Issue: Qualification – Separation from State (Involuntary Resignation); Ruling Date: September 4, 2008; Ruling #2008-2011; Agency: Department of Minority Business Enterprise; Outcome: Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Minority Business Enterprise
Ruling No. 2008-2011
September 4, 2008

The grievant has requested a ruling on whether her January 24, 2008, grievance with the Department of Minority Business Enterprise (DMBE or the agency) qualifies for a hearing. For the reasons discussed below, the grievant's claim that her separation was involuntary is qualified for hearing.

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, the agency's human resources representative. 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. After receiving the memorandum, Mr. M. determined that the grievant nevertheless 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 did. 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 obtained afterwards 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 had been terminated.[1] The agency appears to deny the grievant's allegations about what she was told regarding the accessibility of her personnel file by state agencies in the future.

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 subsequently asked this Department to grant her access to the grievance process. In EDR Ruling Number 2008-1951, this Department granted the grievant access to pursue her grievance through the management resolution steps of the grievance process. The agency head subsequently determined that the grievant's January 24, 2008, grievance does not qualify for a hearing on the basis that the grievant voluntarily resigned from her employment with DMBE and as such, did not have access to the grievance process. The grievant now seeks a qualification determination from this Department.

DISCUSSION

The grievant asserts 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] 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.

"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] A resignation or retirement is involuntary if it is obtained by agency misinformation or deception.[5] An objective test applies to such situations and a court in applying this test will not inquire into the "subjective perceptions of the employee" or "the subjective intentions of the agency."[6] Unlike a resignation which is induced through duress, there is no requirement that an employee be *intentionally* deceived about her employment options, it being sufficient that "the employee shows that a reasonable person would have been misled by

[1] Along with the termination, the grievant claims that she had an active Group I and a Group II Written Notice in her personnel file as well as a fitness for duty exam that she did not want other state agencies to see.
[2] Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 174 (4th Cir. 1988).
[3] *Id.*
[4] *Id.*
[5] Covington v. Dept. of Health and Human Services, 750 F.2d 937, 942 (Fed. Cir. 1984).
[6] *Id.* (quoting Scharf v. Dept. of the Air Force, 710 F.2d. 1522, 1575 (Fed. Cir. 1983)

the agency's statements."[7] The misleading information can be negligently or even innocently provided.[8] If the employee materially relies on the misinformation to her detriment, her resignation is considered involuntary.[9]

In this case, the grievant has raised a sufficient question as to whether her resignation was involuntary. More specifically, as stated above, the grievant claims that she was advised by Mr. S. that if she resigned from her employment with DMBE rather than being terminated, her personnel record would not follow her to a subsequent job with the Commonwealth that she may hold. If such a statement was actually made,[10] it would clearly constitute misinformation.[11] Moreover, Mr. S. in this case is the agency's human resources representative as well as an employee of the Department of Human Resource Management (DHRM), the agency charged with promulgating and interpreting state policies, and as such, it would appear reasonable for the grievant to rely upon any information Mr. S. provided regarding personnel records disclosure and management policies.[12]

Finally, assuming without deciding for purposes of this ruling only that misinformation had been provided as alleged by the grievant, the grievant could be viewed as having relied upon such information to her detriment. More specifically, during this Department's investigation, the grievant stated that in light of what she was allegedly advised by Mr. S., she felt that resignation was a better option than being terminated and then challenging her termination through the grievance process. She further stated that had she been accurately advised of the consequences of her resignation (i.e., that her personnel file would follow her to any subsequent job with the Commonwealth), she would have chosen to take the Group II with termination and challenge such disciplinary action through the grievance process. Through such a challenge, the grievant could possibly be reinstated, an option unavailable to the grievant if she ultimately resigned from her position. Accordingly, the grievant has raised a sufficient question as to whether she relied upon the advice of Mr. S. to her detriment.

Given the totality of the circumstances in this case, we find that this grievance raises a sufficient question as to whether the grievant's resignation and separation from

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[7] *Id.*
[8] *Covington, 750 F.2d at 942.*
[9] *Id.* ("[W]hether the employee made an informed choice is the touchstone of our analysis.") *Id.*
[10] This Department recognizes that there is a question of fact here as to what the grievant was told by Mr. S. regarding the consequences of her resigning from her employment with DMBE. Questions of fact such as this are best left to the hearing officer to decide.
[11] 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.*
[12] *See e.g.*, Scharf, 710 F.2d. at 1575 (concluding that it was reasonable for the plaintiff to rely upon the advice of the agency retirement counselor regarding the consequences of his optional retirement); *see also* Tippett v. U.S., 185 F.3d 1250, 1258 (Fed. Cir. 1999) (concluding that it was reasonable for the plaintiff to rely upon the advice of a military lawyer regarding army regulations and the consequences of a request for discharge from active military duty versus a resignation from active duty in lieu of elimination.)

state employment was involuntary. Accordingly, the issue of involuntary separation is qualified for a hearing.

CONCLUSION

The grievant's January 24, 2008 involuntary resignation claim is qualified for hearing. This qualification ruling in no way determines that the grievant's resignation was involuntary, but rather only that further exploration of the facts by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to adjudicate the qualified claim, using the Grievance Form B.

Should the hearing officer find that the grievant's separation was involuntary, the hearing officer may offer only limited relief. The hearing officer can return grievant to work and the parties to the point at which the agency notified the grievant of its intent to issue the Group II Written Notice with termination for her unapproved absence on December 18, 2007, and presented the grievant with the option of resigning her position or receiving the formal discipline. If the grievant chooses the resignation offer after full disclosure of the resignation terms and adequate time to consider her options, then such a resignation would likely be considered voluntary and she would have no further access to grieve her resignation. If, on the other hand, she elects to reject the resignation offer and instead opts for a disciplinary termination, she may grieve the discipline within 30 **calendar** days of receipt of the formal discipline. Because formal discipline automatically qualifies for hearing, the grievant would have an opportunity to present her case to an impartial hearing officer who would decide whether the disciplinary action was warranted.[13]

Claudia T. Farr
Director

[13] *See* EDR Ruling No. 2008-2027