

Issue: Access Ruling/access question based on employee voluntarily resigned her position; Ruling Date : December 29, 2003; Ruling #2003-497; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: grievant not an employee-no access. Appealed in the Circuit Court of Fairfax County; Decision entered on February 27, 2004; EDR decision Affirmed.



*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. 2003-497  
December 29, 2003

The grievant has requested a ruling on whether she had access to the grievance procedure when she initiated her grievance on September 11, 2003. 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 August 21, 2003, 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 September 11<sup>th</sup> grievance.

FACTS

The grievant was employed as a Case Manager for the agency. On July 27, 2003, the grievant was asked to provide a statement relating to the care of a patient. On August 6, 2003, she was informed that she was being suspended pending an investigation into possible client neglect. On August 20, 2003, the grievant met with the Clinical Director and was informed that he had concluded that she was guilty of neglect and that he planned to terminate her employment as a result of this charge. The grievant then proceeded to ask if she could resign in lieu of being fired. The Clinical Director agreed to allow her to submit a letter of resignation if he received it by noon the next day. The following day, the grievant asked if she could submit her letter by 4:00 instead of noon. Her request was granted.

The grievant submitted her letter of resignation on August 21, 2003. The letter stated that she was "submitting [her] request under duress to avoid being terminated." The following day, August 22<sup>nd</sup>, the Clinical Director called to inform the grievant that he would not accept the letter in its current form. Later that day, the grievant submitted a second resignation letter which did not contain the allegation that she was forced to resign under duress.

### DISCUSSION

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.<sup>1</sup> 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 she was going to be fired if she did not ask for the opportunity to resign. 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."<sup>2</sup> 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.<sup>3</sup> A misrepresentation is material if it concerns either the consequences of the resignation or the alternative to resignation.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

In this case, the grievant, having been informed of management's intention to terminate her employment, requested the opportunity to resign. In other words, it appears as though the grievant deliberately considered and elected to secure a certain outcome, a voluntary resignation, rather than risk the unpredictable result of a grievance hearing to which she was automatically entitled under *the Standards of Conduct*. Moreover, the

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<sup>1</sup> Va. Code § 2.2-3001(A) and *Grievance Procedure Manual* § 2.3, page 5.

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

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

grievant was able to reap the benefit of the bargain that she initiated with the agency: her personnel file indicates that she resigned. Thus, the grievant was able to protect her work record.

The grievant had the choice to contest her termination through the grievance procedure, but the grievant declined to do so and opted for resignation instead. The fact that the grievant may have perceived her choice as between comparably unpleasant alternatives (resignation or termination) does not of itself establish that a resignation was induced by duress or coercion.<sup>7</sup> Therefore, it cannot be concluded that the grievant's resignation was anything other than voluntary.<sup>8</sup> 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.

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Claudia T. Farr  
Director

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William G. Anderson, Jr.  
EDR Consultant, Sr.

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<sup>7</sup> *Id.*

<sup>8</sup> It should be noted that the grievant was given approximately 24 hours in which to submit her letter of resignation. She asked for the opportunity to resign on August 20<sup>th</sup> and was allowed to submit her letter at 4:00 p.m. on the 21<sup>st</sup>.