

Issue: Access to the Grievance Procedure; Ruling Date: November 9, 2015; Ruling No. 2016-4245; Agency: University of Virginia; Outcome: Access Denied.



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

**ACCESS RULING**

In the matter of the University of Virginia  
Ruling Number 2016-4245  
November 9, 2015

On October 5, 2015, the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) received a dismissal grievance submitted by the grievant. The grievant’s former employer, the University of Virginia (the “University”), alleges that the grievant voluntarily resigned prior to initiating the grievance and has requested a ruling from EDR on whether he has access to the grievance procedure to challenge his separation from employment. For the reasons set forth below, EDR concludes that the grievant does not have access to the grievance process to initiate the grievance.

**FACTS**

The grievant was employed in the University’s Facilities Management department. In August and September 2015, the grievant was involved in an incident relating to the loss of a “Master Key that could open every door in the [University’s] housing inventory . . . .” According to the University, the grievant apparently found the key and later admitted to University management that he “pocketed the key for weeks instead of turning it in,” “[lied] multiple times about the circumstances around finding the key, and . . . accused a manager of racial discrimination” in connection with the University’s investigation. The University determined that the grievant’s conduct warranted a Group III Written Notice for failure to follow policy and disruptive behavior. The University also decided to offer the grievant the opportunity to resign in lieu of termination.

On September 8, 2015, University management held a pre-determination meeting with the grievant to discuss the University’s intention to issue disciplinary action and offer the grievant the opportunity to resign. The grievant, the grievant’s supervisor, and two other managers were present. It was explained to the grievant that the University planned to issue a Group III Written Notice with termination and that the grievant also had the choice to resign from the University, in which case the University’s records would show that he voluntarily concluded his employment. The grievant was also informed that, if he chose to resign, he would not have access to the grievance procedure to challenge his separation. The grievant “quickly ended the conversation” by stating that he wanted to resign and signed a resignation form that had been prepared by the University in advance of the meeting.

On or about October 5, 2015, the grievant submitted a dismissal grievance to EDR seeking reinstatement to his former position and alleging that his resignation was involuntary.

## DISCUSSION

The General Assembly has provided that “[u]nless exempted by law, all nonprobationary state employees shall be covered by the grievance procedure . . . .”<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup> In this case, the grievant initiated his grievance after submitting a resignation on September 8, 2015, 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<sup>4</sup> or that he was otherwise constructively discharged.<sup>5</sup> 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.<sup>6</sup> 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.”<sup>7</sup> 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 will be addressed in 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.”<sup>8</sup> “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.”<sup>9</sup>

Cases that ordinarily implicate the *Stone* analysis involve situations where the employer presents the employee with the option that they can resign or be fired. In this case, the grievant resigned before the University had presented him with a formal due process notice advising him of its intent to take disciplinary action. However, the University had indicated that it intended to issue a Group III Written Notice with termination, and advised the grievant of that decision at the September 8, 2015 meeting. That the choice facing an employee is resignation or discipline does

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<sup>1</sup> Va. Code § 2.2-3001(A).

<sup>2</sup> *Grievance Procedure Manual* § 2.3.

<sup>3</sup> *E.g.*, EDR Ruling No. 2005-1043.

<sup>4</sup> *E.g.*, EDR Ruling No. 2010-2510.

<sup>5</sup> 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.

<sup>6</sup> *See* *Staats v. U.S. Postal Serv.*, 99 F.3d 1120, 1123-24 (Fed. Cir. 1996).

<sup>7</sup> *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 174 (4th Cir. 1988) (citations omitted).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* (citation omitted).

not in itself demonstrate duress or coercion, unless the agency “actually lacked good cause to believe that grounds for termination existed.”<sup>10</sup>

[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.<sup>11</sup>

Some of the information provided by the University to support its position that the contemplated disciplinary action was appropriate could be troubling. In particular, the University asserts that the grievant admitted to falsely “accus[ing] a manager of racial discrimination” during the investigation, and that, in part, the disciplinary action was intended to address this alleged misconduct. It is unclear, however, whether the grievant acknowledged to the University that his complaint of discrimination was false or the circumstances under which any such acknowledgment may have occurred. Indeed, the grievant asserts in the dismissal grievance submitted to EDR that the University’s actions were discriminatory and claims that he was the target of the investigation because of his race.

Employers are prohibited from “discharg[ing] any individual . . . because of such individual’s race, color, religion, sex, or national origin” by Title VII of the Civil Rights Act of 1964.<sup>12</sup> Title VII further provides that an employer may not retaliate against an employee because he has opposed discrimination or engaged in other protected activity.<sup>13</sup> Though the University may have believed the grievant complained of discrimination as a “diversionary tactic” to protect himself from the consequences of potential misconduct, he engaged in protected activity by making of claim of race-based discrimination.<sup>14</sup> It is, at the very least, questionable whether the grievant’s complaint of discrimination could have been a valid basis for the issuance of discipline.

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<sup>10</sup> *Id.* at 174 (citations omitted).

<sup>11</sup> *Schultz v. U.S. Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987) (citations omitted); *see also, e.g., Staats v. U.S. Postal Serv.*, 99 F.3d 1120, 1124 (Fed. Cir. 1996) (“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)).

<sup>12</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>13</sup> 42 U.S.C. § 2000e-3(a). Under the grievance procedure, protected activity consists of “participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.” *Grievance Procedure Manual* § 4.1(b)(4); *see Va. Code* § 2.2-3004(A).

<sup>14</sup> For purposes of this ruling only, EDR assumes that the grievant’s allegations of discrimination were reasonable and made in good faith.

Even if we exclude the University's potentially improper consideration of the grievant's complaint of discrimination, however, it is at least arguable that the other acts of misconduct cited by the University would have been sufficient to support the issuance of a Group III Written Notice with termination. While the University's stated bases for the issuance of disciplinary action (failure to follow policy and disruptive behavior) would not, on their own, appear to warrant a Group III Written Notice,<sup>15</sup> the University may have had justifiable reasons to elevate the level of the discipline if the grievant's actions had a "unique impact . . . on the agency" and if "the potential consequences of the . . . misconduct substantially exceeded agency norms."<sup>16</sup> To support that position, the University noted that the grievant's "actions, especially during the investigatory period, during which he repeatedly gave false testimony, destroyed his credibility within the department," that "[c]redibility is an important component of the position that he held," and that the "key that he found . . . granted him unauthorized access to all of the student dormitory rooms" and thus constituted a safety risk. Accordingly, considering the totality of the circumstances, this does not appear to be a case where the agency *knew* that its ultimate 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.<sup>17</sup>

As to the other factors of whether the grievant understood his choice or had time to consider his 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 his decision to resign quickly and, perhaps, hastily, there is no indication that it was the University's conduct that forced his immediate choice to resign.<sup>18</sup> Similarly, the University's choice to prepare a resignation form in advance of the meeting could be construed as a limitation on the grievant's ability to select the effective date of his resignation. The University has indicated that it did so to "expedite and simplify a potentially awkward and unpleased process" if the grievant chose to resign immediately, but that he "would not have seen the dated form had he indicated an interest in further thinking about his decision to resign." Under these circumstances, EDR cannot conclude that the University's actions prevented the grievant from selecting the effective date of his resignation. Though we are unsure whether the grievant fully understood or had adequately considered his options, it appears that University management provided him with sufficient information about the nature of the choice available to him, and the grievant has presented nothing that would the University's actions led to any lack of understanding that may have caused his quick decision.

In consideration of this analysis, EDR cannot conclude that the grievant resigned involuntarily. While we understand the grievant's request, he elected to resign instead of challenging any termination that might have resulted from the agency's consideration of the

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<sup>15</sup> DHRM Policy 1.60, *Standards of Conduct*, Attachment A (classifying disruptive behavior as a Group I offense and failure to follow policy as a Group II offense).

<sup>16</sup> *Id.* § B(2).

<sup>17</sup> *See Stone*, 855 F.2d at 174.

<sup>18</sup> "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 (citations omitted).

allegations against him. 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 he 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.

EDR's rulings on access are final and nonappealable.<sup>19</sup>



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<sup>19</sup> Va. Code § 2.2-1202.1(5).