Issue: Access to the Grievance Procedure; Ruling Date: February 23, 2010; Ruling #2010-2510; Agency: Department of Correctional Education; Outcome: Access Granted.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of the Department of Correctional Education
Ruling No. 2010-2510
February 23, 2010

The grievant has requested a ruling on whether she has access to the grievance procedure to initiate her December 18, 2009 grievance with the Department of Correctional Education (the agency). For the reasons set forth below, this Department concludes that the grievant has access to the grievance procedure and, therefore, the grievance must be permitted to proceed in the manner specified in this ruling.

FACTS

On November 23, 2009, the grievant was told she needed to come to a meeting with two managers the following day. In the meeting on November 24, 2009, the managers informed the grievant of the agency's intent to terminate her employment. She was told that an agency investigation had recommended issuing six Group II Written Notices against her. However, the manager running the meeting informed her that he would only be issuing two of the Written Notices, which would still result in her termination. He offered the grievant the opportunity to resign. After considering her options during the meeting and asking for advice from the managers, she submitted a letter of resignation.[1]

The grievant's December 18, 2009 grievance challenges her separation from state employment and alleges that her resignation was involuntary. She sought to withdraw her resignation after the fact, but the agency declined to allow her to do so. Because the grievant had submitted a letter or resignation, the agency denied her access to the grievance procedure. The grievant now appeals that determination to this Department.

DISCUSSION

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.[2] In addition, this Department has long

[1] Additional facts related to this meeting are discussed below in the analysis of the grievant's claims.
[2] Va. Code § 2.2-3001(A); *Grievance Procedure Manual* § 2.3.

held that once an employee's voluntary resignation becomes effective, he/she no longer has access to file a grievance.[3]

Involuntary Resignation

To demonstrate that she has access to the grievance procedure to challenge her separation from employment, the grievant must show that her resignation was not voluntary. 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.[4] 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."[5] Although the grievant appears to raise some allegations under the misrepresentation theory, due to this Department's analysis of the duress or coercion theory below, the misrepresentation argument need not be addressed.

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.[6] "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."[7]

Alternative Choice

That the alternative choices facing an employee are 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."[8] "[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."[9]

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[3] *E.g.*, EDR Ruling No. 2005-1043.
[4] *See* Staats v. U.S. Postal Serv., 99 F.3d 1120, 1123 (Fed. Cir. 1996).
[5] Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 174 (4th Cir. 1988).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] 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

In this case, there is no evidence the agency *knew* that its threatened disciplinary action could not be substantiated. 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.[10]

Understood the Choice

Although the basic charges were read to her during the November 24th meeting, the grievant states that she was not presented with copies of the proposed Written Notices and never saw any other writing detailing the charges against her. Moreover, unlike the situation discussed in EDR Ruling No. 2010-2370,[11] the grievant did not receive a memo prior to the meeting detailing the acts of misconduct that the agency found unsatisfactory.

The grievant also alleges that when asking the managers during the November 24th meeting whether she could "fight" the charges, the response by one of the managers led her to believe that only management would review the charges and that there was no other challenge available. The managers, however, have indicated that the grievant was told that she could grieve the disciplinary actions that were issued, but that even if she won on one of the charges, there were multiple other proposed Written Notices. Because the agency only needed to establish two Group II Written Notices to terminate, the grievant was reportedly informed that she may have a tough time fighting all of the charges.

In this case, it is doubtful the grievant could fully understand and evaluate the nature of her choices given the compressed timeframe in which she had to make her decision and the fact that she first learned of the agency's allegations and intended action(s) during the November 24th meeting itself, without the benefit of any written documents at any time describing the allegations or intended discipline.

Time to Decide/Ability to Determine Effective Date

The grievant made her decision entirely within the confines of the meeting on November 24th. As stated above, unlike the case in EDR Ruling No. 2010-2370, the grievant had not been previously notified of the charges surrounding the contemplated discipline or the agency's intention to terminate her.[12] 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

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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)).

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

[11] EDR Ruling No. 2010-2370 (denying access to grievant who submitted letter of resignation on the day after she had been advised that the agency was considering taking disciplinary action for identified instances of misconduct and to which she was invited to respond).

[12] Although agency investigators had met with the grievant months earlier during the agency's investigation and questioned the grievant about certain incidents and other events occurring in her department, these discussions are not the same as providing, in effect, pre-disciplinary due process notice of the charges the agency intends to make against an employee and the proposed disciplinary action(s) at issue.

for a finding of involuntariness, but only when the agency has demanded that the employee make an immediate decision."[13]

In this case, the grievant had an extremely limited amount of time, without the advice of counsel, or any other individual, to choose between instant resignation and instant termination. She had no ability to determine the date of her resignation. More importantly, the extreme time pressure under which the grievant had to make her decision, without prior notice of the charges against her, effectively deprived the grievant of free choice in choosing between resignation and termination.[14]

Conclusion

This Department is the finder of fact on questions of access.[15] The totality of the circumstances in this particular case lead to the conclusion that the grievant's resignation was made without her exercise of free choice. She had an extremely small window of time in which to decide whether she wanted the certainty of resignation as opposed to termination with the ability to grieve. As such, the grievant had access to the grievance procedure to challenge her involuntary separation when she submitted her grievance dated December 18, 2009.

Procedural Guidance

Granting access to the grievance procedure for an employee to challenge an involuntary resignation involving proposed discipline and/or termination that was not actually issued can lead to confusion about employment status and the matters at issue in the grievance and, potentially, at hearing. Therefore, this Department is providing the following guidance for both parties for the further handling of this grievance.

This ruling essentially finds that the circumstances under which the grievant had to decide whether to resign or be terminated effectively denied her of free choice. Therefore, the appropriate remedy is to allow the grievant to make her decision again, with the benefit of reasonably adequate time to consider the charges against her (i.e., the equivalent of pre-disciplinary due process) and her options.[16] If the grievant wishes to revoke her resignation, the

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[13] *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. May 26, 1993) (holding that two to three days was reasonable time)

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

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

[16] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985). Although oral notice of the charges is generally appropriate, *see, e.g.*, Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, because there were at least six proposed Written Notices, some of which the agency may not have

grievant must understand the impact this will have on her employment record. Assuming the agency still wishes to maintain the grievant's separation from employment, the revocation of her resignation will mean that the grievant's separation would then be classified as termination. The agency would then issue the grievant any or all of the Written Notices it was proposing to issue on November 24, 2009. From that point, this grievance, and any subsequent hearing, will be about the Written Notices the agency chooses to issue and the grievant's resulting termination.

As such, by proceeding with this grievance, the grievant's record will reflect that she was terminated, not that she resigned, on November 24, 2009. The grievant would only succeed in being reinstated to her job (i.e., reversing the termination) if she is awarded relief by the agency during the management steps or if she prevails at hearing in her challenges to the Written Notices. To sustain her termination at hearing, the agency would have to provide sufficient evidence to support the issuance of at least two of the Group II Written Notices. Mitigating and aggravating circumstances will also be considered.[17]

However, if the grievant does not wish to proceed with this process, she can choose to withdraw her grievance and remain resigned, which should, at that point, be considered a voluntary separation. The grievant must notify the agency of her choice in writing within **ten workdays of the date of this ruling**. If the grievant chooses to proceed with the grievance, the agency is directed to reopen the December 18, 2009 grievance and begin the process anew with the appropriate step-respondent, following issuance of the Written Notices. Otherwise, if the grievant chooses to withdraw her grievance, no further action is necessary.

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Claudia T. Farr
Director

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eventually issued, written notice of all the potential charges would be helpful to clarify the misconduct at issue in this case.

[17] The grievance will essentially proceed as if it was originally initiated to challenge the Written Notices and termination.