

Issue: Access to the Grievance Procedure; Ruling Date: May 21, 2014; Ruling No. 2014-3859; 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 and Developmental Services
Ruling Number 2014-3859
May 21, 2014

On or about March 27, 2014, the grievant submitted a dismissal grievance to the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”). The Department of Behavioral Health and Developmental Services (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

The grievant was employed by the agency as a forensic mental health technician. When the grievant left work on March 7, 2014, she had apparently been given an incorrect copy of her facility’s upcoming schedule. This schedule indicated that the grievant’s next work day was April 7, 2014.¹ On March 12, 2014, the grievant received a phone call from her facility’s scheduling coordinator. The scheduling coordinator asked the grievant why she had not been at work for the past three days, explained that she had been scheduled to work, and stated that failing to report to work without notice for three days was “grounds for termination.”

The grievant apparently believed that, after she had failed to report to work for three days without notice, she had been automatically terminated from her employment. On the following day, March 13, 2014, the grievant went to the administration office at her facility and stated to Manager F that she was there to “check out,” which is a term used internally within the agency to refer to turning in one’s badge and keys upon separation from employment. Manager F assumed the grievant was resigning because the agency had taken no action to terminate her employment, but he did not ask directly about the grievant’s intent. During this conversation, only the phrase “check out” was used, and neither the grievant nor Manager F referred to the grievant’s separation as a resignation. Similarly, the grievant did not make any statements to Manager F about termination or say anything that led him to believe she thought she had been fired.

Manager F referred the grievant to an employee who handles the check out process for the grievant’s facility. After the grievant had completed checking out, Manager W approached the grievant and asked her what was happening. The grievant explained that she thought she had been fired based on her conversation with the staffing coordinator. Manager W explained to the

¹ The grievant apparently did not seek to clarify from her supervisor or anyone else whether she was actually scheduled to be off work for a period of approximately one month. It is unclear, and ultimately immaterial, whether this scheduling error was the fault of the grievant or the agency.

grievant that she would not ordinarily be terminated in this way and offered to speak with Manager F and others in the administration office to get more information. Manager W was told that the grievant should either talk to her supervisor or agency management further or submit a written resignation. When Manager W relayed this information to the grievant, the grievant said words to the effect of, "Well why would I put it in writing if I was fired?" The grievant apparently left the facility at this point.

The grievant did not submit a written resignation notice and never provided the agency with any other type of explanation in writing about the circumstances of her separation. Although the agency filled out the appropriate forms showing that the grievant had voluntarily resigned effective March 13, 2014, she was not given any information in writing to show that her separation was considered a voluntary resignation. The grievant was not issued a due process notice, Written Notice, or informal disciplinary action in relation to her absence from work. Indeed, there appear to be no agency records to indicate that there was any investigation or inquiry into whether the grievant had engaged in misconduct by failing to report to work without notice for three days.

DISCUSSION

To have access to the grievance procedure, an employee "[m]ust have been a non-probationary employee of the Commonwealth at the time the management action or omission that formed the basis of the dispute occurred," "[m]ust not have voluntarily concluded [her] employment with the Commonwealth prior to initiating the grievance," and must not otherwise be exempted by law.² Thus, when an employee is separated from state employment, she may only file a grievance to challenge a termination or other involuntary separation.³ In this case, the grievant asserts she was "discharged automatically" by the agency when she failed to report to work without notice for three days, and filed a dismissal grievance to challenge her separation. The agency asserts that the grievant "verbally submitted her resignation" on March 13 and does not have access to the grievance procedure.

DHRM Policy 1.70, *Termination/Separation From State Service*, classifies the "types of separation from state service," including resignation and discharge, and describes "their related procedures."⁴ The policy defines "resignation" as "an employee's voluntary separation from state service."⁵ Discharge, on the other hand, is "an employee's involuntary termination from state service."⁶ If the grievant was discharged, she is entitled to pursue her claims regarding her separation from employment through the grievance process because her employment was not "voluntarily concluded" prior to the initiation of her grievance.⁷

² *Grievance Procedure Manual* § 2.3; see Va. Code § 2.2-2905.

³ The *Grievance Procedure Manual* defines an involuntary separation as a "[s]eparation which is not of free will." See *id.* § 9.

⁴ The policy also describes other categories of separation related to retirement and layoff. See DHRM Policy 1.70, *Termination/Separation From State Service*. As there is no question here that would implicate these provisions of the policy, they need not be discussed in this ruling.

⁵ *Id.*

⁶ *Id.*

⁷ *Grievance Procedure Manual* § 2.3.

Generally, the voluntariness of an employee's resignation is presumed.⁸ 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."⁹ In this case, there is no indication that the agency procured the grievant's resignation through misrepresentation, deception, duress, or coercion. Rather, the dismissal grievance itself, as well as the factual information submitted by the parties, indicates that the issue here concerns whether the grievant intended to voluntarily conclude her employment and understood that the agency interpreted her actions on March 13 as a voluntary resignation.

"The term 'voluntary' connotes '[u]nconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself . . . [r]esulting from free choice.' An employee's intention to quit may be discerned from words or conduct inconsistent with the maintenance of an employer/employee relationship."¹⁰ The parties have presented conflicting evidence as to whether the grievant's separation was voluntary. The grievant maintains that she was "discharged automatically" after she failed to report to work without notice, and that she was merely turning in her badge and keys on March 13 as part of the termination process. Indeed, there is nothing to show that the grievant affirmatively conveyed a desire to end her employment with the agency at any time.¹¹

In addition, there is some evidence to suggest that, at least initially, the grievant did not convey an "intention to quit" through "words or conduct" that were "inconsistent with the maintenance of an employer/employee relationship."¹² For example, when she reported to the administration office on March 13, the grievant did not state that she was there to resign or indicate that she wished to voluntarily conclude her employment; rather, she stated to Manager F that she was there to "check out." Manager F did not seek to clarify the grievant's intent; he merely assumed that she wished to resign because she had not received any notice of potential discipline. The grievant and the agency proceeded with the check out process, during which there was apparently no discussion of whether the grievant had been terminated or was resigning, until Manager W arrived.

While the grievant may not have initially understood whether she had been terminated and was merely turning in her badge and keys or whether she was resigning, her discussion with Manager W demonstrates that the agency did explain to the grievant that no disciplinary action or termination had occurred. In doing so, Manager W, and by extension the agency, notified the grievant that her possible failure to report to work for three days had not ended her employment with the agency. At that point, Manager W told the grievant that she could submit a written resignation and conclude her employment, or remain employed and speak with her supervisor

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

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

¹⁰ *Shuler v. Va. Employment Comm'n*, 9 Va. App. 147, 150-151, 384 S.E.2d 122, 124 (1989) (quoting *Barnes v. Singer Co.*, 324 N.C. 213, 216, 376 S.E.2d 756, 758 (1989); *Tate v. Briggs & Stratton Corp.*, 23 Wis. 2d 1, 6, 126 N.W.2d 513, 515 (1964)) (internal quotation marks omitted).

¹¹ This fact also distinguishes this case from the typical "resign or be fired" situation regarding whether a resignation was voluntary or involuntary, which has been addressed in previous EDR rulings. See, e.g., EDR Ruling No. 2011-2832; EDR Ruling No. 2008-1902.

¹² *Shuler*, 9 Va. App. at 151, 384 S.E.2d at 124.

and/or agency management about her absence and the possibility of disciplinary action.¹³ The grievant apparently chose to do neither, and instead remained separated without providing any written notice.

EDR is the finder of fact on questions of access.¹⁴ In considering the totality of the circumstances in this case, the grievant's separation is properly characterized as a voluntary resignation. Although the grievant did not possess an intent to resign when she first reported to her facility's administration office, she was clearly informed by Manager W before her separation became effective that she had not been terminated and that she faced two choices: to remain employed and possibly face disciplinary action, or to resign. At this point, the grievant knew or should have known that she was still employed by the agency and had not been terminated. Although she declined to submit her resignation in written form, the grievant's decision to leave work after Manager W told her that she had not been terminated was "inconsistent with the maintenance of an employer/employee relationship."¹⁵ In other words, we find that the grievant was aware that she had not been terminated when she left work on March 13 and yet still decided to end her employment with the agency.

While the grievant may now regret her decision, we do not find that the facts of this case demonstrate that her separation was involuntary. We do not disagree that the agency's initial response to the grievant on March 13 was insufficient to convey to the grievant either the status of her employment or its perception that she was resigning. However, we are unable to see any other more effective way in which the agency could have corrected this initial miscommunication and made it clear to the grievant that her separation would be considered a resignation besides the actions of Manager W. That the grievant may not have believed or accepted Manager W's explanation of the agency's position does not make her decision to conclude her employment involuntary.

Accordingly, we find that the grievant voluntarily resigned on March 13 and that she does not have access to the grievance procedure to initiate a grievance to challenge her separation from employment. Therefore, this dismissal grievance will be closed and will not proceed to a hearing.

EDR's rulings on access are final and nonappealable.¹⁶



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¹³ An email between Manager W and the agency's benefits coordinator appears to be somewhat inconsistent with this account. The email indicates that Manager F "told [the grievant] that she in fact was not terminated per say [sic] but given verbal counseling . . ." It also states that Manager F told the grievant that "if she still chose [sic] to leave she would need to resign" and that the grievant "choose [sic] the resign option." In light of the information provided to EDR by both the grievant and the agency, as well as the analysis above, we find that this email is not factually determinative in favor of either party.

¹⁴ See Va. Code § 2.2-1202.1(5); see also *Grievance Procedure Manual* § 2.3.

¹⁵ *Shuler*, 9 Va. App. at 151, 384 S.E.2d at 124.

¹⁶ Va. Code § 2.2-1202.1(5).