

Issue: Qualification – Separation from State (Involuntary Resignation); Ruling
Date: September 24, 2008; Ruling #2008-2052; Agency: UVA Health System;
Outcome: Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the University of Virginia
Ruling No. 2008-2052
September 24, 2008

The grievant has requested a ruling on whether her grievance with the University of Virginia (UVA or University) 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 OR Scrub Tech /Massage Therapist. On or about April 29, 2008, the grievant was informed by her immediate supervisor that she was facing termination of her employment for attendance issues and that she could resign in lieu of being terminated. The grievant was told that if she resigned, she would not be disciplined for the attendance issues and that she would be eligible for re-hire. In addition, when the grievant consulted with the Human Resource (HR) Department, she was told that she could grieve her separation, that is, have access to the grievance procedure, regardless of whether she chose to resign or to be terminated. Based on that representation, the grievant elected to resign on May 2, 2008. On May 13, 2008, she initiated a grievance to challenge what she characterizes as an involuntary resignation.

The University asserts that it advised the grievant prior to her resignation that either a resignation or termination in her particular case was "grievable," and that it allowed the grievant to proceed through the management steps. The University also asserts that it directed the grievant to the Department of Employment Dispute Resolution web site for further information, and that at no time did it inform the grievant that her grievance would qualify for hearing.

DISCUSSION

Once an employee's voluntary resignation becomes effective, that employee does not have access to the grievance procedure, and agency management may deny that

employee access to the grievance procedure at any point following receipt of a written grievance.¹

The grievant, here, however, 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 by advising that she could grieve it.

"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 is involuntary if it is obtained by agency misinformation.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 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 reasonably 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. Specifically, as stated above, the grievant was told by the University's HR Department that she could "grieve" either a termination or resignation. Depending on all the surrounding facts and circumstances, a reasonable fact-finder could potentially find the HR Department's statement to be a misrepresentation of a material fact concerning the resignation, upon which the grievant reasonably relied, and for which the grievant would suffer a loss or detriment if the University's representation to the grievant were now denied.

CONCLUSION

The grievant's May 13, 2008 involuntary resignation claim is qualified for hearing. This qualification ruling in no way determines that the grievant's resignation was involuntary, rather only that further exploration of the facts by a hearing officer is

¹ *Grievance Procedure Manual* § 2.3; see also EDR Ruling No. 2005-1043.

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.*

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 terminate the grievant for her absences and presented the grievant with the option of resigning her position or being terminated. 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.¹⁰

Claudia T. Farr
Director

¹⁰ See EDR Ruling Nos. 2008-2011 and 2008-2027.