

Issue: Access/access to the grievance procedure; Ruling Date: January 24, 2007; Ruling #2007-1496; Agency: Department of Corrections; Outcome: access granted



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2007-1496
January 24, 2007

The grievant has requested a ruling on whether he had access to the grievance procedure when he initiated his grievance on October 18, 2006.¹ The Department of Corrections (DOC or the agency) claims that the grievant does not have access to the grievance procedure because he voluntarily resigned his position on September 22, 2006 and thus was not an employee of the Commonwealth at the time the grievance was initiated. The grievant asserts that he was forced to resign by the agency's alleged harassment and retaliation. For the reasons set forth below, this Department concludes that the grievant has access to 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 agency 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, 2006.² 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 the alleged retaliation and harassment.³ 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. The grievant has appealed the agency's determination to this Department.

¹ The grievant asserts that the agency's denial of access constitutes noncompliance with the grievance procedure. However, in accordance with § 2.3 of the *Grievance Procedure Manual*, the grievant's ruling request to this Department will be treated as being for an access ruling.

² In light of the serious nature of these alleged offenses, we assume, for purposes of this ruling, that the disciplinary action contemplated by the agency included termination.

³ 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.

DISCUSSION

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.⁴ 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 argues, in effect, that his resignation was involuntary because he was threatened with allegedly wrongful disciplinary action if he had not resigned. 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."⁵

"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."⁶ A misrepresentation is material if it concerns either the consequences of the resignation or the alternative to resignation.⁷ 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.⁸ "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."⁹

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."¹⁰ "[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

⁴ Va. Code § 2.2-3001(A) and *Grievance Procedure Manual* § 2.3.

⁵ *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167, 174 (4th Cir. 1988).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

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.”¹¹ Here, the grievant alleges that he resigned under duress because the agency threatened disciplinary action out of a retaliatory motive rather than because of any wrongful conduct by the grievant.

Generally, when this Department rules on questions of access to the grievance procedure, material facts are not in dispute (for example, that the grievant works in a P-14 status, *see* EDR Ruling No. 2006-1096) or the grievant’s assertions, even if taken as true, are insufficient to establish access. In this case, though, the parties apparently dispute a material threshold issue: whether the grievant’s resignation was induced by a knowingly wrongful threat of discipline. Such conduct, if established by the grievant, would arguably constitute coercion sufficient to render his resignation involuntary.

However, resolving this dispute would prematurely involve this Department in determining the merits of the grievance itself. In circumstances like this, *where the disputed event forms the basis of the grievance*, this Department avoids engaging in fact-finding on the merits of the grievance before the agency and the grievant have had the opportunity to review the grievance during the management resolution steps. This practice preserves a grievant’s right to take his case on the merits through the resolution steps and does not prejudice the agency’s case on the merits. Should the grievant later request a qualification ruling from this Department, he will be required to show that the facts, taken as a whole, support the qualification of his grievance for hearing. Likewise, the agency will have the opportunity to refute the merits of the grievant’s claims and argue against qualification. We thus conclude that the grievant has access to pursue his October 18, 2006 grievance.

CONCLUSION

The grievant has access to the grievance procedure for purposes of his October 18, 2006 grievance. If the grievant wishes to continue with his grievance, he has five workdays from receipt of this ruling to return the grievance to the first-step respondent. This ruling in no way determines the ultimate merits of the grievance and is not binding on future rulings or proceedings in this matter.

Claudia T. Farr

¹¹ *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 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))

January 24, 2007
Ruling #2007-1496
Page 5

Director