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ACCESS RULING

In the matter of the Department of Corrections
Ruling Number 2020-4985
September 23, 2019

On September 15, 2019, the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management[1] received a dismissal grievance submitted by the grievant. The grievant's former employer, the Department of Corrections (the "agency"), 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 this grievance.

FACTS

On August 17 and August 19, 2019, the grievant was allegedly observed sleeping during work hours by a supervisor at the facility where he worked. According to the supervisor's account of the two incidents, the grievant admitted to sleeping when confronted. After receiving reports from the supervisor about the incidents, a Manager at the facility instructed the grievant to return to the facility after the conclusion of his shift on August 19 for a meeting. The Manager and two other agency employees were present for the meeting with the grievant. At the meeting, the Manager questioned the grievant about the incidents. At the conclusion of the meeting, the grievant submitted a handwritten resignation letter stating, "I [grievant] resign from [facility]." The letter is signed by the grievant and dated August 19, 2019. The grievant subsequently contacted the facility on August 20, asking to rescind his resignation and alleging that he had not received due process prior to resigning. The agency declined the grievant's request to rescind his resignation.

On September 15, 2019, the grievant submitted a dismissal grievance directly to EDR, alleging that he was "forced to resign."[2] The agency has requested an access ruling from EDR,

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

[2] The grievant also claims that the agency did not provide him with adequate due process pursuant to the Correctional Officer Procedural Guarantee Act ("COPGA"). *See* Va. Code §§ 9.1-508 through 9.1-512. EDR cannot

arguing that the grievant voluntarily resigned from employment and does not have access to the grievance procedure to file the dismissal grievance.

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, he or she is not covered by the grievance procedure and accordingly may not initiate a grievance.[5] In this case, the grievant asserts that he was forced to resign by agency management and initiated the grievance at issue here to challenge his separation. The agency asserts that the grievant voluntarily resigned on August 19, 2019 and, therefore, he does not have access to the grievance procedure.

To have access to the grievance procedure to challenge his separation, the grievant must show that his resignation was involuntary[6] or that he was otherwise constructively discharged.[7] 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.[8] 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."[9]

"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."[10] "A misrepresentation is material if it concerns either the consequences of the resignation, [] or the alternative to resignation."[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."[12] "Factors to be considered

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address that allegation in this ruling as a matter of whether the grievant has access to the state employee grievance procedure. Whether the grievant received due process prior to his separation from employment is not material to EDR's analysis of whether his resignation was voluntary or involuntary. This ruling does not address whether there may be some other legal or equitable remedy available to the grievant in relation to his claims regarding the COPGA.

[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.

[7] 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. Constructive discharge occurs when "an employer deliberately makes an employee's working conditions intolerable and thereby forces [her] to quit [her] job." Bristow v. Daily Press, Inc. 770 F.2d 1251, 1255 (4th Cir. 1985) (internal citations omitted). Here, no evidence suggests that the grievant resigned in order to avoid intolerable working conditions, rather than to avoid dismissal for cause.

[8] *See* Jenkins v. Merit Sys. Prot. Bd., 911 F.3d 1370, 1375 (Fed. Cir. 2019) (citing Staats v. U.S. Postal Serv., 99 F.3d 1120, 1123-24 (Fed. Cir. 1996)).

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

[10] *Id.* (citation omitted).

[11] *Id.* (citations omitted).

[12] *Id.*

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."[13]

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 agency had presented him with a formal due process notice advising him of its intent to take disciplinary action. However, there does not appear to be a dispute between the parties that the Manager told the grievant the agency was considering issuing some level of disciplinary action, up to and potentially including termination, at the meeting on August 19, 2019. 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."[14]

> [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.[15]

In this case, it is at least arguable that the alleged misconduct reported to the Manager by the Supervisor – that the grievant was observed sleeping during work hours on two occasions – would have been sufficient to support the issuance of disciplinary action. Under DHRM Policy 1.60, *Standards of Conduct*, "sleeping during work hours" is specifically identified as a Group III offense,[16] and the first occurrence of a Group III offense "normally should warrant termination."[17] 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 this resignation was induced by duress or coercion.[18]

As to the other factors of whether the grievant understood his choice and its consequences or had time to consider his options, EDR is not persuaded that the facts support a conclusion that the grievant's resignation was procured through misrepresentation, duress, or coercion. According to the grievant, the Manager told him at the August 19, 2019 meeting that

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[13] *Id.* (citation omitted).
[14] *Id.* (citations omitted).
[15] 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)).
[16] DHRM Policy 1.60, *Standards of Conduct*, Attachment A.
[17] *Id.* § B(2)(c).
[18] *See Stone*, 855 F.2d at 174.

he could either resign and the Manager would rehire him at the facility, or he would be terminated. The grievant further argues that the Manager and the two other employees at the meeting "gave [him] a blank paper and told [him] what to write as a resignation letter." If true, these allegations could support a conclusion that the grievant was misled by agency management about the nature of his choice and/or was not given a reasonable time to make that choice.[19] On the other hand, EDR, as factfinder for the issue of access, cannot conclude that the grievant was in fact forced to resign or induced to do so through his reasonable reliance on an agency misrepresentation. It appears that the first time the grievant asserted that the Manager offered to rehire him if he resigned was in his dismissal grievance submission to EDR. In an August 20 email to the agency seeking to rescind his resignation, the grievant explained that he felt "[p]ressure to resign or [be] terminat[ed]" and did not receive due process, but did not claim that any of the participants in the meeting misled him into resigning or otherwise engaged in deceptive conduct. In addition, both the Manager's written account of the meeting, as well as notes taken by one of the other employees who was present, tend to show that the grievant was not asked to choose immediately between resignation or termination; rather, he chose to resign voluntarily rather than proceed through the disciplinary process. Finally, the grievant has not argued that he did not understand why the agency was considering issuing disciplinary action, nor does he appear to deny that he actually engaged in the behavior described to him at the meeting (i.e., sleeping during work hours).

In summary, and although it is unclear whether the grievant subjectively understood the consequences of his decision or had in fact fully considered the options available to him, EDR cannot conclude under these circumstances that the agency engaged in conduct that forced his immediate choice to resign or otherwise deprived him of free choice in resigning from employment with the agency.[20] In consideration of this analysis, EDR finds that the facts in this case do not support a finding of involuntariness in view of the general presumption of a voluntary resignation. Having considered the totality of the circumstances in this case, the grievant's separation is properly characterized as a voluntary resignation. As such, the grievant was not an employee of the Commonwealth of Virginia when he initiated his dismissal grievance and, thus, does not have access to the grievance procedure. As such, the dismissal grievance will not proceed to a hearing and EDR's file will be closed.

EDR's rulings on access are final and nonappealable.[21]

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[19] *See, e.g.*, EDR Ruling No. 2010-2510.
[20] "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). Here, as explained above, EDR finds that the agency did not demand an immediate decision by the grievant.
[21] Va. Code § 2.2-1202.1(5).