

Issue: Access to the grievance procedure: Ruling Date: February 6, 2015; Ruling No. 2015-4093; 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 Department of Behavioral Health and Developmental Services
Ruling Number 2015-4093
February 6, 2015

On January 9, 2015, the grievant submitted a dismissal grievance to the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”). Because the grievant had submitted a resignation prior to initiating her grievance, the grievant’s former employer, the Department of Behavioral Health and Developmental Services (the “agency”), challenges whether she has access to the grievance procedure to initiate this grievance. For the reasons set forth below, EDR concludes that the grievant does not have access to the grievance procedure and, therefore, the grievance does not qualify for a hearing.

FACTS

On December 12, 2014, the grievant’s supervisor and a representative from Human Resources met with the grievant. The purpose of the meeting was to give the grievant a due process notice advising her of the agency’s intent to issue a Group II Written Notice with termination. After the purpose of the meeting was verbally explained to the grievant, she asked about her options, including whether she could retire. She was advised that she could retire and was provided with a pen and a paper. The grievant then wrote a resignation note, which the agency accepted.¹ The grievant subsequently attempted to rescind her resignation, but the agency refused to reinstate her employment.

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, 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.”³ EDR has long held that once an employee’s voluntary resignation becomes effective, he or she is not covered by the

¹ The grievant states that she erroneously wrote “resign” in the letter rather than “retire” as she intended. As both words indicate the grievant’s intent to leave her state employment voluntarily, we will use the word “resign” in this ruling.

² Va. Code § 2.2-3001(A).

³ *Grievance Procedure Manual* § 2.3.

grievance procedure and accordingly may not initiate a grievance.⁴ In this case, the grievant initiated her dismissal grievance after submitting a resignation on December 12, 2014. Therefore, to have access to the grievance procedure, she must show that her resignation was involuntary.⁵

The voluntariness of an employee's resignation is presumed.⁶ 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*.⁷ 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. Thus, 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" ⁸ Based on EDR's review of the grievant's dismissal grievance submission, she has not raised any allegations that could fall under the misrepresentation theory. Therefore, only the duress or coercion theory will be addressed.

A separation can be viewed as involuntary if "it appears that the employer's conduct . . . effectively deprived the employee of free choice in the matter."⁹ "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 [s]he was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether [s]he was permitted to select the effective date of resignation."¹⁰

Cases that ordinarily implicate the *Stone* analysis involve situations where the employer presents the employee with the option that they can resign or be fired. In this case, the grievant's resignation arose before the agency had reached a final conclusion that the grievant would be fired. Even if the grievant perceived that she would be eventually terminated, that the choice facing an employee is resignation or discipline does not in itself demonstrate duress or coercion, unless the agency "actually lacked good cause to believe that grounds for termination existed."¹¹

[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

⁴ *E.g.*, EDR Ruling No. 2005-1043.

⁵ *E.g.*, EDR Ruling No. 2010-2510. 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 *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 (4th Cir. 1988).

⁸ *Id.* at 174 (citations omitted).

⁹ *Id.*

¹⁰ *Id.* (citation omitted)

¹¹ *Id.* (citations omitted).

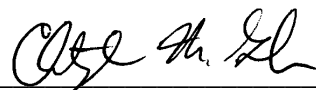
the threatened removal could not be substantiated, the threatened action by the agency is purely coercive.¹²

There is insufficient evidence here to indicate that this is such a case. 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.¹³

As to the other factors of whether the grievant understood her choice or had time to consider her options, we are not persuaded that the facts support finding the grievant's resignation was procured through duress or coercion. Although it appears the grievant made her resignation decision quickly and, perhaps, hastily, there is no indication that it was the agency's conduct that forced her immediate choice to resign.¹⁴ Similarly, we are unsure whether the grievant understood or had adequately considered her options. However, we again have reviewed nothing in the information presented by the grievant that suggests it was the agency's actions that led to any lack of understanding that may have resulted from her quick decision.

In consideration of this analysis, EDR cannot conclude that the grievant resigned involuntarily. While we understand the grievant's request, she elected to resign instead of challenging any termination that might have resulted from the agency's consideration of the allegations against her. The totality of the circumstances in this analysis indicates that the grievant's resignation was voluntary. As such, the grievant was not an employee of the Commonwealth of Virginia when she initiated this grievance and, thus, does not have access to the grievance procedure. Because the grievant did not have access to initiate the grievance, EDR will not process the grievance further and the file will be closed.

EDR's rulings on access are final and nonappealable.¹⁵



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¹² *Schultz v. U.S. Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987) (citations omitted); *see also, e.g., Staats v. U.S. Postal Serv.*, 99 F.3d 1120, 1124 (Fed. Cir. 1996) (“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)).

¹³ *See Stone*, 855 F.2d at 174.

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 (citations omitted).

¹⁵ Va. Code § 2.2-1202.1(5).