

Issue: Access; Ruling Date: June 27, 2002; Ruling #2002-114; Agency: Department of Motor Vehicles; Outcome: no access to grievance procedure



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of Department of Motor Vehicles No. 2002-114
June 27, 2002

The grievant has requested a ruling on whether she had access to the grievance procedure when she initiated her grievance on April 26, 2002. The Department of Motor Vehicles claims that the grievant does not have access to the grievance procedure because she was not an employee of the Commonwealth of Virginia at the time the grievance was initiated. For the reasons set forth below, this Department concludes that the grievant did not have access to the grievance process when she initiated her April 26th grievance.

FACTS

On August 30, 2000, grievant was issued a Group III Written Notice terminating her employment as an Engineering Technician III with the Department of Motor Vehicles. In response to her termination, the grievant initiated a grievance on April 5, 2001.¹ After progressing to the third resolution step, a Grievance Settlement Agreement was tendered by the Department of Motor Vehicles on February 7, 2002. The Agreement stated, among other things, that (1) in lieu of termination effective August 30, 2000, the Department of Motor Vehicles would accept the grievant's resignation effective on December 9, 2000; (2) the Department of Motor Vehicles would pay grievant back pay without benefits from August 30, 2000 through December 9, 2000 with a net of not less than \$5,000; (3) the Department of Motor Vehicles would provide a neutral reference to any prospective employers; and (4) the grievant would withdraw her April 5, 2001 grievance.² The grievant signed the Agreement on February 13, 2002. The grievant acknowledges that under the terms of the Agreement, she was allowed to resign in lieu of termination. On February 27, 2002, the Department of Motor Vehicles mailed to the grievant a signed copy of the Agreement and a check in the amount of \$5,004.35.

On April 26, 2002, grievant initiated this second grievance alleging that the Department of Motor Vehicles failed to comply with the terms of the Agreement.³ Specifically, the grievant alleges that, in consideration of her signing the Agreement, the Department of Motor Vehicles orally agreed to write a letter to an employee of the

¹ Although, typically, a grievance must be initiated within 30 calendar days of the event or action that is the basis of the grievance, in a previous ruling, the Department of Employment Dispute Resolution found that there was just cause for the delay.

² Grievance Settlement Agreement, dated February 7, 2002, between the grievant and the Department of Motor Vehicles.

Department of Motor Vehicles restricting that employee from having any contact with the grievant. Grievant maintains that she was supposed to receive a copy of this letter as well. The grievant further alleges that there was an oral agreement between herself and the Department of Motor Vehicles for employment in the Richmond area. On May 8, 2002, the Department of Motor Vehicles informed the grievant that she did not have access to the grievance procedure because she is no longer an employee of the Commonwealth of Virginia.³

DISCUSSION

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.⁴ The *Grievance Procedure Manual* specifically states that an employee must meet all of the following criteria to have access to the grievance procedure: (1) [the employee] must not be exempt from the Virginia Personnel Act; (2) [the employee] “must have been a non-probationary employee of the Commonwealth at the time the event that formed the basis of the dispute occurred”; and (3) [the employee] “must have been employed by the Commonwealth at the time the grievance is initiated (unless the action grieved is a termination or *involuntary* separation).”⁵

Employees who voluntarily resign, however, may not have access to the grievance process, depending upon the surrounding circumstances, such as the nature of their claim or when the grievance is initiated. For example, this Department has long held that any grievance initiated by an employee *prior* to the effective date of a voluntary resignation may, at the employee’s option, continue through the grievance process, assuming it otherwise complied with the 30-day calendar rule. On the other hand, this Department has also long held that once an employee’s voluntary resignation becomes effective, she may not file a grievance.

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. Thus, a resignation may be involuntary “(1) where [the resignation] was obtained by the employer’s misrepresentation or deception... and (2) where forced by the employer’s duress or coercion.”⁶ 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.⁷ A misrepresentation is material if it concerns either the consequences of the resignation or the alternative to resignation.⁸ The grievant has not alleged that the Department of Motor Vehicles made any misrepresentation that caused her to sign the Settlement Agreement and thus resign

⁴ Va. Code § 2.2-3001(A) and *Grievance Procedure Manual* § 2.3(1) and (2), page 5.

⁵ *Grievance Procedure Manual* § 2.3(1), (2) and (3) (emphasis added).

⁶ *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167, 174 (4th Cir. 1988).

⁷ *Id.*

⁸ *Id.*

her position, nor has this Department found evidence of such. She claims only that the agency has failed to fulfill an obligation under that Agreement, which, even if proven, does not show that her signing of the agreement and resulting resignation were involuntary.

A resignation also may arise from duress or coercion and thus be involuntary if in the totality of circumstances it appears that the employer's conduct in requesting resignation effectively deprived that employee of free choice in the matter.⁹ Facts to be considered are: (1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice 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.¹⁰

Here, the grievant signed the Settlement Agreement six days after it was tendered. The grievant's decision indicates that she deliberately considered and elected to resign from her position rather than to proceed with her grievance challenging that termination. The fact that the grievant may have perceived her choice as between comparably unpleasant alternatives (resignation or challenging her termination through the grievance procedure) does not of itself establish that a resignation was induced by duress or coercion.¹¹ Therefore, given the totality of the circumstances surrounding grievant's separation from employment, we cannot conclude that the grievant's resignation, effective December 9, 2000, was anything other than voluntary. Because the grievant voluntarily resigned her position effective December 9, 2000, she was no longer an employee of the Commonwealth of Virginia when her second grievance was initiated on April 26, 2002, and as such, she does not have access to the grievance procedure.

APPEAL RIGHTS AND OTHER INFORMATION

For more information regarding actions you may take as a result of this ruling, please refer to the enclosed sheet. If you wish to appeal the determination that you do not have access to the grievance procedure to circuit court, please notify your Human Resources Office, in writing, within five workdays of receipt of this ruling.

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Director

Jennifer S.C. Alger
Employee Relations Consultant

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*