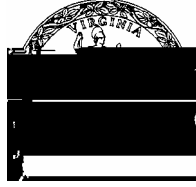


Issue: Access/no access based on voluntarily resignation; Ruling Date: June 8, 2005; Ruling #2005-1043; Agency: Department of Juvenile Justice; Outcome: no access



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling Number 2005-1043
June 8, 2005

The grievant has requested a ruling on whether he had access to the grievance procedure when he initiated his grievance on May 2, 2005. The Department of Juvenile Justice (DSS or the agency) claims that the grievant does not have access to the grievance procedure because he voluntarily resigned his position on April 9, 2005¹ 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 he initiated his May 2nd grievance.

FACTS

Prior to his resignation, the grievant was employed as a Juvenile Correctional Officer with DJJ. On April 7, 2005, DJJ management sent the grievant home after informing him that it was the agency's intent to give him a Group III Written Notice with termination. A meeting to present the grievant his Group III Written Notice was scheduled for April 11, 2005. To avoid a termination on his work record, the grievant presented a letter of resignation upon entering the meeting, which the agency accepted. Later that same week, the grievant told DJJ management that he wanted to rescind his resignation. The grievant was allegedly advised that human resources would have to be consulted as to the procedure for a withdrawal of resignation. When the grievant got no further response, he presented the agency with a letter on April 26, 2005 withdrawing his resignation. Subsequently, on May 2, 2005, the grievant initiated a grievance alleging involuntary termination. The second-step respondent denied the grievant access to the grievance procedure due to his alleged voluntary resignation.

DISCUSSION

¹ There appears to be a discrepancy as to the effective date of the greivant's resignation. The agency claims that the grievant's resignation was effective April 9, 2005, however, the grievant's letter of resignation sets an effective date of April 11, 2005. Whether the date was the 9th or the 11th has no bearing on the outcome of this ruling.

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.² 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, he may not file a grievance.

In this case, the grievant maintains that his resignation was involuntary because he was going to be fired if he did not 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."³ 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.⁴ A misrepresentation is material if it concerns either the consequences of the resignation or the alternative to resignation.⁵ The grievant has not alleged that the agency made any misrepresentation that caused him to resign his 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.⁶ 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 he was permitted to select the effective date of resignation.⁷

In this case, the grievant, having been informed of management's intention to terminate his employment, decided to submit his resignation instead. He deliberately considered and elected to secure a certain outcome, a voluntary resignation, rather than risk the unpredictable result of a grievance hearing to which he was automatically entitled under *the Standards of Conduct*. Accordingly, it appears the grievant understood the nature of the choice given. Moreover, the grievant was able to reap the benefit of the bargain as his personnel file indicates that he resigned. Thus, the grievant was able to achieve the result he desired: protection of his work record.

² Va. Code § 2.2-3001(A) and *Grievance Procedure Manual* § 2.3.

³ *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167, 174 (4th Cir. 1988).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

Moreover, the grievant's disciplinary meeting was scheduled for April 11, 2005 at 3:30 p.m. The grievant was informed of the meeting and impending termination on April 7, 2005. As such, the grievant was given several days, a reasonable amount of time, to choose between his options. While the grievant may have perceived his choice as between two unpleasant alternatives (resignation or termination), that alone does not indicate that his resignation was induced by duress or coercion.⁸ Although the grievant asserts that he was shocked, confused, did not consider his options, and acted hastily in his decision, it cannot be concluded that his resignation was anything other than voluntary. As such, the grievant was not an employee of the Commonwealth of Virginia when he initiated this grievance and, thus, does not have access to the grievance procedure.

Further, DJJ did not violate policy by refusing to accept the grievant's withdrawal of his resignation. An agency's decision to accept or not accept an employee's attempt to rescind a resignation is entirely discretionary. The relevant state policy is the Department of Human Resource Management ("DHRM") Policy 1.70, which allows (but does not require) an agency to "accept an employee's request to rescind his or her resignation within 30 calendar days of separation."⁹ Because the decision to approve a withdrawal is entirely discretionary, the agency cannot violate state policy by refusing to accept the withdrawal.¹⁰

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

Jennifer S.C. Alger
EDR Consultant

⁸ *Id.*

⁹ DHRM Policy 1.70 II(A)(3).

¹⁰ Of course, an agency could violate a policy other than 1.70 by refusing to accept a withdrawal of a resignation. For instance, if the agency's refusal was based upon a discriminatory animus, such as bias based on age, race, or handicap, such an action would violate Policy 2.05 (Equal Employment Opportunity). There is, however, no claim or evidence of such animus in this case.