

Issue: Access to the grievance procedure; Ruling Date: March 31, 2003; Ruling #2003-031; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: no access.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
and Substance Abuse Services
No. 2003-031
March 31, 2003

The grievant has requested a ruling on whether she had access to the grievance procedure when she initiated her grievance on December 20, 2002. The Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency) claims that the grievant does not have access to the grievance procedure because she voluntarily resigned her position on November 22, 2002, and thus was not an employee of the Commonwealth 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 December 20th grievance.

FACTS

The grievant was employed as a Clinical Social Worker for the agency. On November 8, 2002, the grievant's supervisor met with her to discuss the grievant's alleged improper use of agency property.¹ During this meeting, the supervisor advised the grievant that the agency deemed the matter very serious and that there would be an ongoing investigation. Additionally, she encouraged the grievant to submit a written response to management explaining her position. Subsequently, the grievant submitted a brief one paragraph written statement. On the morning of November 22, 2002, the grievant's supervisor and the Director of Social Work met with the grievant and presented two options: (1) receive a Group III Written Notice (Written Notice) with termination for alleged "Theft or Unauthorized Use of State/Agency Property" and for allegedly "Falsifying Official State/Agency Documents" or (2) submit her resignation. Additionally, they also informed the grievant that the State Police may be contacted about possible criminal prosecution. The grievant requested further time (such as over the weekend) to consider her options, but they denied this request. She was, however,

¹ There appears to be some confusion as to the exact date of this meeting. The agency head's access determination, dated January 29, 2003, indicates that this meeting occurred on November 11, 2002, while an internal agency memorandum states that the supervisor met with the grievant on November 7th. During the investigation for this ruling, the supervisor informed the investigating consultant that her initial meeting with the grievant regarding the improper use of agency property actually took place on November 8th. As the dates are relatively close in time, the exact date has no bearing on the outcome of this ruling.

granted time to make telephone calls to individuals outside the agency to discuss the situation.

Some facts concerning the grievant's actions remain in dispute. The grievant states that she signed the Written Notice only to indicate she had received it, but eventually decided to resign as she was escorted around the building by her supervisor. On the other hand, management maintains that the grievant first chose to accept termination rather than resign, but later changed her mind during the process of checking out (gathering personal items, grievance forms, etc.). It is undisputed, however, that after conferring with human resources personnel and the Director of Social Services, the supervisor accepted a handwritten resignation from the grievant. The agency destroyed the Written Notice signed by the grievant.

On December 20, 2002, the grievant initiated a grievance challenging her alleged forced resignation, but her former supervisor denied her access to the grievance procedure. Subsequently, on January 10, 2003, the grievant requested access, but the agency head denied her request.² The grievant then appealed the agency head's decision to this Department.

DISCUSSION

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.³ 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.

In this case, the grievant maintains that her resignation was involuntary because management coerced her into submitting her resignation. 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."⁴ 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

² The grievant mistakenly requested access to the grievance procedure from the Director of the facility rather than the agency head as is required under the rules of the grievance procedure (*Grievance Procedure Manual* § 2.3, p. 5). However, the agency did not raise the issue of her noncompliance, and the agency head responded to the grievant's request on January 29, 2003.

³ Va. Code § 2.2-3001(A) and *Grievance Procedure Manual* § 2.3.

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

resignation.⁵ A misrepresentation is material if it concerns either the consequences of the resignation or the alternative to resignation.⁶ The grievant has not alleged that the agency made any misrepresentation that caused her to resign her position, nor has this Department found evidence of such.

A resignation may also 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.⁷ 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 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.⁸

The grievant claims that management threatened her with termination and possible criminal prosecution, and thus placed her in the position "of having no reasonable alternative" but to resign.⁹ Significantly, an objective standard is used to determine whether real alternatives were presented to the employee; "that the employee may perceive [her] only option to be resignation... is irrelevant."¹⁰ Here, management offered the grievant a choice: (1) receive a Written Notice with termination (and be subject to possible criminal prosecution) or (2) resign. The fact that the grievant subjectively perceived her choice as between comparably unpleasant alternatives does not of itself establish that a resignation was induced by duress or coercion.¹¹ Further, the grievant has not presented any evidence to suggest she did not understand the nature of the choice offered. In fact, the grievant clearly recognized that termination and possible criminal prosecution could impact her career and made a decision that would avoid such an outcome.¹²

In support of her claim of involuntary resignation, the grievant also asserts that the agency did not give her a reasonable amount of time to make her choice. Nor was she

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See Grievant's Attachment I to Grievance Form A, page 1.

¹⁰ Stone at 855 F.2d 167, 174.

¹¹ *Id.*; see also Zepp v. Rehrmann, 79 F.3d 381 (4th Cir. 1996)(jailer faced with decision to resign or be fired and face litigation against him in his individual capacity was not coerced); Hargray v. City of Hallendale, 57 F.3d 1560 (11th Cir. 1995) (resignation was not involuntary where alternative was criminal charge). An exception to this rule exists if the employer lacked good cause to believe that grounds for termination and the criminal charges existed. See Stone, 855 F.2d at 174. No credible evidence of such was presented in this case.

¹² During the investigation for this ruling, the agency maintained that the grievant was well aware of the differences in receiving a Written Notice with termination versus resigning, claiming that the grievant specifically questioned what the agency would tell potential employers under each scenario. Additionally, they claim she asked whether she could apply for another state job if she resigned. Whether the grievant actually questioned management concerning the ramifications of termination as management has asserted, it is evident from her statements in the attachments to her Grievance Form A that she understood such ramifications.

permitted to select the effective date of her resignation. As evidence, the grievant states that on November 22nd, management called her into a meeting, handed her a Written Notice, and informed her that the only way to avoid termination was to submit her resignation, effective that day, which allegedly subjected her to “unbearable coercion” and forced her resignation.¹³

Management met with the grievant at approximately 9:00 in the morning and presented her with the choice of immediate termination or resignation. It is undisputed that the grievant asked management for more time to consider her options, but management denied this request. She left the premises around 12:30 p.m., thus reaching the decision to resign within approximately three hours. As discussed below, while the grievant may have been under some time pressure to make a choice and her resignation was to be effective immediately, the evidence presented does not under the totality of the circumstances support the legal conclusion that the grievant’s resignation was involuntary due to coercion or duress.

First, the grievant could not have been taken completely off guard by management’s disciplinary action as she seems to imply in her letter of January 10, 2003. Her supervisor had met with her on November 8th and advised that the agency considered the matter extremely serious and that there would be an ongoing investigation.¹⁴ At that time, the grievant was encouraged to submit a written statement explaining her actions, which she did. Therefore, the grievant previously had been able to respond to the evidence and understood the nature of the charges against her.¹⁵

Additionally, a period of a few hours to reach a decision concerning resignation is not *per se* unreasonable.¹⁶ Further, management’s request for an immediate effective date is not dispositive of improper coercion or duress by the agency;¹⁷ it is one *factor to be considered* when reviewing the totality of the circumstances presented. While the agency refused to grant her further time (such as over the weekend) to consider her options, she was given time to place personal telephone calls, including the opportunity to contact an attorney to discuss the matter. Although she was unable to contact an attorney, she did reach a relative with whom she was able to discuss the situation. Significantly, the agency did not force the grievant to make a decision in isolation, but permitted her to seek the advice of anyone she chose prior to her decision.¹⁸

¹³ Grievant’s letter to the Facility Director, dated January 10, 2003.

¹⁴ See note 1, *supra*.

¹⁵ The agency complied with policy and provided her with the due process that is required prior to management’s decision to terminate her employment. See Department of Human Resource Management Policy 1.60(VII)(E)(2). Prior to termination, an employee must be given oral or written notification of the offense, an explanation of the agency’s evidence, and a reasonable opportunity to respond.

¹⁶ See Stone, 855 F.2d at 177 (medical doctor’s decision to resign was made under time pressure of several hours and found to be voluntary).

¹⁷ *Id.* at 171 (medical doctor’s resignation from hospital was effective immediately although he remained on faculty while looking for another position and resignation was found to be voluntary)

¹⁸ See *id.* at 177 (court considered employee’s opportunity to seek advice of anyone he wished over period of several hours a factor in determination that resignation was voluntary; employee was unable to contact an attorney, but spoke with a friend).

In this case, the grievant basically claims that she was forced to make an unpleasant decision in a short amount of time, while upset, and without the advice of counsel. However, these facts alone do not establish that the grievant's resignation was obtained by coercion or duress.¹⁹ Although presented with inherently unpleasant alternatives, the grievant was given a choice by management, and she understood the nature of that choice. Further, she was provided the opportunity to seek the counsel of others before reaching a decision. In sum, the grievant has failed to present sufficient evidence that, under the totality of the circumstances, the agency's conduct in obtaining her resignation deprived her of free will in choosing to resign. Therefore, it cannot be concluded that the grievant's resignation was anything other than voluntary. As such, the grievant was not an employee of the Commonwealth of Virginia when she initiated this grievance and thus 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.

Claudia T. Farr
Director

Susan L. Curtis
Employment Relations Consultant

¹⁹ *Id.* at 177; *see also* Paraczay v. Hodges, 297 F.2d 439 (D.C Cir. 1961)(employee's resignation found to be involuntary where employee not permitted to leave room before he signed resignation letter, charges would be filed immediately if he left the room, and employer forbid him to consult an attorney). Here, the grievant was allowed to leave the room and consult with whomever she wished. Additionally, while informed that there could be a criminal investigation by the State Police, there was no immediacy involved.