

Issue: Access to the Grievance Procedure; Ruling Date: December 3, 2010; Ruling No. 2011-2832; Agency: Department of Corrections; Outcome: Access Denied.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2011-2832
December 3, 2010

The grievant has requested a ruling on whether she had access to the grievance procedure when she initiated her grievance on October 20, 2010 with the Department of Corrections (the agency). The agency claims that the grievant does not have access to the grievance procedure because she voluntarily resigned on October 15, 2010, and thus was not an employee of the Commonwealth at the time the grievance was initiated. For the reasons set forth below, this Department concludes that the grievant did not have access to the grievance procedure.

FACTS

Prior to her separation, the grievant was employed as a Corrections Officer with the Department of Corrections. On October 14, 2010, the grievant was informed she was under investigation for fraternization. Once the grievant learned about the investigation, she asked her supervisor what options she had. The grievant's supervisor indicated her options were to resign or quit. On October 15, 2010, the grievant tendered her resignation to the agency, effective retroactively to October 14, 2010. Thereafter, on October 20, 2010, the grievant initiated a grievance challenging her separation as involuntary. The grievant alleges her resignation was obtained through misrepresentation, deception, duress, and an unreasonable time pressure. In a letter dated November 10, 2010, the agency head denied the grievant access to the grievance procedure stating that the grievant voluntarily resigned from her position. The grievant now asks this Department to grant her access to the grievance process.

DISCUSSION

To have access to the grievance procedure, an employee "must have been employed by the Commonwealth at the time the grievance is initiated (unless the *action grieved* is a termination or involuntary separation)."¹ Thus, once an employee separates from state employment, the only claim for which he or she may have access to the grievance procedure is a challenge to a termination or an involuntary separation. Employees who voluntarily resign their employment may not have access to the grievance process, depending upon the surrounding

¹ *Grievance Procedure Manual* § 2.3 (emphasis added). In addition, the employee must satisfy the other requirements for access to the grievance procedure, such as non-probationary status. *Id.*

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 or she may not file a grievance.

The grievant argues her resignation was involuntary because the decision was against her own free will and it was obtained through misrepresentation, deception, duress, and an unreasonable time pressure. 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

"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 In this case, prior to the grievant tendering her resignation, only two material facts were represented by her supervisor. First, the grievant was under investigation for fraternization. Second, the grievant's options were to "resign or quit" if she chose not to proceed with the investigation. Here, the supervisor's two statements did not misrepresent any facts. Thus, the grievant's assertions are insufficient to establish an involuntary resignation under the misrepresentation theory.

Under the 'duress' theory, a resignation may be found involuntary if under the totality of the circumstances it appears that the employer's conduct in requesting resignation effectively deprived the employee of a free choice in the matter.⁵ 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 or she was given; (3) whether the employee was given reasonable time in which to choose; and (4) whether he was permitted to select the effective date of resignation.⁶ In applying this totality of circumstances test, the assessment of whether real alternatives were offered must be gauged by an objective standard rather than by the grievant's purely subjective evaluation.⁷ The mere fact that the choice is between two comparably unpleasant alternatives – e.g., resignation or face investigation – does not in itself establish that resignation was induced by duress or coercion.⁸

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

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

In this case, after the grievant had this conversation with her supervisor, she decided to leave work immediately instead of finishing her shift for the day. According to the grievant, the Major did not request that her decision to resign or quit be given by a certain date. Later that day, the grievant called the agency's human resources department to discuss the resignation process. Human resources informed the grievant she would need to fax in a formal letter of resignation, and the grievant faxed in her letter of resignation the following day. The grievant willingly decided the effective date of her resignation, October 14, 2010. Here, the grievant knew the alternative to resignation was to proceed with the investigation and she seemed to fully understand that consequence. Moreover, the grievant was not given a deadline for making the decision and was given an opportunity to discuss the situation with human resources before she submitted her resignation the following day. After the grievant had reasonable time to make an informed decision, the grievant tendered her resignation on October 15, 2010, by her own free will; the grievant voluntarily chose the effective date of resignation to be October 14, 2010. Considering all these factors, we find the grievant's resignation was not induced by duress or coercion. Accordingly, this Department concludes that the grievant's resignation was voluntary, thus she does not have access to pursue her October 20, 2010 grievance.

APPEAL RIGHTS AND OTHER INFORMATION

For all the above reasons, this Department concludes that the grievant in this case does not have access to the Commonwealth's employee grievance procedure. 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 this Department's access determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling.

Claudia Farr
Director