

Issue: Access to the Grievance Procedure; Ruling Date: March 25, 2010; Ruling #2010-2571; Agency: Department of Behavioral Health and Developmental Services; Outcome: Access Denied.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of the Department of Behavioral Health and Developmental Services
Ruling No. 2010-2571
March 25, 2010

The grievant has requested a ruling on whether she had access to the grievance procedure when she initiated her January 27, 2010 grievance with the Department of Behavioral Health and Developmental Services (the agency). For the reasons set forth below, this Department concludes that the grievant does not have access to the grievance procedure.

FACTS

On January 6, 2010, the agency first notified the grievant that her termination was being recommended through disciplinary action against her. The grievant was given the opportunity to respond, which she did in writing on January 9, 2010. The agency then notified the grievant of its intent to terminate her with a second Group II Written Notice¹ on January 12, 2010. The agency gave the grievant the opportunity to respond by the following day. However, the grievant decided to submit a resignation on January 12, 2010. Thereafter, she sought to file this grievance to get her job back. The agency determined that the grievant did not have access to the grievance procedure because she had resigned. The grievant now appeals that determination to this Department arguing that her resignation was involuntary.

DISCUSSION

The General Assembly has provided that all non-probationary state employees may utilize the grievance process, unless exempted by law.² Employees who voluntarily resign, however, may not have access to the grievance process, depending upon the surrounding circumstances, such as the nature of their claim or when the grievance is initiated. For example, this Department has long held that any grievance initiated by an employee *prior* to the effective date of a voluntary resignation may, at the employee's option, continue through the grievance process, assuming it otherwise complied with the 30-day calendar rule. On the other hand, this Department has also long held that once an employee's voluntary resignation becomes effective, he/she may not file a grievance.³

¹ The grievant already had an active Group II Written Notice in her file at the time, which she received on November 23, 2009.

² Va. Code § 2.2-3001(A); *Grievance Procedure Manual* § 2.3.

³ *E.g.*, EDR Ruling No. 2005-1043.

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."⁴

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."⁵ A misrepresentation is material if it concerns either the consequences of the resignation or the alternative to resignation.⁶ A resignation or retirement is involuntary if it is obtained by agency misinformation or deception.⁷ 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."⁸ Unlike a resignation which is induced through duress, there is no requirement that an employee be intentionally deceived about his/her employment options, it being sufficient that "the employee shows that a reasonable person would have been misled by the agency's statements."⁹ The misleading information can be negligently or even innocently provided.¹⁰ If the employee materially relies on the misinformation to his/her detriment, his/her resignation is considered involuntary.¹¹ However, in this case, the grievant has not alleged that the agency made any misrepresentation that caused her to resign, nor has this Department found evidence of such.¹²

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.¹³ "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 [she] was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether [she] was permitted to select the effective date of resignation."¹⁴

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

⁴ Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 174 (4th Cir. 1988).

⁵ *Id.*

⁶ *Id.*

⁷ Covington v. Dept. of Health and Human Services, 750 F.2d 937, 942 (Fed. Cir. 1984).

⁸ *Id.* (quoting Scharf v. Dept. of the Air Force, 710 F.2d. 1572, 1575 (Fed. Cir. 1983)).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* ("[W]hether the employee made an informed choice is the touchstone of our analysis.").

¹² The grievant asserts that the proposed termination was harsh given the alleged misconduct at issue. Even if the grievant is correct, she has not pointed to any fact misrepresented by the agency.

¹³ Stone, 855 F.2d at 174.

¹⁴ *Id.*

grounds for termination existed.”¹⁵ “[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.”¹⁶

Although the grievant could understandably argue that her termination was a harsh result, this does not appear to be a case where the agency *knew* its threatened disciplinary action could not be supported. 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.¹⁷

Understood the Choice

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 between termination and resignation. There is some indication, however, that the grievant may have been unclear on some of the consequences of termination. It appears that she may have believed that if she was fired, she would not be able to get another job with any state government agency. The grievant has not presented any other indication that she did not understand the nature of the choice in this case.

Time to Decide/Ability to Determine Effective Date

“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.”¹⁸ It does not appear that this is such a case. The approximately 24-hour period provided following notification of the agency’s intent to terminate her employment based on a second Group II Written Notice does not appear to have been unreasonable under the circumstances of this case.¹⁹ Ultimately, the grievant chose to resign immediately.

¹⁵ *Id.*

¹⁶ *Schultz v. U.S. Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987); *see also, e.g., 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)).

¹⁷ *Stone*, 855 F.2d at 174.

¹⁸ *Staats*, 99 F.3d at 1126.

¹⁹ *See, e.g., 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). *But see Wolford v. Angelone*, 38 F. Supp. 2d 452, 459 (W.D.

In consideration of all the above factors, this Department cannot conclude that the grievant resigned involuntarily. The only factor that might arguably weigh in the grievant's favor is the allegation regarding her understanding of the consequences of termination. However, the grievant was given a day to make her decision and ostensibly would have had time to inquire further about this issue. She ultimately chose not to use that time and resigned. As a result, this evidence does not clearly support the grievant's position. The totality of the circumstances in this analysis, therefore, indicates that the grievant's resignation was voluntary. As such, the grievant was not an employee of the Commonwealth of Virginia when she initiated this grievance and, thus, does not have access to the grievance procedure.

APPEAL RIGHTS AND OTHER INFORMATION

For more information regarding actions that you may take as a result of this ruling, please refer to the enclosed sheet. If you wish to appeal the determination that you do not have access to the grievance procedure to circuit court, please notify your Human Resources Office, in writing, within five workdays of receipt of this ruling.²⁰

Claudia T. Farr
Director

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).

²⁰ See *Grievance Procedure Manual* § 2.3.