Issues: Access to the Grievance Procedure, and Qualification – Separation From State (involuntary resignation); Ruling Date: July 24, 2008; Ruling #2008-2027; Agency: Department of Corrections; Outcome: Access Granted, Qualified for Hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS and QUALIFICATION
RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Nos. 2008-2027
July 24, 2008

The grievant has requested a ruling on whether her November 15, 2007, grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. For the reasons set forth below, the grievant is granted access to the grievance procedure solely to challenge her separation. Furthermore, her claim that her separation was involuntary and discriminatory is qualified for hearing.

FACTS

The grievant was employed with the agency as a probation officer. The grievant asserts that on November 5, 2007, she was called into a meeting with her Chief. She was told that the Chief was contemplating taking disciplinary action against her. The following day, the grievant again met with the Chief who informed her that he had decided to issue her a Group III Written Notice with Termination. The Chief, however, offered the grievant the option of resigning in lieu of being terminated. The grievant purportedly asked if she could make a phone call before deciding on whether to accept the offer to resign but was told that she could not. The grievant then submitted a resignation that was immediately effective and she was escorted from the premises.

The grievant initiated a grievance challenging what she characterizes as her termination. She further asserts that she was discriminated against and treated differently from others. The agency denied qualification of this grievance because it claims that the grievant voluntarily resigned her employment.

DISCUSSION

I. Involuntary resignation

Access

To be qualified for hearing, a claim must be within the jurisdictional limits of this Department and the state employee grievance procedure. Consequently, as part of establishing a

basis for qualification in this case, the grievant must demonstrate that she, in fact, has access to the grievance procedure to challenge her resignation. To do this, she must show that her resignation was involuntary, because employees whose resignations are voluntary do not have access to the grievance procedure to challenge their separation from employment.[1]

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]

A. Misrepresentation

"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 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 asserts that she was not informed that her personnel record would reflect her separation status as "resigned in lieu of termination—not eligible for rehire." The grievant has not asserted, nor has this Department been provided with any evidence indicating that the agency intended to mislead the grievant by not discussing how her departure would be represented in the future if she elected to resign. However, as reflected above, even an inadvertent omission of a material term of a separation agreement can be tantamount to a misrepresentation. This Department has long recognized an employee can benefit from being offered the option to protect her work record by being offered the opportunity to resign instead of being terminated. However, where an employee is offered a "resignation" but later finds that her employment record indicates that she "resigned in lieu of termination," and is "not eligible for

[1] *See* Va. Code § 2.2-3001(A). Once an employee separates from state employment, the only claim for which she has access to the grievance procedure is a challenge to a termination or an involuntary separation. See *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] 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)
[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.*

rehire," there is little, if any, benefit derived from such a bargain. The goal of protection of a work record is rarely, if ever, achieved through such a bargain because the designation of "resigned in lieu of termination" is essentially tantamount to a "terminated" designation. Thus, in most cases, the failure to inform an employee that her voluntary resignation will be designated as a "resignation in lieu of termination" would be a critical omission that could render the resignation involuntary.

B. Coercion or Duress

A separation can also be viewed as involuntary, if it appears that the employer's conduct effectively deprived the employee of free choice in the matter.[10] "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 [s]he was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether [s]he was permitted to select the effective date of resignation."[11]

1. Alternative Choice

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."[12] "[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 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."[13]

Although the grievant could have good arguments why she did not deserve to be disciplined, this does not appear to be a case where the agency *knew* its threatened disciplinary actions could not be supported. The grievant and the agency may have differing views about whether her workload was substantially different from others and whether she was being held to a higher standard than other employees. However, this reasonable disagreement does not support a conclusion that the agency actually lacked good cause to believe that grounds for

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[10] *Stone, 855 F.2d at 174.*
[11] *Id.*
[12] *Id.*
[13] 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 agency 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))

termination existed. Thus, while the grievant may have perceived her choice as between two unpleasant alternatives (resignation or termination), that alone does not indicate that her resignation was induced by duress or coercion.[14]

2. Understood the Choice

As to the second factor, it is not clear that the grievant in this case truly understood the nature of the choice she was given. As alluded to above, this Department has recognized that in weighing her options, an employee may elect to protect her work record by opting for the certainty of an unconditional resignation over the uncertainty of a grievance challenge to a termination. However, as discussed above, there is little if any benefit of the bargain available to an employee who gives up the right to grieve in exchange for a "resigned in lieu of termination" designation. Thus, where an employee is not expressly informed that her resignation will be designated as "resigned in lieu of termination," a question of fact will often remain as to whether the employee adequately understood the nature of the choice she was given.

3. Time to Decide

As to the third factor, whether the employee was given a reasonable time in which to choose, the grievant asserts that she was told that she had to make her determination in the November 6, 2007 meeting. She asserts that when she asked if she could make a phone call, she was purportedly told "no."

4. Ability to Determine Effective Date

As to the final factor, whether she was permitted to select the effective date of resignation, the grievant was not provided with a choice. Her termination was immediately effective.

Given the totality of the circumstances in this case, *for purposes of access only*, we find that the grievant has provided sufficient evidence that she was involuntarily separated from employment. Accordingly, the grievant has access to the grievance procedure.

Qualification

This case presents a unique question in the context of qualification: whether the grievance of an employee who was allowed to resign but purportedly not informed that her status will be designated "resigned in lieu of termination," qualifies for hearing on the basis that the grievant has suffered an involuntary separation. For all of the reasons set forth above in the access section, we find that the grievant has raised a sufficient question of fact as to whether she was involuntarily separated from employment to warrant sending her involuntary separation claims to hearing. Accordingly, the issue of involuntary separation is qualified for hearing.

[14] *Stone, 855 F.2d at 174.*

II. Discrimination

The grievant asserts that she has been discriminated against and treated differently from others. To the extent that she is claiming that the manner in which the agency handled her separation only was discriminatory or that the agency treated her differently from other similarly situated employees in relation to her separation only, her claim of discrimination is qualified. To the extent that the grievant is attempting to challenge any actions other than her separation, she does not have access to grieve such actions because once an employee separates from state employment, the only claim for which she has access to the grievance procedure is a challenge to her termination or an involuntary separation.[15]

CONCLUSION

The grievant's November 15, 2007 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 separation occurred. The agency then may offer the grievant the choice of (1) an unconditional resignation, (2) a resignation in lieu of termination, or (3) discipline with termination. 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.

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Claudia T. Farr
Director

[15] *Grievance Procedure Manual* § 2.3.