

Issue: Access to the Grievance Procedure: Ruling Date: December 21, 2007;  
Ruling #2008-1880; Agency: Department of Corrections; Outcome: Access  
Denied.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**ACCESS RULING OF DIRECTOR**

In the matter of Department of Corrections  
Ruling No. 2008-1880  
December 21, 2007

The grievant has requested a ruling on whether his October 16, 2007 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. For the reasons stated below, this Department finds that the grievant lacks access to the grievance procedure, and therefore this grievance may not proceed to hearing.

**FACTS**

The grievant was previously employed with the agency as a Corrections Officer. On October 15, 2007, the grievant resigned from his employment with DOC, after being advised by the agency that it intended to issue him a Group III Written Notice for Workplace Harassment and terminate his employment.

On October 16, 2007, the grievant initiated a grievance seeking, in effect, to rescind his resignation and be granted a transfer to another facility in lieu of termination. After the grievant failed to receive his requested relief during the management resolution steps, he asked the agency head to qualify his grievance for hearing. The agency head denied the grievant's request, and he has appealed to this Department.

**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

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

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.

Here, the grievant argues, in effect, 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."<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 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.<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 he 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 his employment, elected to submit his resignation instead. He apparently 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* and a work record showing a termination. We note that the grievant was apparently informed of the impending termination on October 11, 2007, several days before his resignation. It therefore appears that the grievant received 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

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<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.*

was induced by duress or coercion.<sup>7</sup> Further, while the grievant asserts that he should now be allowed to transfer in lieu of termination, as he has sought assistance through the Employee Assistance Program, he has not presented any evidence that any physical or mental disability affected his ability to make a knowing election to resign rather than be terminated. Accordingly, the grievant does not have access to the grievance procedure.

#### APPEAL RIGHTS AND OTHER INFORMATION

For more information regarding actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the determination that he does not have access to the grievance procedure to circuit court, he should notify the 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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<sup>7</sup> *Id.*