformation to his detriment, his [resignation] is considered involuntary.’¹³

Here, while the grievant indicates that he told Ms. T. that he would only resign if an appeal of the disciplinary action could proceed, the agency did not advise him (nor does he specifically allege) that he would have access to the grievance procedure following a voluntary resignation. While a better response from the agency’s representative, if in doubt of an answer, may have been to simply direct the grievant to the Human Resource Manager, we find nothing in the agency’s response that constitutes a misrepresentation under the analysis in *Stone*. Consequently, it would be unreasonable for the grievant to have concluded that -- in the absence of misrepresentation, deception, duress, coercion, or time pressure -- he could proceed with a grievance despite having resigned.

Given the totality of the circumstances, we conclude that the grievant has failed to demonstrate that his resignation was involuntary. As such, we find that the grievant voluntarily resigned, was not an employee of the Commonwealth of Virginia when he initiated this grievance, and thus does not have access to the grievance procedure. Thus, the grievant’s September 12, 2012 dismissal grievance is now closed and will not be processed further. EDR’s access rulings are final and nonappealable.¹⁴



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¹² *Id.*

¹³ *Id.*

¹⁴ Va. Code § 2.2-1202.1(5).