

Issue: Access and Qualification – Separation from State (voluntary resignation);
Ruling Date: August 22, 2008; Ruling No. 2009-2077; Agency: Department of
Corrections; Outcome: Access Granted, Not Qualified for Hearing.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS AND QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2009-2077
August 22, 2008

The grievant has requested a ruling on whether his April 1, 2008 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons set forth below, this Department concludes that the grievance does not qualify for a hearing.

FACTS

The grievant was formerly a probation and parole officer with the agency. He claims he had been “falsely accused” of domestic assault and “misrepresented” by his attorney at trial. After being convicted, the agency advised him that disciplinary action was pending against him due to the conviction. On March 4, 2008, the grievant resigned his position. The grievant states that he made a “rash decision” in resigning. He says he “felt forced to resign or be fired.” The grievant initiated his grievance on April 1, 2008 to raise these issues and request reinstatement.

DISCUSSION

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 he, in fact, has access to the grievance procedure to challenge his resignation. To do this, he must show that his 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 As discussed further below, there is no evidence in this case that the grievant’s resignation was involuntary. First, there is no evidence that the agency ever requested the grievant’s resignation with any “resign or be terminated” directive or implication. Second, even if the agency had done so, there is no

¹ See Va. Code § 2.2-3001(A); see also, e.g., EDR Ruling No. 2005-1043. 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).

evidence that the grievant's choice to resign, difficult as it may have been, was induced by any misrepresentation, duress or coercion by the agency.

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 his 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 his detriment, his resignation is considered involuntary.⁹ However, in this case, the grievant has not alleged that the agency made any misrepresentation that caused him to resign his position, nor has this Department found evidence of such.¹⁰

Duress or Coercion

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.¹¹ “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.”¹²

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.”¹³ “[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

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. 1572, 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.”).

¹⁰ The grievant asserts that he was “falsely accused” of assault. Even if the grievant’s argument is true, the grievant has not pointed to any fact misrepresented to the grievant *by the agency*. The agency’s threatened disciplinary action was based upon the grievant’s conviction for assault.

¹¹ *Stone*, 855 F.2d at 174.

¹² *Id.*

¹³ *Id.*

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.”¹⁴

Although the grievant could have good arguments why his conviction was not proper and, thus, he did not deserve to be disciplined, he was disciplined due to the conviction, and this does not appear to be a case where the agency *knew* that any disciplinary action for this conviction could not be supported. 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.¹⁵

Understood the Choice

This Department has recognized that in weighing the options, an employee may choose to protect his work record by opting for the certainty of an unconditional resignation over the uncertainty of a grievance challenge to a termination. However, where an employee is not expressly informed that his resignation will be designated as “pending disciplinary action,” a question of fact will often remain as to whether the employee adequately understood the nature of any “resign or be terminated” choice given by the employer. In this case, however, it appears that agency policy plainly states that employees “who resign while disciplinary action is pending...should be notified in writing at the point of separation that they will be ineligible for rehire.” Further, the employee’s personnel record “will reflect that the employee resigned while disciplinary action was pending.”¹⁶ The grievant is deemed to have knowledge of agency policies. Indeed, upon accepting the grievant’s resignation, the agency promptly notified the grievant that his record would reflect that he resigned pending disciplinary action and would not be eligible for re-hire. The grievant has not presented any argument that he did not understand the nature of this choice. Therefore, based on the totality of the circumstances, it cannot be determined that the grievant did not understand the choice before him.

Time to Decide

It appears that the agency first discussed the pending discipline with the grievant on February 29, 2008 (a Friday). The agency met with the grievant again on the following Monday,

¹⁴ *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)).

¹⁵ *Stone*, 855 F.2d at 174.

¹⁶ DOC HR-2006-2, modifying DOC Procedure 135.1, Standards of Conduct, by adding section VIII.E.

March 3, 2008, and on March 4, 2008. Because the grievant had multiple days to consider his options, it does not appear that he was under any time pressure in this case sufficient to render his resignation involuntary.¹⁷

Ability to Determine Effective Date

As to the final factor, there has been no evidence submitted that the agency prevented the grievant from selecting the effective date of his resignation. Indeed, as discussed above, the grievant had a few days to make his decision. Ultimately, his resignation was immediately effective.

In consideration of the above factors, 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, did not have access to the grievance procedure. For this reason, the grievance does not qualify for hearing.¹⁸

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

¹⁷ See *id.* at 177-78 (finding that, when considering the other surrounding circumstances, the fact that plaintiff had several hours to consider his options was not sufficient to raise a genuine issue as to the voluntariness of his resignation).

¹⁸ It should be noted that this Department considered information provided by the grievant that upon appealing his conviction, he was "not convicted" in circuit court. However, that information is not relevant to the questions presented in this grievance, i.e., whether the grievant's resignation was involuntary. Information regarding the status of the grievant's conviction might be raised anew with the agency to request an exemption to his ineligibility for re-hire consistent with agency policy. See DOC HR-2002-2, modifying DOC Procedure 135.1, Standards of Conduct (stating that "the [DOC] Director provides the final approval/disapproval of exception re-hire requests for those who...resign while disciplinary action is pending").