Issues: Access to the Grievance Procedure, and Qualification – Separation from State (Involuntary Resignation0; Ruling Date: September 3, 2009; Ruling #2010-2370; Agency: Library of Virginia; Outcome: Access Denied, Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS AND QUALIFICATION RULING OF DIRECTOR

In the matter of the Library of Virginia
Ruling No. 2010-2370
September 3, 2009

The grievant has requested a ruling on whether her June 11, 2009 grievance with the Library of Virginia (the agency) qualifies for a hearing. For the reasons set forth below, this Department concludes that the grievant does not have access to the grievance procedure and, therefore, the grievance does not qualify for a hearing.

FACTS

According to documentation provided to this Department, ongoing work-related issues existed between the grievant and her supervisor. On January 27, 2009, the grievant was issued a Group II Written Notice for failure to follow a supervisor's instructions or comply with written policy. The misconduct giving rise to that disciplinary action involved use of inappropriate language and argumentative/insubordinate behavior. It appears that the agency counseled the grievant about similar instances of alleged misconduct since that time.

On May 7, 2009, another situation of alleged misconduct arose. On May 12, 2009, the grievant was provided a memo outlining the nature of her alleged misconduct indicating that disciplinary action was recommended. Further, a meeting was held on May 12, 2009 to discuss the situation. She was asked to provide a written response and another meeting was held on May 13, 2009. At a later meeting that same day, the grievant was informed that the agency was going to terminate her employment by issuing her a Group II Written Notice for the alleged misconduct on May 7, 2009. The agency offered the grievant the opportunity to resign. According to the grievant, she requested alternative ways to resolve the issues, such as transfer, demotion, salary reduction, and leave without pay. When those were refused, she asked for time to consider her options. The agency also declined to give her more time to decide whether to resign or be terminated in the meeting. The grievant states she had approximately six minutes to make this decision. She ultimately decided to resign. The agency wrote out a short resignation letter, which the grievant signed. The grievant has now initiated her June 11, 2009 grievance to challenge these events as an involuntary resignation.

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 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. Generally, the voluntariness of an employee's resignation is presumed.[2] A resignation may be viewed as involuntary only (1) "where [the resignation was] obtained by the employer's misrepresentation or deception" or (2) "where forced by the employer's duress or coercion."[3] There is no allegation that the grievant's resignation was procured by misrepresentation. As such, only the question of duress or coercion is addressed by this ruling.

A resignation can be viewed as forced by the employer's duress or coercion, if it appears that the employer's conduct effectively deprived the employee of free choice in the matter.[4] "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."[5]

Alternative Choice

That the choice facing an employee is resignation or disciplinary termination does not in itself demonstrate duress or coercion, unless the agency "actually lacked good cause to believe that grounds for termination existed."[6] "[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."[7]

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[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 to file a grievance is a challenge to a termination or an involuntary separation. *See Grievance Procedure Manual* § 2.3.
[2] *See* Staats v. U.S. Postal Serv., 99 F.3d 1120, 1123 (Fed. Cir. 1996).
[3] Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 174 (4th Cir. 1988).
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] Schultz v. U.S. Navy, 810 F.2d 1133, 1136 (Fed. Cir. 1987); *see also Staats*, 99 F.3d at 1124 ("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

The grievant could have good arguments to support the position that the agency's contemplated disciplinary action was improper. However, this does not appear to be a case where the agency *knew* that its threatened disciplinary action could not be substantiated. There is evidence of some level of reasonably alleged misconduct. 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.[8]

Understood the Choice

The grievant asserts she was unclear on the reasons she was given the "ultimatum" to resign or be fired. She states she was not presented with a Written Notice. However, one day prior to the meeting, she was given a memo from her supervisor detailing the events of May 7, 2009 that her supervisor found unsatisfactory. This memo also indicated that disciplinary action was recommended. She additionally attended a meeting on May 12, 2009 and later responded to the charges in writing.

Even if the grievant was not presented with a copy of the unissued Written Notice, her supervisor's memo made her aware of the basis for the disciplinary action. Therefore, the facts of this case indicate that the grievant, having been informed of the agency's intention to terminate her employment, decided to submit a resignation instead. She elected to secure a certain outcome, a voluntary resignation, rather than risk the unpredictable result of a grievance hearing to which she was automatically entitled under the *Standards of Conduct*. Accordingly, it appears the grievant understood the nature of the choice given. The grievant has not presented any other indication that she did not understand the nature of this choice.

Time to Decide/Ability to Determine Effective Date

It appears that the agency did not allow the grievant the additional time she had requested during the afternoon May 13, 2009 meeting to make her decision. The grievant had been notified of the issues surrounding the contemplated discipline the previous day by memo and in a meeting, but it appears she had not been told, until the afternoon May 13, 2009 meeting, that the agency was considering terminating her employment. The grievant had a matter of minutes to make her decision, without the advice of counsel. "Time pressure to make a decision has, on occasion, provided the basis for a finding of involuntariness, but only when the agency has demanded that the employee make an immediate decision."[9]

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action which was unjustified or contrary to its own regulations, rules or procedures, the decision was found to be involuntary." (citations omitted)).

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

[9] *Staats*, 99 F.3d at 1126; *see also Stone*, 855 F.2d at 177 (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); Shealy v. Winston, 929 F.2d 1009, 1013 (4th Cir. 1991) (holding that one to two days after meeting was reasonable time); Herron v. Va. Commonwealth Univ., 366 F. Supp. 2d 355, 365-66 (E.D. Va. 2004) (holding that twenty-four hours was reasonable time); Wolford v. Angelone, 38 F. Supp. 2d 452, 459 (W.D. Va. 1999) (holding that resignation tendered in the same day as interviewed by supervisors is unclear to affirm employee had reasonable time, thus denied motion for summary judgment); Fox v. Experiment in Int'l Living, Inc., No. 92-1448-LFO, 1993 U.S. Dist. LEXIS 7043, at *11-12 (D.D.C. 1993) (holding that two to three days was reasonable time)

In this case, the grievant was given an extremely limited amount of time, without the advice of counsel, to make an unpalatable choice between resignation and termination. The extreme time pressure under which the grievant had to make her decision creates a sufficient question as to whether her resignation may have been involuntary.[10] However, the analysis does not end there.

While in most grievances raising a sufficient question will be enough to qualify for hearing, a grievance cannot be qualified if the grievant does not have access to the grievance procedure. This Department is the finder of fact on such questions of access.[11] Therefore, this Department is required to consider the facts and determine whether the grievant's resignation was involuntary on the merits. We cannot so conclude.

While it appears the grievant was under extreme time pressure to make her decision, the totality of the circumstances in this particular case does not suggest that the agency procured the grievant's resignation without her exercise of free choice. Indeed, it appears the grievant deliberately chose to resign to protect her record for any future job search.[12] It is certainly true that she had a small window in which to decide if she wanted to opt for the certainty of a resignation rather than accept termination with the ability to grieve. Thus, while this was a difficult choice, the facts do not support a finding of involuntariness in view of the general presumption of a voluntary resignation.[13]

Because this Department cannot conclude that the grievant resigned involuntarily, the grievant was not an employee of the Commonwealth of Virginia when she initiated this grievance and, thus, did not have access to the grievance procedure. For this reason, the grievance does not qualify for hearing.

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 access and 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

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[10] *See, e.g.*, Paroczay v. Hodges, 297 F.2d 439, 441 (D.C. Cir. 1961); *Wolford*, 38 F. Supp. 2d at 459.

[11] *See* Va. Code § 2.2-1001(4) (iv); *see also Grievance Procedure Manual* § 2.3.

[12] Agencies should be aware that this was an incredibly close decision. The extremely limited amount of time that the grievant was given to make her decision could very well be viewed as unreasonable. However, the facts indicate that even in those few minutes, the grievant made a deliberate, free choice. Agencies should be mindful, however, that it may not be a best practice in these situations to limit employees to such a time period, especially if they request more time. For instance, in an analogous situation, the Standards of Conduct recommend providing twenty-four hours' due process notice and an opportunity to respond to proposed disciplinary actions in most cases. DHRM Policy 1.60, *Standards of Conduct*. In most cases, one day to consider in a resign-or-be-fired situation would appear to be a reasonable amount of time to consider those options. *See supra* note 9.

[13] Furthermore, when this Department inquired of the grievant what changed her mind or what other factor or information she would have considered had she had more time, the grievant did not provide a sufficient explanation to alter this result. The grievant indicated that at the time of her resignation she was concerned for her economic situation as related to any future job search.

court.[14] If the court should grant access for this grievant by finding that her resignation was involuntary, the grievant will be entitled to a hearing. However, the court's finding of an involuntary resignation will obviate the need for a hearing on that particular issue. Consequently, the resultant hearing would address the merits of the disciplinary action with termination that the agency had proposed to take against the grievant on May 13, 2009. Within five workdays of receipt of such a decision by the court, the agency will request the appointment of a hearing officer using the Form B unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

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Claudia T. Farr
Director

[14] *See Grievance Procedure Manual* §§ 2.3, 4.4.