Issue: Access to the Grievance Procedure; Ruling Date: December 16, 2014; Ruling No. 2015-4058; Agency: Virginia Tech; Outcome: Access Denied.

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

ACCESS RULING

In the matter of Virginia Polytechnic Institute & State University
Ruling Number 2015-4058
December 16, 2014

On November 19, 2014, the grievant submitted a dismissal 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 his grievance, the grievant's former employer, Virginia Polytechnic Institute & State University (the University or the agency), challenges whether he 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 October 20, 2014, the University's Director of Housing and Residence Life provided the grievant with a pre-disciplinary due process letter indicating that a Group III Written Notice with termination was the recommended discipline for specified alleged misconduct. The letter requested that the grievant attend a meeting the following day, October 21, in order to provide the Director with any information that he wished her to consider before rendering a final determination.

At the meeting on October 21, 2014, the grievant was provided with the opportunity to respond to various allegations raised against him in the due process letter. The grievant was told that a decision regarding the proposed discipline would follow by October 23, and a follow-up meeting was subsequently established for that day. Prior to the meeting on October 23, the grievant provided the Director with a letter of resignation dated October 23, 2014. The grievant indicates that he proposed January 9, 2015, as the last day of his employment; however, the University refused to allow him to work until this date and advised him to leave the premises on October 23. In his letter of resignation, the grievant stated that his last day of employment would be October 23, 2014.[1] However, the grievant subsequently submitted a dismissal grievance directly to EDR challenging these actions and alleging that his resignation was forced.

[1] Based upon the grievant's language in this letter, EDR is presuming that his intended effective date of resignation was October 23, 2014.

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 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 his grievance after submitting a resignation on October 23, 2014, raising questions of access.

To have access to the grievance procedure to challenge his separation as a result of the resignation, the grievant must show that his resignation was involuntary[5] or that he was otherwise constructively discharged.[6] 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.[7] 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."[8] There is no allegation that the grievant's resignation was procured by misrepresentation or deception or that he 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."[9] "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."[10]

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."[11] "[W]here an employee is faced merely with the

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[2] Va. Code § 2.2-3001(A).
[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, 1123-24 (Fed. Cir. 1996).
[8] Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 174 (4th Cir. 1988) (citations omitted).
[9] *Id.*
[10] *Id.* (citation omitted).
[11] *Id.* at 174-75 (citations omitted).

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."[12]

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 his choice as between two unpleasant alternatives (resignation or termination), that alone does not indicate that his resignation was induced by duress or coercion.[13]

Understanding of the Choice

Here, the grievant does not assert that he was unclear on the reasons he was presented with the proposed discipline. He was provided with a detailed pre-disciplinary due process letter that outlined the aspects of his work performance that his Director found unsatisfactory. This letter also indicated that disciplinary action was recommended. Further, the grievant attended a meeting on October 21, 2014 where he was provided with an 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 his employment, decided to submit a resignation instead. He elected to secure a certain outcome, a voluntary resignation, rather than risk the unpredictable result of a grievance hearing to which he 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 he did not understand the nature of this choice.

Time to Decide/Ability to Determine Effective Date

In this case, it appears that the University allowed the grievant approximately three days in which to make a decision regarding the proposed discipline. The grievant had been notified of

[12] 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 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)).

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

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

the issues surrounding the contemplated discipline by memo on October 20, 2014, and in a meeting on October 21. He was told that the final determination regarding his termination would be provided to him on October 23. "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 his resignation involuntary. Further, though the grievant may not have been permitted to determine the effective date of his resignation, that fact alone does not suggest that the agency procured the grievant's resignation without his exercise of free choice. Thus, while this was 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 his employment with the Commonwealth of Virginia when he 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]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[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).