Issues: Qualification – Separation from State (voluntary resignation), Retaliation (grievance activity participation), and Compliance – Grievance Procedure (documents); Ruling Date: March 10, 2008; Ruling #2007-1629, 2008-1812; Agency: Department of Corrections; Outcome: Not Qualified; Agency In Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Nos. 2007-1629, 2007-1812
March 10, 2008

The grievant has requested a ruling on whether his October 18, 2006 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. He also asserts that the agency failed to comply with the grievance procedure.

FACTS

The grievant was employed with the agency as a Corrections Lieutenant. He asserts that after he complained in January 2006 to the Chief of Security about an allegedly pornographic e-mail sent by the Administrative Captain, the Captain began a campaign of harassment and retaliation against him. The grievant claims this alleged course of agency conduct culminated in his being wrongfully threatened with disciplinary action for abandonment of shift and breach of security on September 1, 2006. He asserts that on that date, he had gone to the hospital for chest pains and had appropriately notified the agency that he would not be reporting to work. The grievant further states that the agency's conduct led him to resign involuntarily from his employment on September 22, 2006.

On October 18, 2006, the grievant initiated a grievance challenging his allegedly involuntary resignation, as well as alleged retaliation and harassment.[1] By letter dated October 25, 2006, the agency advised the grievant that he did not have access to the grievance procedure, as he had voluntarily separated from employment. In Ruling 2007-1496, this Department ruled that the grievant had access to advance his grievance through the management resolution steps. To avoid prematurely determining the merits of the grievance itself, this Department did not rule on the merits of the grievant's claim that he resigned involuntarily, reserving that issue for the hearing qualification stage. On August 21, 2007, after the parties had completed the resolution steps, the agency head denied the

[1] The grievant apparently signed and dated his Grievance Form A on October 18, 2006. The agency states that the grievance was received in Human Resources on October 23, 2006. As it is immaterial to the issues addressed in this ruling whether the grievance was initiated on October 18th or October 23rd, it is unnecessary to resolve any conflict between the parties regarding the initiation date.

grievant's request for qualification of his grievance for hearing. The grievant has appealed the denial of qualification to this Department.

In addition, by letter dated April 4, 2007, the grievant requested a compliance ruling from this Department on the agency's alleged failure to make the third-step respondent available for a face-to-face meeting, after the grievant had elected to receive only a written response from the second-step respondent. Prior to this Department's investigation of this request, the parties advised EDR that the agency's alleged noncompliance had been cured. However, the grievant advised this Department that he would shortly be requesting a noncompliance ruling on an alleged failure by the agency to provide a timely third-step response. That alleged noncompliance was subsequently cured by the agency.

An additional compliance issue exists, however, as the grievant asserts that the agency has failed to provide him with requested documentation. After a series of exchanges between the grievant and the agency regarding the requested documentation, culminating with the agency's response of October 31, 2007, the only remaining issues of alleged noncompliance are the agency's purported failure to provide the grievant with an explanation as to why the call-in records for September 1, 2006 do not reflect phone calls he claims to have made, and the agency's alleged failure to provide him with a copy of a memorandum allegedly distributed by the warden "concerning doctor's notes for calling in sick."

DISCUSSION

Compliance

The grievance statute provides that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be made available upon request from a party to the grievance, by the opposing party."[2] This Department's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided.

The grievance statute further states that "[d]ocuments pertaining to nonparties that are relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance."[3] Documents, as defined by the Rules of the Supreme Court of Virginia, include "writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form."[4] While a party is not required to create a document if the document does not exist,[5] parties may mutually agree to allow for disclosure of

[2] Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.
[3] *Id.*
[4] *See* Rules of the Supreme Court of Virginia, Rule 4:9(a)(1).
[5] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

relevant non-privileged information in an alternative form that still protects the privacy interests of third parties, such as a chart or table, in lieu of production of original redacted documents.

This Department has also long held that both parties to a grievance should have access to relevant documents during the management steps and qualification phase, prior to the hearing phase. Early access to information facilitates discussion and allows an opportunity for the parties to resolve a grievance without the need for a hearing. To assist the resolution process, a party has a duty to conduct a reasonable search to determine whether the requested documentation is available and, absent just cause, to provide the information to the other party in a timely manner.

In this case, the grievant challenges the agency's failure to provide an explanation for why the agency's call-in records for September 1, 2006 do not reflect phone calls the grievant alleges he made on that date. The agency has advised the grievant that it cannot explain why events the grievant says occurred were not recorded in the logbook. Because a party is not required by the grievance procedure to produce a document not in existence or create a new document to respond to a document request, the agency did not have a duty to provide the written explanation requested by the grievant, assuming that a written explanation did not already exist (and the grievant does not assert that such a document was in existence prior to his request). Moreover, it appears that the agency has, in effect, provided the written explanation sought, by advising the grievant that it cannot explain the alleged discrepancy between its records and events grievant claims occurred.

With respect to the agency's alleged failure to provide the memorandum from the warden concerning doctor's notes, the agency has advised the grievant that it could not locate the requested document.[6] While the grievant maintains that such a memorandum once existed, he has not presented any evidence—other than his own belief—that the requested document still exists or that it was destroyed by the agency in bad faith. Accordingly, we do not find the agency to be out of compliance with respect to its failure to provide this document.

This Department's rulings on compliance are final and nonappealable.[7]

Qualification

To be qualified for hearing, a claim must be within the jurisdictional limits of this Department and the state employee grievance procedure. Consequently, as part of establishing a basis for qualification in this case, the grievant must now demonstrate that he, in fact, does have access to the grievance procedure to challenge his resignation. To

[6] In lieu of the memorandum, the agency provided minutes of a meeting attended by the grievant which apparently addressed the sick call-in procedure.
[7] Va. Code § 2.2-1001(5).

do this, he must show that his resignation was involuntary, because employees whose resignations are voluntary do not have access to the grievance procedure to challenge their separation from employment.[8]

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."[9]

"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."[10] A misrepresentation is material if it concerns either the consequences of the resignation or the alternative to resignation.[11] 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.

However, 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 effectively deprived the employee of free choice in the matter.[12] "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 he was 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."[13]

That the choice facing an employee is resignation or discipline does not in itself demonstrate duress or coercion, unless the agency "actually lacked good cause to believe that grounds for termination existed."[14] "[W]here an employee is faced merely with the unpleasant alternatives of resigning or being subject to removal for cause, such limited choices do not make the resulting resignation an involuntary act. On the other hand, inherent in that proposition is that the agency has reasonable grounds for threatening to take an adverse action. If an employee can show that the agency knew that the reason for the threatened removal could not be substantiated, the threatened action by the agency is purely coercive."[15] Here, the grievant alleges that he resigned under duress because the

---

[8] Va. Code § 2.2-3001(A) and *Grievance Procedure Manual* § 2.3.
[9] Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 174 (4th Cir. 1988).
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Schultz v. U.S. Navy, 810 F.2d 1133, 1136 (Fed. Cir. 1987). *See also* Staats v. U.S. Postal Serv., 99 F.3d 1120, 1124 (Fed. Cir. 1996) ("An example of an involuntary resignation based on coercion is a resignation that is induced by a threat to take disciplinary action that the agency knows could not be substantiated. The Board has also found retirements or resignations to be involuntary based on coercion when the agency has taken steps against an employee, not for any legitimate purpose but simply to force

agency threatened disciplinary action out of a retaliatory motive rather than because of any wrongful conduct by the grievant. Therefore to prove that his resignation was involuntary due to duress, the grievant must show that the warden knew, at the time she allegedly threatened discipline, that the charges against him could not be substantiated.

Here, the grievant is unable to make this showing. First, it is questionable whether the warden's actions constitute an actual threat of termination. The grievant concedes that at the time of his resignation, he had merely been advised that a disciplinary hearing would be held on the charges of abandonment of shift and breach of security. At that hearing, the grievant would presumably have had an opportunity to defend himself against the charges, and it is possible that his defense would have been successful. Further, the grievant has not presented any evidence that the warden knew at the time she informed him of the disciplinary hearing that the charges were without merit. To the contrary, the grievant claims that the warden based the potential charges on false allegations made by the captain and assistant warden, and he does not argue that the warden herself knew the allegations to be untrue. As there is insufficient evidence to support the grievant's claim that his resignation was involuntary, his grievance is not qualified for hearing.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

---

the employee to quit." (citations omitted)); Braun v. Dept. of Veterans Affairs, 50 F.3d 1005, 1007-08 (Fed. Cir. 1995) (finding employee had made a "non-frivolous allegation" of coercion where he had been subjected to eleven allegedly unwarranted disciplinary actions in seventeen months); Murphy v. U.S., 69 Fed. Cl. 593, 605 (Fed. Cl. 2006) ("If a plaintiff decides to resign or retire rather than face a justified government action, the decision is held to be voluntary. But when a plaintiff's decision to retire or resign was the result of government action which was unjustified or contrary to its own regulations, rules or procedures, the decision was found to be involuntary." (citations omitted))