

Issue: Access to the Grievance Procedure; Ruling Date: January 31, 2008; Ruling #2008-1902; Agency: Virginia Community College System; Outcome: Access Denied.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of the Northern Virginia Community College
Ruling No. 2008-1902
January 31, 2008

The grievant has requested a ruling on whether he had access to the grievance procedure when he initiated his grievance on December 4, 2007. Northern Virginia Community College (the College) claims that the grievant did not have access to the grievance procedure because he voluntarily resigned his position on November 13, 2007, 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 College's threatened disciplinary action. For the reasons set forth below, this Department concludes that the grievant does not have access to the grievance procedure.

FACTS

On November 12, 2007, the grievant's supervisor advised the grievant that there were four Written Notices being contemplated against the grievant. The Written Notices arose out of the grievant's enrollment in the Commuter Choice program, whereby the grievant received a monthly payment to fund his commute to work using mass transit. The grievant's supervisor had discovered that the grievant had been driving to work certain days instead of taking mass transit as allegedly contemplated under the Commuter Choice program. On the days the grievant drove to work, he issued himself a parking tag, allegedly without authorization. The Written Notices (three Group III's and one Group II) charged the grievant with "theft of state funds," misuse of state property/records/funds, abuse of authority, and falsifying records. The proposed Written Notices were given to the grievant on November 12, 2007. In the accompanying letter, the grievant was given the option to "resign/retire" or provide a response to the proposed charges. However, if the response was not "compelling," the grievant's supervisor indicated that the grievant would be terminated. The grievant had until 5:00 p.m., on November 13, 2007, to make his decision. The grievant was placed on administrative leave pending the disciplinary action and told to leave all "uniforms, badges, keys, id card, and any/all other college property" at the College.

The grievant states, contrary to the College's allegations, that he regularly purchased a monthly train ticket to commute from his home, as well as using bus passes. The grievant admits he drove to work on certain days, but that he did so because he was required to be at work exceptionally early on those days. The mass transit he normally used was not in operation at the time he needed to leave home. As such, he drove to work. In addition, he claims that he had

authorization to use a visitor parking tag because he approved those for various other visitors to the facility. However, instead of responding to the proposed charges, the grievant resigned on November 13, 2007.

DISCUSSION

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.¹ 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.²

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."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 College made any misrepresentation that caused him to resign his position, nor has this Department found evidence of such.

Under the "duress or coercion" theory, a resignation may be found to 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.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 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."⁷

That the choice facing an employee is resignation or discipline does not in itself demonstrate duress or coercion, unless the College "actually lacked good cause to believe that

¹ Va. Code § 2.2-3001(A); *Grievance Procedure Manual* § 2.3.

² *E.g.*, EDR Ruling No. 2005-1043.

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.*

grounds for termination existed.”⁸ “[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 [College] has reasonable grounds for threatening to take an adverse action. If an employee can show that the [College] knew that the reason for the threatened removal could not be substantiated, the threatened action by the agency is purely coercive.”⁹ Here, the grievant alleges that he was forced to resign because the College threatened disciplinary action that could not be supported.

However, even though the grievant could have good arguments why he did not engage in the misconduct alleged, this does not appear to be a case where the College *knew* its threatened disciplinary actions could not be supported. The grievant and the College have differing views about whether the grievant followed the provisions of the Commuter Choice program. This reasonable disagreement does not support a conclusion that the College actually lacked good cause to believe that grounds for termination existed. Thus, 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.¹⁰

Further, the facts of this case indicate that the grievant, having been informed of his supervisor’s intention to terminate his employment, decided to submit his resignation instead. He 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, he was able to achieve the result he desired: protection of his work record.

Although the grievant was given very little time to consider his options, it does not appear that the time pressure he was under in this case was sufficient to render his resignation involuntary.¹¹ In sum, this Department cannot conclude that the grievant resigned involuntarily. 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.

⁸ *Id.*

⁹ *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))

¹⁰ *Id.*

¹¹ *See Stone*, 855 F.2d at 177-78 (finding that, when considering the other surrounding circumstances, the fact that plaintiff had only several hours to consider his options was insufficient to conclude that his resignation had been involuntary).

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.¹²

Claudia T. Farr
Director

¹² See *Grievance Procedure Manual* § 2.3.