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ACCESS RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2021-5209
March 4, 2021

On January 22, 2021, the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management received a dismissal grievance submitted by the grievant. The Department of Behavioral Health and Developmental Services (the “agency”) has requested a ruling from EDR on whether she has access to the grievance procedure to challenge her separation from employment, alleging that the grievant voluntarily resigned prior to initiating the grievance.

FACTS

Prior to the events addressed in this ruling, the grievant worked at one of the agency’s hospitals. Beginning on or about December 4, 2020, the grievant was unable to work due to a medical issue. According to the agency, the grievant exhausted her paid leave balances on December 18. At that point, management advised the grievant that further absences would be unauthorized because she had been out of work for an extended time and that she should file a short-term disability claim if she was unable to return to work. The grievant had approval for intermittent unpaid leave pursuant to the Family and Medical Leave Act (“FMLA”).¹ She appears to have believed that her absences in December were covered by FMLA leave. She did not file a claim for short-term disability.

When the grievant had not returned to work by December 29, 2020, an agency manager sent a letter to the grievant’s home address. The letter stated that the grievant had been “absent for three or more workdays without proper authorization,” which could lead to disciplinary action under state policy if she returned to work. The letter further explained that she must contact the manager within three workdays or the agency would consider her to have resigned from her position. The letter was delivered on January 7, 2021. The grievant did not call the manager who wrote the letter, though she states that she did contact a unit manager at the hospital on January 9 to explain that she was returning to work that evening. The grievant claims that, when she arrived

¹ 29 U.S.C. §§ 2601 through 2654.

at the hospital on January 9, she was not permitted to enter the building and was told that she had been terminated.

The grievant alleges that, when she contacted the hospital's human resources office several days later, she learned that she had been terminated as of December 19, 2020. She further contends that an unidentified person told her to return her keys and identification badge, and to provide a letter of resignation. The grievant claims that, when she arrived at the hospital to return her keys and badge, a receptionist instructed her to write a resignation notice, which she did at the reception desk. The grievant's handwritten resignation notice is dated January 11, 2021, and states that she resigned effective December 19, 2020.

According to the agency, the unit manager denies speaking with the grievant directly or advising her to report to work on January 9, 2021. The agency further asserts that no one at the facility spoke with the grievant about resigning, either before or after receiving her resignation notice. The agency's records indicate that the grievant resigned as of December 19, 2020. The grievant did not receive a due process notice, Written Notice, or other disciplinary action before she submitted her resignation notice.

The grievant submitted a dismissal grievance directly to EDR on January 22, 2021, alleging that she "was terminated after being told I could return to work" and was "still not exactly sure of the exact reason for the termination." As relief, the grievant requested "a second chance to be able to continue my job." The agency has requested an access ruling from EDR, arguing that the grievant voluntarily resigned and does not have access to the grievance procedure to challenge her separation.

DISCUSSION

Resignation

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 grievance procedure and accordingly may not initiate a grievance.⁴ In this case, the grievant submitted a written resignation notice to the agency on January 11, 2021, raising a question of access.

To have access to the grievance procedure to challenge her separation, the grievant must show that the resignation was involuntary⁵ or that she was otherwise constructively discharged. 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.⁶

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 *See* *Rosario-Fabregas v. Merit Sys. Prot. Bd.*, 833 F.3d 1342, 1346 (Fed. Cir. 2016).

EDR is the finder of fact on questions of access.⁷ Having considered the totality of the circumstances in this case, we determine that the grievant has raised a sufficient question whether her resignation was involuntary such that the grievance must proceed. Both parties' accounts of the events that preceded the grievant's submission of the resignation letter on January 11, 2021 are confusing. Among the few facts that are undisputed is that the grievant did not return to work after December 3, 2020. The grievant's extended absence led a manager at the hospital to send her a letter on December 29 stating that it would consider her to have resigned if she did not contact the manager within three workdays.⁸ The grievant later submitted a handwritten resignation notice dated January 11, 2021, which stated she resigned as of December 19, 2020.

The December 29 letter is concerning because there appears to be no provision of state policy that permits an agency to consider an employee's failure to report to work as a resignation. Absence in excess of three workdays without authorization may support the issuance of a Group III Written Notice with termination⁹ and inability to meet the working conditions of one's employment may lead to removal.¹⁰ Both these methods of separation, however, require that the employee receive notice and an opportunity to respond in advance of the removal, as well as final notification of their separation.¹¹ Significantly, an employee also has access to the grievance procedure to challenge an involuntary separation from employment.¹² The December 29 letter by itself does not seem to be sufficient to inform the grievant of an impending removal without further agency action.

This case is further complicated by the grievant's prior approval to use intermittent FMLA leave and her assertion that she was unable to work in December 2020 and January 2021 for FMLA-qualifying reasons. If this is indeed the case, the agency may lack a basis to discipline or remove the grievant for her failure to report to work. However, the grievant does not appear to have given the agency any documentation about her need for leave during this time or otherwise communicated with management the nature of her absence, so it is unclear whether her absence qualifies for FMLA leave.

Finally, the parties have offered conflicting descriptions of events between January 9 and 11, 2021 that cannot be reconciled. The grievant asserts that, on January 9, she notified a unit manager she was returning to work that day. When she arrived, the grievant claims that an unidentified individual denied her entry to the hospital and told her she had been terminated. The grievant states that she contacted the hospital's human resources office on January 11 and was told again that she had been terminated as of December 19, 2020. The grievant claims that she went to the hospital, returned her keys and identification badge to a receptionist, and wrote a resignation notice at the receptionist's direction after the receptionist spoke with someone in human resources. As noted above, however, the agency had not taken steps to issue discipline or remove the grievant

⁷ See Va. Code § 2.2-1202.1(5); see also *Grievance Procedure Manual* § 2.3.

⁸ Although the letter states that the grievant must contact the manager "within 3 workdays of the date of this letter," the agency states that it intended this language to mean three business days of her receipt of the letter.

⁹ DHRM Policy 1.60, *Standards of Conduct*, Attachment A: Examples of Offenses Grouped by Level.

¹⁰ DHRM Policy 1.60, *Standards of Conduct*, at 18.

¹¹ *Id.* at 15-16, 18.

¹² *Grievance Procedure Manual* § 2.4 (describing the initiation requirements of the grievance procedure, including processes for challenging dismissals due to formal discipline and other types of separation from employment).

from her position as of January 11 in a manner consistent with state policy, and thus it could not accurately be said that the grievant was “terminated” from employment.

The agency, in its account of these events, essentially denies that anyone in management or human resources had direct contact with the grievant between the mailing of the letter on December 29, 2020 and its receipt of the resignation notice on January 11, 2021. Yet the grievant seemingly returned her keys and badge to the hospital. Moreover, someone in the agency’s human resources office stamped the grievant’s resignation notice as received on January 11.

The evidence offered by both parties is not entirely credible or persuasive to establish conclusively what led the grievant to submit her resignation notice on January 11, 2021. The grievant has alleged that she did not resign voluntarily, but instead at the agency’s direction and with the belief that she had already been terminated. The evidence offered by the agency is insufficient to refute the grievant’s claim or support a conclusion that she voluntarily resigned at this time. Taking all of the facts surrounding this situation together, EDR therefore finds that the grievant has presented sufficient evidence to raise a question of whether her resignation was voluntary.

Procedural Guidance

In the past, EDR has held that the appropriate remedy when a grievant has resigned in lieu of termination and the resignation is found to be involuntary is to allow the grievant to make her decision again, with the benefit of reasonably adequate time to consider the charges against her (*i.e.*, the equivalent of pre-disciplinary due process) and her options.¹³ In this case, however, the grievant was not presented with such a choice because the agency had not given her a due process notice or otherwise taken steps to discipline or remove her. Indeed, it is unclear from the record before EDR what level of disciplinary action might be appropriate in this situation or whether termination would be warranted at all.

As a result, this case is better analogized to those involving a non-disciplinary involuntary separation from employment, such as a layoff or removal for inability to meet working conditions. Grievances challenging separations of this nature do not advance directly to a hearing through the dismissal grievance process,¹⁴ but instead use the expedited grievance process.¹⁵ The expedited process involves a single management step, followed by a qualification decision from the agency head that may be appealed to EDR.¹⁶ Because this case involves a management action that appears substantially similar to other involuntary separations that are not eligible for the dismissal grievance process, the grievance will proceed using the expedited process.

EDR forwarded a copy of the original grievance paperwork to the agency when the grievant initially submitted her dismissal grievance. The agency is directed to contact the grievant to

¹³ *E.g.*, EDR Ruling No. 2013-3564.

¹⁴ The *Grievance Procedure Manual* defines “dismissals” as terminations due to formal discipline or unsatisfactory job performance. Va. Code § 2.2-3003(A); *Grievance Procedure Manual* § 2.5.

¹⁵ *Grievance Procedure Manual* § 3.4 (stating that the expedited process may be used in cases involving “a separation not considered a ‘dismissal’. . . , demotion, suspension without pay, or any other action that results in an actual loss of wages”).

¹⁶ *Id.*

schedule the single management step meeting **within ten workdays of the date of this ruling.**¹⁷ It is permissible under the grievance procedure to hold such a meeting by electronic means (such as audio or video teleconference) during the current public health emergency.

In closing, we note that the evidence provided at this time does not appear to support a conclusion that the grievant's removal from her position was consistent with the processes for removal laid out in DHRM Policy 1.60, *Standards of Conduct*. If the grievant were to request a qualification ruling from EDR under these same facts, the grievance would likely qualify for a hearing. The grievant's assertion that she did not voluntarily resign, the factual inconsistencies between the parties' account of events, and the lack of documentation to establish the nature of the grievant's removal or other circumstances surrounding her separation raise questions that a hearing officer would be in the best position to resolve. The parties are therefore encouraged to reach a resolution of this matter or, at the very least, to bring greater clarity to these events while they have the opportunity to do so during the single management step of the grievance process.

EDR's rulings on access are final and nonappealable.¹⁸

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¹⁷ *Id.* § 3.4. As the originally-filed dismissal grievance form does not provide space for the single management step response and qualification decision, the parties should use a blank second page of the expedited grievance form to complete the remaining steps of this grievance as they occur. If the agency requires an additional copy of the grievant's dismissal grievance submission, EDR will provide one upon request.

¹⁸ Va. Code § 2.2-1202.1(5).