Issue: Assess to the Grievance Procedure; Ruling Date: August 28, 2013; Ruling No. 2014-3699; Agency: Department of Corrections; 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 Corrections
Ruling Number 2014-3699
August 28, 2013

On August 20, 2013, the grievant submitted a dismissal grievance to the Office of Employment Dispute Resolution (EDR) and the Department of Human Resource Management. The grievance seeks to have her resignation from employment removed. Upon being notified of the filing of this grievance, the grievant's former employer, the Department of Corrections (the agency), raised the issue of whether the grievant 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 to submit her dismissal grievance.

FACTS

On July 23, 2013, the grievant was told she had to meet with the warden. The grievant states she was informed it was about a different topic than what ended up being the subject of the meeting. In short, the grievant did not know what the meeting was about until she arrived. At the meeting, she was informed that the agency was investigating her for alleged fraternization with an inmate. The grievant maintains she did not participate in any such activity. The grievant was informed that she was being suspended pending the completion of the agency's investigation into the allegations. The grievant states she felt that she was already being judged as guilty.

According to the grievant, an investigator, who was at the meeting and also an acquaintance of the grievant outside work, told her that if the investigation went forward, she was going to be fired. The investigator told her that if she was fired, she would not be able to get another job and would not receive "her money."[1] The grievant then informed the warden that she wanted to resign. Paper was provided to the grievant to write a resignation letter, which was accepted.

On August 20, 2013, the grievant submitted her dismissal grievance to have her resignation removed so that she could continue employment with the Commonwealth.[2] Due to the grievant's resignation, the agency disputes that the grievant has access to the grievance procedure to file her grievance.

[1] It is not clear to what "money" the investigator was referring. The grievant states she did not know either.
[2] Although a letter received by the grievant indicated that the agency has noted that the grievant resigned in lieu of termination and was not eligible for rehire with the "state," the agency only determined that the grievant was ineligible for rehire by the agency, not all state agencies.

DISCUSSION

The General Assembly has provided that "[u]nless exempted by law, all nonprobationary state employees shall be covered by the grievance procedure."[3] 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."[4] EDR has long held that once an employee's voluntary resignation becomes effective, she is not covered by the grievance procedure and accordingly may not initiate a grievance.[5] In this case, the employee initiated her dismissal grievance after submitting a resignation on July 23, 2013. Therefore, to have access to the grievance procedure, she must show that her resignation was involuntary.[6]

The voluntariness of an employee's resignation is presumed.[7] 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.*[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. 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."[9] Based on EDR's review of the submitted documentation and information gathered in its investigation for this ruling, the grievant has not raised any allegations 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.[10] "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 [she] was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether [she] was permitted to select the effective date of resignation."[11]

Cases that ordinarily implicate the *Stone* analysis involve situations where the employer presents the employee with the option that she can resign or be fired. In this case, the grievant's resignation arose before it had even been determined that the grievant was going to be terminated. The July 23 meeting was to notify the grievant that she was being suspended pending the investigation into her alleged misconduct. It appears that based on information she was told by an investigator at the meeting, the grievant would be facing termination at the end of

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[3] Va. Code § 2.2-3001(A).
[4] *Grievance Procedure Manual* § 2.3.
[5] *E.g.*, EDR Ruling No. 2005-1043.
[6] *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.
[7] *See* Staats v. U.S. Postal Serv., 99 F.3d 1120, 1123-24 (Fed. Cir. 1996).
[8] Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167 (4th Cir. 1988).
[9] *Id.* at 174.
[10] *Id.*
[11] *Id.*

the investigation. Even so, 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."[12]

> "[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."[13]

Given that the charge being investigated was fraternization, a Group III offense, this does not appear to be a case where the agency knew the potential disciplinary action could not be supported. 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.[14]

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.[15] 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 requests, she elected to resign instead of challenging any termination that might have resulted from the agency's investigation. 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.

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[12] *Id.*

[13] Schultz v. U.S. Navy, 810 F.2d 1133, 1136 (Fed. Cir. 1987); *see also, e.g., 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 Merit Systems Protection 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)).

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

[15] "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.

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

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[16] Va. Code § 2.2-1202.1(5).