

Issue: Access to the Grievance Procedure; Ruling Date: September 24, 2013;
Ruling No. 2014-3711; Agency: Virginia Department of Health; Outcome: Access
Granted in Part, and Denied in Part.



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

ACCESS RULING

In the matter of the Virginia Department of Health
Ruling Number 2014-3711
September 24, 2013

On September 4, 2013, the grievant submitted an expedited 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 Virginia Department of Health (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 has access to the grievance procedure to the extent described below.

FACTS

On August 23 and 26, 2013, the grievant was allegedly told by a manager to accept applications from certain vendors for an upcoming event past the normal deadline. The grievant disputed the requests by the manager as inappropriate because, among other reasons, many other vendors who submitted late applications had been turned away. The grievant was ultimately told to accept applications from the specific vendors identified by the manager and to contact those who had been turned away to accept their applications as well. According to her grievance, the grievant asked to be removed from her involvement in the event because of her disagreement with how it was handled. Her request was apparently granted.

The next Friday, August 30, 2013, the grievant sent an e-mail to many individuals, including those in management, indicating her intent to end her employment with the agency.¹ The grievant was informed on September 4th (the following Tuesday, after a Monday holiday) that the agency accepted her resignation and made it effective August 30th. The grievant was surprised at this, apparently believing she would work a two-week notice period. The grievant submitted her expedited grievance directly to EDR challenging these actions.

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

¹ Additional discussion as to the contents of this e-mail is included below.

² Va. Code § 2.2-3001(A).

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 grievance procedure and accordingly may not initiate a grievance.⁴ In this case, the grievant initiated her grievance after submitting a resignation on August 30, 2013, raising questions of access. However, the circumstances of the grievant’s resignation present at least two separate issues of access: 1) does she have access to grieve her resignation and ultimate removal from employment; and 2) does she have access to raise issues concerning the effective date of the resignation?

To have access to the grievance procedure to challenge her separation as a result of the resignation, she must show that her resignation was involuntary⁵ or that she was otherwise constructively discharged.⁶ The voluntariness of an employee’s resignation is presumed.⁷ EDR has reviewed nothing in the materials presented by the grievant that would rebut this presumption and show that her resignation was not the result of free and informed choice.⁸ Rather, the posture of this case is more appropriately reviewed as one of constructive discharge.

To prove constructive discharge, an employee must at the outset show that the employer “deliberately made her working conditions intolerable in an effort to induce her to quit.”⁹ The employee must therefore demonstrate: (1) that the employer’s actions were deliberate, and (2) that working conditions were intolerable.¹⁰ An employer’s actions are deliberate only if they “were intended by the employer as an effort to force the [employee] to quit.”¹¹ Whether an employment environment is intolerable is determined from the objective perspective of a reasonable person.¹²

Based upon a review of the situation as presented in her grievance, the grievant has not provided sufficient indication that management deliberately made her working conditions intolerable in an effort to induce her to quit. Moreover, assuming for purposes of this ruling only the truth of the grievant’s allegations, the alleged conduct in this case is not so extreme as to make the grievant’s working conditions objectively intolerable. “[D]issatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign.”¹³ While the grievant may have

³ *Grievance Procedure Manual* § 2.3.

⁴ *E.g.*, EDR Ruling No. 2005-1043.

⁵ *E.g.*, EDR Ruling No. 2010-2510.

⁶ 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 (Fed. Cir. 1996).

⁸ *See* *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 174 (4th Cir. 1988).

⁹ *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 272 (4th Cir. 2001) (internal quotation marks omitted).

¹⁰ *See* *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 186-87 (4th Cir. 2004); *Munday v. Waste Mgmt. of N. Am., Inc.*, 126 F.3d 239, 244 (4th Cir. 1997).

¹¹ *Matvia*, 259 F.3d at 272.

¹² *See* *Williams v. Giant Food Inc.*, 370 F.3d 423, 434 (4th Cir. 2004).

¹³ *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 378 (4th Cir. 2004)(citations omitted); *see also*, *Williams* 370 F.3d at 434 (not intolerable working condition where “supervisors yelled at [employee], told her she was a poor

perceived the situation as an ethical dilemma, EDR has not reviewed anything that would suggest the grievant's only choice was to resign. Thus, the actions here cannot support a claim of constructive discharge. The grievant does not have access to the grievance procedure to challenge her ultimate separation from state employment. The analysis does not end here, however. Issues still remain as to the appropriate effective date of the grievant's resignation.

DHRM Policy 1.70 defines resignation as "an employee's voluntary separation from state service."¹⁴ Thus, it is the employee's voluntary act that severs him/her from employment through resignation. Therefore, for example, had the grievant clearly indicated that she intended to resign effective two weeks from the date of her e-mail, the agency could not make her resignation retroactive¹⁵ and separate her from employment on the date of the e-mail without a basis to do so.¹⁶ In this case, the agency appears to have seized on the grievant's lack of clarity in her August 30th e-mail to make her resignation effective immediately rather than after an offered two-week notice period.

At a minimum, the grievant's e-mail is susceptible to multiple interpretations and there are disputed facts as to its meaning. The e-mail does not contain an effective date, but does include the following sentence: "I will gladly work a two week notice" We can understand the agency's perspective to a certain degree in that the grievant's e-mail is less than clear and contains no specifically identified effective date of her resignation. However, given that it is the employee's voluntary act that separates her from employment, it is important to consider that the terms of the grievant's e-mail cannot be read to indicate a clear desire to quit her job immediately.¹⁷ Therefore, the grievant has at least raised facts sufficient to call into question whether the agency had grounds to separate her on August 30th without a clearly articulated intent to resign on that date. Accordingly, EDR will grant access for the grievant to challenge this aspect of the situation only.

Going forward, this grievance cannot proceed as a dismissal grievance because even the allegedly premature separation on August 30th would not be a separation based on discipline or unsatisfactory performance.¹⁸ This grievance must be processed as an expedited grievance (as it was filed) and be redirected back to the agency and the appropriate second step-respondent.¹⁹ Further, the parties must understand that reinstatement is not available as relief for the grievant (unless the agency would choose to allow the grievant to rescind her resignation²⁰). She

manager, and gave her poor [performance] evaluations, chastised her in front of customers, and once required her to work with an injured back").

¹⁴ DHRM Policy 1.70, *Termination/Separation from State Service*.

¹⁵ While an agency could not change the effective date of an employee's resignation in this way, the agency could certainly require that the grievant not come to work for the duration of the two-week notice period while the grievant was still technically employed.

¹⁶ There is no indication in this case, and the agency does not take the position, that there were other grounds, such as a disciplinary basis, on which to terminate the grievant's employment on August 30th.

¹⁷ Indeed, the facts surrounding these events support such a conclusion. The grievant worked the entire day on August 30th, after sending her resignation e-mail, and contacted her supervisor on the following Monday and Tuesday for follow-up.

¹⁸ See *Grievance Procedure Manual* § 2.5.

¹⁹ *Grievance Procedure Manual* § 3.4.

²⁰ See DHRM Policy 1.70.

ultimately submitted a voluntary resignation and EDR has reviewed nothing that would indicate her resignation should be undone. The only questions remain as to the effective date of her resignation and, if it should be altered, any appropriate back pay and benefits due for no more than a two-week period following August 30th.²¹

If the grievant wishes to proceed with her grievance, she must resubmit the grievance paperwork to the appropriate second step-respondent at the agency **within five workdays of receipt of this ruling**. Upon receipt, the agency must process this grievance as an expedited grievance to the extent described above. EDR's rulings on access and compliance are final and nonappealable.²²



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²¹ If the parties come to an agreement on any salary and/or benefits due for this two-week notice period, or if the agency otherwise fully compensates the grievant for that period during the pendency of the grievance, any adverse effect of this situation would appear to be ameliorated and, thus, any basis on which the grievance could proceed to hearing could be moot.

²² Va. Code § 2.2-1202.1(5).