

Issue: Access to Grievance Procedure; Ruling Date: March 5, 2008; Ruling #2008-1951; Agency: Department of Minority Business Enterprise; Outcome: Access Granted.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of the Department of Minority Business Enterprise
Ruling No. 2008-1951
March 5, 2008

The grievant has requested a ruling on whether she had access to the grievance procedure when she initiated her grievance on January 24, 2008. The Department of Minority Business Enterprise (DMBE or the agency) claims that the grievant does not have access to the grievance procedure because she voluntarily resigned her position on January 4, 2008 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 has access to the grievance procedure.

FACTS

Prior to her separation, the grievant was employed as an Administrative and Office Specialist III with DMBE. On December 18, 2007, the grievant left work due to a family medical emergency. The grievant failed to return to work and/or to notify her employer that she would not be returning to the office on December 18, 2007. The following day, December 19, 2007, the grievant submitted a leave slip for her absence on December 18th. The grievant's supervisor, Mr. M., allegedly advised the grievant that he would not approve her leave for her absence on December 18th. Thereafter, on December 26, 2007, the grievant met with Mr. M. and Mr. S. At this meeting, the grievant was notified that the agency intended to issue her a Group II Written Notice with termination for her unapproved absence on December 18th and advised the grievant that she must submit an explanation to the charges against her by 8:30 a.m. the next day, December 27, 2007.

On the morning of December 27, 2007, the grievant met with Mr. M. and Mr. S. again and provided them with a memorandum stating the reasons she should not be terminated from her employment with DMBE. Despite the justifications expressed in her memorandum, Mr. M. determined that the grievant would be given a Group II Written Notice with termination. Before the Group II Written Notice was issued however, the grievant was presented with the option of resigning her position, which she ultimately accepted. The grievant resigned from her position with DMBE effective January 4, 2008.

Thereafter, on January 24, 2008, the grievant initiated a grievance challenging her separation from employment with DMBE. In a letter dated January 30, 2008, the agency head denied the grievant access to the grievance procedure stating that the grievant voluntarily resigned from her position with DMBE. The grievant now asks this Department to grant her access to the grievance process.

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, she may not file a grievance.

In this case, the grievant argues, in effect, that her resignation was involuntary. 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."² "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."³ A misrepresentation is material if it concerns either the consequences of the resignation or the alternative to resignation.⁴ Here, the grievant alleges that the agency misrepresented the consequences of her resignation and that she relied upon this misrepresentation in resigning her position with DMBE.

According to the parties, prior to her tendering her resignation, the grievant was verbally advised by Mr. S. of the consequences of both resignation and termination. The grievant claims that during this conversation, she was told that if she resigned, her personnel file could not be subsequently obtained by any state agency for which she may work in the future, but that if she were terminated, her personnel file could be obtained by her employers in her next state government job and would reflect that she was terminated.⁵ The agency appears to deny the grievant's allegations about what she says she was told regarding subsequent acquisition of her personnel file.

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

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

³ *Id.*

⁴ *Id.*

⁵ Along with the termination, the grievant claims that she had an active Group II Written Notice in her personnel file that she did not want other state agencies to see.

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 false statement regarding a material fact, in this case, future acquisition of the grievant's personnel file if she were to resign from her employment with DMBE. If established by the grievant, the agency's statements regarding subsequent state government employers' examination of the grievant's personnel file if she resigned may potentially constitute a misrepresentation of a material fact sufficient to render her resignation involuntary.⁶

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 her 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, she will be required to show that the facts, taken as a whole, support the qualification of her 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 her January 24, 2008 grievance.

CONCLUSION

The grievant has access to the grievance procedure for purposes of her January 24, 2008 grievance. If the grievant wishes to continue with her grievance, she has five workdays from receipt of this ruling to return the grievance to the second 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
Director

⁶ DHRM policy states that “[r]ecords of personnel re-employed into classified positions within five years of their separation date must be requested from the separating agency by the employing agency.” The records that are provided to the new employing agency must include original written notice forms. *See* DHRM Policy 6.10, *Personnel Records Management*.