Issue: Access to the Grievance Procedure; Ruling Date: February 25, 2016; Ruling No. 2016-4303; 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 2016-4303
February 25, 2016

On February 9, 2016, the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) received a dismissal grievance initiated by the grievant to challenge her separation from employment. Because the grievant had submitted a resignation prior to initiating her grievance, the grievant's former employer, the Department of Behavioral Health & 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 January 25, 2016, the agency provided the grievant with a pre-disciplinary due process letter and memorandum indicating that a Group III Written Notice with termination was the recommended discipline for specified alleged misconduct. The grievant was given until January 26, 2016 to respond in writing to the charges if she chose to do so.

At a meeting on January 29, 2016, the grievant was given the Group III Written Notice, with termination, as recommended in the January 25 memorandum. The agency asserts that, during this meeting, the grievant stated that she did not want to tarnish her employment record and inquired about the possibility of resignation. When her supervisor agreed, the grievant handwrote a letter of resignation, effective the same day, January 29, 2016. The agency has confirmed that the grievant's employment record reflects "resignation" rather than "termination" and that the proposed Written Notice was never issued. However, the grievant submitted a dismissal grievance directly to EDR on February 9, 2016, challenging these actions and alleging that her decision to resign was made under duress.

DISCUSSION

The General Assembly has provided that "[u]nless exempted by law, all nonprobationary state employees shall be covered by the grievance procedure . . . ."[1] 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

[1] Va. Code § 2.2-3001(A).

employment with the Commonwealth prior to initiating the grievance."[2] EDR 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.[3] In this case, the grievant initiated her grievance after submitting a resignation letter on January 29, 2016, raising questions of access.

To have access to the grievance procedure to challenge her separation as a result of the resignation, the grievant must show that her resignation was involuntary[4] or that she was otherwise constructively discharged.[5] 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] There is no allegation that the grievant's resignation was procured by misrepresentation or deception or that she 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."[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 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."[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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[2] *Grievance Procedure Manual* § 2.3.
[3] *E.g.*, EDR Ruling No. 2005-1043.
[4] *E.g.*, EDR Ruling No. 2010-2510.
[5] 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] *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) (citations omitted).
[8] *Id.*
[9] *Id.* (citation omitted).
[10] *Id.* at 174-75 (citations omitted).
[11] 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

The grievant could have good arguments to support the position that the agency's contemplated disciplinary action was improper.[12] 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. 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]

Understanding of the Choice

Here, the grievant does not assert that she was unclear on the reasons she was presented with the proposed discipline. She was provided with a pre-disciplinary Recommendation for Written Notice that outlined the alleged misconduct. An attached letter further explained that disciplinary action was recommended and indicated that the grievant had twenty-four hours to respond to the charges against her. Further, the grievant attended a meeting on January 29, 2016 where she was provided with further opportunity to respond to the charges.

Therefore, the facts of this case indicate that the grievant, having been informed of the agency's intention to terminate her employment, decided to submit a resignation instead. She elected to secure a certain outcome, a voluntary resignation, rather than risk the unpredictable result of a grievance hearing to which she was automatically entitled under the grievance procedure[14] and DHRM Policy 1.60, *Standards of Conduct*. Accordingly, it appears the grievant understood the nature of the choice given. The grievant has not presented any other indication that she did not understand the nature of this choice.

Time to Decide

In this case, it appears that the agency allowed the grievant approximately four days in which to make a decision regarding the proposed discipline. The grievant had been notified of the issues surrounding the contemplated discipline by letter on January 25, 2016, upon which she indicated receipt by signature. She was provided with 24 hours in which to respond to the allegations against her and placed on administrative leave pending the agency's review of the matter. It appears the grievant did respond on January 26, 2016 to the agency's allegations; however, the agency proceeded to issue the proposed discipline to the grievant at a meeting on January 29, 2016. During that meeting, the grievant provided the agency with a letter of

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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)).

[12] The grievant has submitted additional documentation to EDR to support her position, which has been carefully reviewed. However, this ruling only addresses the question of access to the grievance procedure, not whether the agency's disciplinary action was appropriate.

[13] *See Stone*, 855 F.2d at 174.

[14] *See Grievance Procedure Manual* § 4.1(a).

resignation. "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."[15] We cannot, in this instance, find that the grievant was forced to make an immediate decision that would render her resignation involuntary. While the grievant may have been confronted with a difficult choice, the facts do not support a finding of involuntariness in view of the general presumption of a voluntary resignation.

Because EDR cannot conclude that the grievant resigned involuntarily, the grievant had voluntarily concluded her employment with the Commonwealth of Virginia when she initiated this grievance and, thus, did not have access to the grievance procedure.[16] For this reason, the grievance does not qualify for hearing.

EDR's access rulings are final and nonappealable.[17]

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[15] *Staats*, 99 F.3d at 1126 (citations omitted); *see also* Shealy v. Winston, 929 F.2d 1009, 1013 (4th Cir. 1991) (holding that one to two days after the initial meeting was a reasonable time in which to make a decision to resign); *Stone*, 855 F.2d at 177-78 (finding that, in 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); Herron v. Va. Commw. Univ., 366 F. Supp. 2d 355, 365-66 (E.D. Va. 2004) (holding that twenty-four hours was a reasonable time in which to decide); 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 a reasonable time to make a decision); *cf.* Wolford v. Angelone, 38 F. Supp. 2d 452, 459 (W.D. Va. 1999) (holding that it was unclear whether a resignation tendered on the same day as an interview with management was reasonable).

[16] *Grievance Procedure Manual* § 2.3.

[17] Va. Code § 2.2-1202.1(5).