

Issue: Access to the Grievance Procedure; Ruling Date: June 10, 2016; Ruling No. 2016-4358; Agency: Virginia Commonwealth University; Outcome: Access Denied.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

ACCESS RULING

In the matter of Virginia Commonwealth University
Ruling Number 2016-4358
June 10, 2016

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether he has access to the grievance procedure to initiate his April 29, 2016 grievance with Virginia Commonwealth University (the “University”)

FACTS

The grievant was employed by the University as an administrative assistant. On April 2, 2016, the University provided the grievant with a pre-disciplinary due process notice indicating that it intended to issue him a Group II Written Notice for specific alleged misconduct, with termination as the recommended disciplinary action.¹ After the grievant provided a response, the University issued a Group II Written Notice with termination on April 7, 2016. The grievant contacted the University’s Human Resources department in an attempt to informally appeal the discipline. On or about April 18, 2016, at the suggestion of Human Resources, the grievant requested that University management allow him to resign in lieu of termination and asked for a letter of reference to aid him in obtaining future employment. The grievant received a response on April 27 that management would accept his resignation in lieu of termination and directed him to the Human Resources department for information about a letter of reference. At approximately 2:40 a.m. on April 28, the grievant submitted a letter of resignation by email, stating that his separation from employment was effective as of April 7, 2016 (i.e., the date the Written Notice was issued).² University management replied that his resignation had been received and accepted at approximately 3:38 p.m. on April 28.³

The grievant asserts that, after he received the 3:38 p.m. email from University management on April 28, 2016, he met with a member of the University’s Human Resources department and was told that he could “still proceed with a grievance” to dispute the Written

¹ It appears that the grievant had a prior active Group II Written Notice at the time the due process notice was issued. The accumulation of two active Group II Written Notices would have been sufficient to warrant termination. *See* DHRM Policy 1.60, *Standards of Conduct* § B(2)(b) (stating that the issuance of “[a] second active Group II Notice normally should result in termination”).

² The grievant’s letter of resignation is dated April 27, 2016.

³ According to the University, the grievant’s employment record with the University indicates that he resigned in lieu of termination on April 7, 2016.

Notice, but that he would not be able to challenge his separation from employment. Based on this information, the grievant submitted a grievance to the University challenging the issuance of the Group II Written Notice on April 29. Upon receiving the grievance, the University informed the grievant that he did not have access to the grievance procedure because he had voluntarily concluded his employment prior to initiating the grievance. The grievant now appeals that determination to EDR, alleging that he chose to resign based on the representation by the Human Resources department that he would still be allowed to grieve the Written Notice if he resigned in lieu of termination.

DISCUSSION

The General Assembly has provided that “[u]nless exempted by law, all nonprobationary state employees shall be covered by the grievance procedure”⁴ 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.”⁵ 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.⁶ In this case, the grievant initiated his grievance after submitting a resignation letter date April 27, 2016 and effective as of April 7, 2016, thus raising questions of access.

To have access to the grievance procedure to challenge the Written Notice, the grievant must show that his resignation was involuntary⁷ or that he was otherwise constructively discharged.⁸ 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.⁹ 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.”¹⁰ Although the grievant asserts that he “submitted [his] resignation under duress” because he had been terminated and requested the opportunity to resign in lieu of termination at the suggestion of the University’s Human Resources department, these allegations are not sufficient to support a claim that the grievant’s resignation was forced by duress or coercion.¹¹ As a result, this ruling will

⁴ Va. Code § 2.2-3001(A).

⁵ *Grievance Procedure Manual* § 2.3.

⁶ *E.g.*, EDR Ruling No. 2005-1043.

⁷ *E.g.*, EDR Ruling No. 2010-2510.

⁸ 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.

⁹ *See* *Staats v. U.S. Postal Serv.*, 99 F.3d 1120, 1123-24 (Fed. Cir. 1996).

¹⁰ *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 174 (4th Cir. 1988) (citations omitted).

¹¹ 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. *Stone*, 855 F.2d at 174. “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.” *Id.* (citation omitted).

address only the question of whether the University procured the grievant's resignation by misrepresentation or deceit.

“Under the ‘misrepresentation’ theory, a resignation may be found involuntary if induced by an employee’s reasonable reliance upon an employer’s misrepresentation of a material fact concerning the resignation.”¹² “A misrepresentation is material if it concerns either the consequences of the resignation, [] or the alternative to resignation.”¹³ A resignation is involuntary if it is obtained by agency misinformation.¹⁴ “[A]n objective test applies to such situations,” and “a court in applying this test will not inquire into the subjective perceptions of the employee or the subjective intentions of the agency.”¹⁵ “[T]here is no requirement that an employee be intentionally deceived about his employment options, it being sufficient that the employee shows that a reasonable person would have been misled by the agency’s statements.”¹⁶ “The misleading information can be negligently or even innocently provided.”¹⁷ “[I]f the employee reasonably relies on the misinformation to his detriment, his resignation is considered involuntary.”¹⁸

Based on a review of the information submitted by the parties, EDR concludes that the grievant’s separation is properly characterized as a voluntary resignation. As stated above, the grievant submitted a resignation letter to the University at approximately 2:40 a.m. on April 28, 2016. The University acknowledged its acceptance of his resignation at approximately 3:38 p.m. on April 28. The grievant alleges that, after his resignation had been submitted and accepted, he was informed by the University’s Human Resources department that he could submit his resignation and grieve the underlying Written Notice, claiming that this information influenced his decision to resign. Even assuming the grievant’s assertion regarding the information given to him by Human Resources is accurate, he has presented no information to show that the University misrepresented any material fact regarding the impact of his decision to resign *before* he chose to resign. Any misrepresentation by the University regarding the grievant’s ability to grieve the Written Notice, if such misrepresentation in fact occurred, took place *after* the grievant had submitted his resignation and the University had acknowledged acceptance of it.

EDR has long held that it is incumbent upon each employee to know his or her responsibilities under the grievance procedure.¹⁹ Any lack of understanding on the grievant’s part about the impact of his resignation on his grievance rights when it was submitted does not demonstrate that he lacked free choice in making the decision to resign or otherwise render his resignation involuntary. While we understand the grievant’s desire to dispute the Written Notice and his perception of the choice between two unpleasant alternatives (resignation and

¹² *Id.* (citation omitted).

¹³ *Id.* (citations omitted).

¹⁴ *Covington v. Dept. of Health and Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984).

¹⁵ *Id.* (quoting *Scharf v. Dept. of the Air Force*, 710 F.2d. 1572, 1575 (Fed. Cir. 1983) (internal quotation marks omitted)).

¹⁶ *Id.* (citation and internal quotation marks omitted).

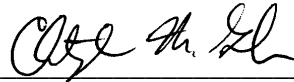
¹⁷ *Id.*

¹⁸ *Id.* (“[W]hether the employee made an informed choice is the touchstone of our analysis.”).

¹⁹ *See, e.g.*, EDR Ruling Nos. 2006-1349, 2006-1350; EDR Ruling No. 2002-159; EDR Ruling No. 2002-057.

termination), the totality of the circumstances in this case indicate that the grievant's decision to resign was voluntary. As such, the grievant was not an employee of the Commonwealth of Virginia when he initiated his grievance and, thus, does not have access to the grievance procedure. The parties are advised that the grievance should be marked as concluded and no further action is required.

EDR's rulings on access are final and nonappealable.²⁰



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²⁰ Va. Code § 2.2-1202.1(5).