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ACCESS RULING

In the matter of the Department of Corrections
Ruling Number 2021-5142
August 6, 2020

On July 29, 2020, the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management received a dismissal grievance submitted by the grievant. Because the grievant had resigned prior to initiating her grievance, the grievant's former employer, the Department of Corrections (the "agency"), challenges whether she has access to the grievance procedure to initiate this grievance.

FACTS

On July 27, 2020, the agency issued a Group II Written Notice for failure to follow instructions and/or policy to the grievant and terminated her employment based on her accumulation of disciplinary actions. Later in the evening on July 27, the grievant emailed the superintendent at her institution and asked if she could resign. The superintendent accepted the grievant's resignation in lieu of termination, effective July 27. The agency has represented to EDR that it rescinded the Group II Written Notice and the grievant's termination after accepting her resignation. The grievant subsequently submitted a dismissal grievance directly to EDR,[1] challenging the issuance of the Written Notice and seeking removal of the disciplinary action "as well as the option to be able to retain employment" with the agency.

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 their employment with the Commonwealth prior to initiating the grievance."[3] EDR has long held that once an employee's voluntary resignation becomes effective, they are not covered by the

[1] Although the grievant used the expedited grievance form, EDR considers her to have initiated dismissal grievance because she is challenging events relating to her receipt of a Group II Written Notice with termination and subsequent resignation in lieu of termination. *See Grievance Procedure Manual* § 2.5.
[2] Va. Code § 2.2-3001(A).
[3] *Grievance Procedure Manual* § 2.3.

grievance procedure and accordingly may not initiate a grievance.[4] In this case, the grievant initiated her grievance after resigning in lieu of termination on July 27, 2020, raising a question of access.

To have access to the grievance procedure to challenge her separation, the grievant must show that the resignation was involuntary[5] or that she 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 she was constructively discharged.[9] As such, only the issue 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."[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 this analysis involve situations where the employer presents the employee with the option that they can resign or be fired. Here, however, the grievant received the Written Notice and was informed of her termination on July 27, 2020. Later that evening, she requested the option to resign. The agency accepted the grievant's resignation in lieu of termination and rescinded the Written Notice. Although there is no evidence before EDR to indicate that the agency afforded the grievant an opportunity to resign *before* issuing the Written Notice, the events of this case are functionally equivalent to one where an employee has the option to resign or be fired in advance of the employer's decision to terminate. Indeed, the grievant ultimately received the benefit of a resignation in such a situation: removal of the Written Notice and termination from her employment record with the agency.

Significantly, that the choice facing an employee is resignation or disciplinary termination does not 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,

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[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* Rosario-Fabregas v. Merit Sys. Prot. Bd., 833 F.3d 1342, 1346 (Fed. Cir. 2016).
[8] Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 174 (4th Cir. 1988) (citations omitted).
[9] 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.
[10] *Stone*, 855 F.2d at 174.
[11] *Id.* (citation omitted).
[12] *Id.* at 174-75 (citations omitted).

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] In this case, 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 her choice as between two unpleasant alternatives (resignation or potential termination), that alone does not indicate that her resignation was induced by duress or coercion.[14]

As to the whether the grievant understood her choice and its consequences, had time to consider her options, or was permitted to select the effective date of her separation, EDR is not persuaded that the facts support a conclusion that her resignation was procured through duress or coercion. The grievant has not asserted that she did not understand the reasons the agency issued the Written Notice, though she disagrees with its characterization of her behavior, nor has she offered any information to indicate that she did not understand the nature of the choice between resignation and termination. Moreover, the evidence does not demonstrate that the grievant was given a limited time to choose between resignation and termination. To the contrary, she contacted the superintendent at her institution to inquire about resigning *after* she received the Written Notice, when the agency was under no obligation to accept her resignation in lieu of termination. The superintendent notified the grievant that her resignation was accepted and effective July 27, 2020, the same as the date of her termination on the Written Notice. Given the sequence of events in this case – particularly the grievant's request to resign after receiving notice of her termination – EDR finds that the agency's decision to maintain the grievant's separation on the same date was reasonable.

Having considered the totality of the circumstances in this particular case, EDR finds that the evidence is insufficient to demonstrate that the agency procured the grievant's resignation by duress or coercion, without her exercise of free choice. The grievant received a Group II Written Notice with termination July 27, 2020. Later that same day, she asked to resign and the agency accepted her resignation in lieu of termination. These facts do not support a finding of involuntariness in view of the general presumption of a voluntary resignation. Accordingly, we conclude that the grievant's separation from employment was based on a voluntary resignation, and thus she does not have access to the grievance procedure. The dismissal grievance will not proceed to hearing and EDR's file will be closed.

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[13] Schultz v. U.S. Navy, 810 F.2d 1133, 1136 (Fed. Cir. 1987) (citations omitted); *see also* 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)); Braun v. Dep't of Veterans Affairs, 50 F.3d 1005, 1008 (Fed. Cir. 1995) (finding that an employee had made a "non-frivolous allegation" of coercion where he had been subjected to 11 allegedly unwarranted disciplinary actions in 17 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)).

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

EDR's rulings on access are final and nonappealable.[15]

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[15] Va. Code § 2.2-1202.1(5).