Issue: Access to the Grievance Procedure; Ruling Date: April 4, 2013; Ruling No. 2013-3564; Agency: Department of General Services; Outcome: Access Granted.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

ACCESS RULING

In the matter of the Department of General Services
Ruling Number 2013-3564
April 4, 2013

EDR has determined that a ruling is necessary to determine whether the grievant in this matter has access to the grievance procedure to initiate her grievance with the Department of General Services (the agency). For the reasons set forth below, EDR concludes that the grievant has access to the grievance procedure and, therefore, the grievance must be permitted to proceed in the manner specified in this ruling.

FACTS

On February 14, 2013, the grievant was told she needed to meet with two agency managers. During that meeting, which took place at the end of the grievant's work day, the managers apparently advised the grievant that she had been observed sleeping and was being terminated for the offense with the knowledge and approval of Human Resources. The grievant states that she then was asked to sign a Group III Written Notice with termination. After she did so, one of the managers advised her that she could resign in lieu of termination, although he did not know how that would affect her ability to receive unemployment insurance payments. She was also told that she had to make the decision whether to be terminated or resign during the meeting, and that after the meeting ended, she would not be able to change her mind.[1] One of the managers gave her a piece of notebook paper, and she wrote that she was resigning due to her sleep apnea having worsened and affecting her job.[2]

Subsequently, on March 15, 2013, the grievant initiated a grievance challenging the Written Notice and her termination. Because the grievant had submitted a letter of resignation, the agency advised EDR of this fact. EDR must now determine whether the grievant has access to the grievance procedure to file this grievance in light of her resignation letter

[1] The agency acknowledges that the grievant asked for more time to consider her decision but was told that she had to decide before the meeting ended.
[2] The grievant asserts that the agency was aware of her medical condition.

DISCUSSION

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.[3] In addition, EDR has long held that once an employee's voluntary resignation becomes effective, he/she no longer has access to the grievance procedure.[4] However, if an employee's resignation is considered "involuntary," the situation is the proper subject of a grievance.[5]

Involuntary Resignation

To demonstrate that she has access to the grievance procedure to challenge her separation from employment, the grievant must show that her resignation was not voluntary. 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]

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.[8] "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."[9]

Alternative Choice

That the alternative choices facing an employee are 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 be substantiated, the threatened action by the agency is purely coercive."[11]

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[3] Va. Code § 2.2-3001(A); *Grievance Procedure Manual* § 2.3.
[4] *E.g.*, EDR Ruling No. 2005-1043.
[5] *E.g.*, EDR Ruling No. 2010-2510.
[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). In light of our analysis of the duress or coercion theory, the misrepresentation argument need not be addressed.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] Schultz v. U.S. Navy, 810 F.2d 1133, 1136 (Fed. Cir. 1987); *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

In this case, while the grievant challenges the appropriateness of the Written Notice, there is no evidence the agency *knew* that its threatened disciplinary action could not be substantiated. Thus, while the grievant may have perceived her choice as between two unpleasant alternatives (resignation or termination), that alone does not indicate that her resignation was induced by duress or coercion.[12]

Understanding of the Choice

Although the grievant signed a copy of the Written Notice stating the charge against her, she did so in the context of an unexpected disciplinary meeting. It is therefore unlikely that she had time to review that document carefully or to assess and consider the charge or its implications before making her decision to resign. In contrast to the situation discussed in EDR Ruling No. 2010-2370,[13] the grievant did not receive a memo prior to the meeting detailing the acts of misconduct that the agency found unsatisfactory. Further, in this case, the grievant was apparently unaware that she was asleep or had been observed sleeping during the incident at issue. Given these circumstances, it is doubtful that the grievant was fully able to understand the choice she was making.

Time to Decide/Ability to Determine Effective Date

The grievant made her decision entirely within the confines of the meeting on February 14th. As stated above, unlike the case in EDR Ruling No. 2010-2370, the grievant had not been previously notified of the charges surrounding the contemplated discipline or the agency's intention to terminate her. The grievant had a matter of minutes at the end of the work day to make her decision, without the advice of counsel.[14] When she asked for more time to consider her decision, the agency denied her request. Moreover, she had no opportunity to determine the

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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 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] EDR Ruling No. 2010-2370 (denying access to grievant who submitted letter of resignation on the day after she had been advised that the agency was considering taking disciplinary action for identified instances of misconduct and to which she was invited to respond).

[14] "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." *Staats*, 99 F.3d at 1126; *see also Stone*, 855 F.2d at 177-78 (finding that, when 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); Shealy v. Winston, 929 F.2d 1009, 1013 (4th Cir. 1991) (holding that one to two days after meeting was reasonable time); Herron v. Va. Commonwealth Univ., 366 F. Supp. 2d 355, 365-66 (E.D. Va. 2004) (holding that twenty-four hours was reasonable time); Wolford v. Angelone, 38 F. Supp. 2d 452, 459 (W.D. Va. 1999) (holding that resignation tendered in the same day as interview with supervisors is unclear as to reasonable time); 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 reasonable time).

effective date of her resignation. These factors effectively deprived the grievant of free choice in choosing between resignation and termination.[15]

Conclusion

EDR is the finder of fact on questions of access.[16] The totality of the circumstances in this particular case lead to the conclusion that the grievant's resignation was made without her exercise of free choice. She had an extremely small window of time in which to decide whether she wanted the certainty of resignation as opposed to termination with the ability to grieve. Further, the absence of prior notice before the meeting (i.e., due process) combined with the grievant's lack of understanding of the situation at the time supports the contention that this was an involuntary resignation under the ***Stone*** factors. As such, the grievant had access to the grievance procedure to challenge her involuntary separation when she submitted her grievance dated March 15, 2013.

Procedural Guidance

Granting access to the grievance procedure for an employee to challenge an involuntary resignation involving proposed discipline and/or termination that was not actually issued can lead to confusion about employment status and the matters at issue in the grievance and, potentially, at hearing. Therefore, EDR is providing the following guidance for both parties for the further handling of this grievance.

This ruling essentially finds that the circumstances under which the grievant had to decide whether to resign or be terminated effectively denied her of free choice. Therefore, the appropriate remedy is to allow the grievant to make her decision again, with the benefit of reasonably adequate time to consider the charges against her (i.e., the equivalent of pre-disciplinary due process) and her options.[17] If the grievant wishes to revoke her resignation, the grievant must understand the impact this will have on her employment record. Assuming the agency still wishes to maintain the grievant's separation from employment, the revocation of her resignation will mean that the grievant's separation would then be classified as termination. The agency would then issue the grievant the Written Notice it was proposing to issue on February 14, 2013. From that point, this grievance and subsequent hearing will be about the Written Notice and the grievant's resulting termination.

As such, by proceeding with this grievance, the grievant's record will reflect that she was terminated, not that she resigned, on February 14, 2013. The grievant would only succeed in being reinstated to her job (i.e., reversing the termination) if she prevails at hearing in her challenge to the Written Notice. To sustain her termination at hearing, the agency would have to

[15] *See, e.g.*, Paroczay v. Hodges, 297 F.2d 439, 441 (D.C. Cir. 1961); *Wolford*, 38 F. Supp. 2d at 459.
[16] *See* Va. Code § 2.2-1202.1(5); *see also Grievance Procedure Manual* § 2.3.
[17] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985).

provide sufficient evidence to support the issuance of the Group III Written Notice with termination. Mitigating and aggravating circumstances will also be considered.[18]

However, if the grievant does not wish to proceed with this process, she can choose to withdraw her grievance and remain resigned, which would, at that point, be considered a voluntary separation. The grievant must notify EDR of her choice in writing within **ten workdays of the date of this ruling**. If the grievant chooses to proceed with the grievance, EDR will proceed with the appointment of a hearing officer for the dismissal grievance. Otherwise, if the grievant chooses to withdraw her grievance, no further action is necessary. The agency will be notified of the grievant's decision by EDR if it is not sent to the agency by the grievant.

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[18] The grievance will essentially proceed as if it were originally initiated to challenge the Written Notice and termination.