Issue: Access to the Grievance Procedure; Ruling Date: March 23, 2016; Ruling No. 2016-4319; Agency: Department of Aging and Rehabilitative 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 for Aging and Rehabilitative Services
Ruling Number 2016-4319
March 23, 2016

On March 1, 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 for Aging and Rehabilitative 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 February 1, 2016, the agency provided the grievant with a pre-disciplinary due process memorandum indicating that termination for falsification of state records was being considered. The grievant was given until February 3, 2016 to respond in writing to the charges if she chose to do so. The grievant provided a written response to the due process notice on February 2, 2016. On February 8, 2016, the agency issued the grievant a Group III Written Notice with termination. The grievant signed the Written Notice form but then provided the agency with a resignation letter, also effective February 8, 2016. The agency accepted the grievant's resignation and did not thereafter enter the Written Notice into the state personnel records system. The grievant submitted a dismissal grievance to EDR on March 1, 2016. The agency argues that the grievant does not have access to the grievance procedure.

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 employment with the Commonwealth prior to initiating the grievance."[2] EDR has long held that

[1] Va. Code § 2.2-3001(A).
[2] *Grievance Procedure Manual* § 2.3.

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 effective February 8, 2016, thus 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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[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 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

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

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 due process memorandum that outlined the alleged misconduct. The memorandum explained that disciplinary action was possible and indicated that the grievant had approximately two days to respond to the charges against her. Further, the grievant submitted her resignation only after having had an opportunity to review and sign the Written Notice.

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[13] 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 a week 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 February 1, 2016. She was provided with approximately two days in which to respond to the allegations against her, and it appears the grievant did in fact respond on February 2, 2016. The agency elected to move forward with issuing the Written Notice on February 8, 2016, after which the grievant provided the agency with a letter of 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."[14] We cannot, in this instance, find that the grievant

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

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

[14] *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

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.[15] For this reason, the grievance does not qualify for hearing.

EDR's access rulings are final and nonappealable.[16]

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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).

[15] *Grievance Procedure Manual* § 2.3.

[16] Va. Code § 2.2-1202.1(5).