Issue: Qualification – Compensation (Involuntary Demotion); Ruling Date: April 4, 2011; Ruling No. 2011-2918; Agency: Department of Corrections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2011-2918
April 4, 2011

The grievant has requested a ruling on whether her partially qualified grievance with the Department of Corrections ("DOC" or the agency) qualifies for a hearing. For the reasons discussed below, the grievant's claim that her demotion was involuntary is not qualified for hearing.

FACTS

Prior to her demotion, the grievant was employed as a Time Computation Specialist with DOC. According to the agency, the grievant failed to timely process the file of an offender and was issued, on November 10, 2010, a Group II Written Notice for "Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy." The same day, the grievant signed a document which indicated that she was voluntarily accepting a demotion to a position as a Support Staff.

The grievant initiated a grievance challenging the Group II Written Notice and the demotion.[1] The agency qualified the Written Notice but declined to qualify demotion. The grievant now seeks qualification of the demotion, claiming that it was not truly voluntary.

DISCUSSION

The grievant claims that she felt that she had to accept a demotion, and thus her demotion was involuntary. In assessing this qualification request, this Department believes that prior rulings relating to the voluntariness of resignations may be instructive. 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] A resignation can be viewed as forced by the employer's duress or coercion, if it appears that the employer's conduct effectively deprived

[1] The Group II Written Notice was qualified and thus may proceed to a hearing officer who is authorized to make findings of fact "de novo," that is to say, afresh and independently, as if no determinations have been made. *Rules for Conducting Grievance Hearings VI(B).*
[2] Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 174 (4th Cir. 1988).

the employee of free choice in the matter.[3] "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 a reasonable time in which to choose; and (4) whether [the employee] was permitted to select the effective date of resignation."[4] These factors are applied below to the comparable issue of whether the grievant's demotion was voluntary.

Alternative Choice

That the choice facing an employee is demotion or a possible Group III Written Notice with termination (instead of receiving a Group II Written Notice without termination as the grievant received here) does not in itself demonstrate duress or coercion, unless the agency "actually lacked good cause to believe that grounds for termination existed."[5] "[W]here an employee is faced merely with the unpleasant alternatives of [accepting a voluntary demotion] or being subject to removal for cause, such limited choices do not make the resulting [demotion] 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."[6]

Under the facts of this case, this Department cannot conclude that the agency lacked good cause to believe that grounds for issuing a Group III Written Notice with potential termination existed. It is true that failure to follow policy or comply with established written policy is normally viewed as a Group II offense. However, the Standards of Conduct (SOC) states "that in certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense" when a particular offense had "an unusual and truly material adverse impact on the agency." Here, the agency states that the grievant's failure to follow policy had just such an impact because her actions (or inactions) caused an offender to be incarcerated longer than she should have been, essentially resulting in an illegal incarceration. This Department cannot conclude that the concerns raised by the agency would fall short of meeting the "truly material adverse impact" standard set forth in the SOC or that the proposed charges were otherwise clearly unsustainable. Thus, while the grievant may have perceived her choice as between two

[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] Schultz v. U.S. Navy, 810 F.2d 1133, 1136 (Fed. Cir. 1987); *see also* Staats v. United States Postal Service, 99 F.3d 1120, 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 action which was unjustified or contrary to its own regulations, rules or procedures, the decision was found to be involuntary." (citations omitted)).

unpleasant alternatives (demotion or potential termination), that alone does not indicate that her demotion was induced by duress or coercion.[7]

Understood the Choice

The grievant has not presented any indication or evidence that she did not understand the nature of the choice she was given.

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."[8] Here, the agency demanded no such immediate decision. Rather, it allowed the grievant to consider her decision overnight. Thus, under the particular facts here, we cannot find that the grievant had insufficient time to consider her decision.

CONCLUSION, APPEAL RIGHTS, AND OTHER INFORMATION

Given the totality of the circumstances in this particular case, the facts do not suggest that the agency procured the grievant's demotion without her exercise of free choice. Accordingly, the issue of the demotion does not qualify for hearing. 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 issue, 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.

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Claudia T. Farr
Director

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

[8] *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)