

Issue: Access to the Grievance Procedure; Ruling Date: August 19, 2011; Ruling No. 2012-3054; Agency: University of Virginia; Outcome: Access Denied.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of the University of Virginia
Ruling No. 2012-3054
August 19, 2011

The grievant has requested a ruling on whether she had access to the grievance procedure when she initiated her June 17, 2011 grievance¹ with the University of Virginia (the University). For the reasons set forth below, this Department concludes that the grievant does not have access to the grievance procedure.

FACTS

The University met with the grievant on May 24, 2011 for the 90-day evaluation of her performance plan. The grievant was informed of two specific performance issues and asked to consider her response to the allegations. A follow-up meeting was held on May 25, 2011, at which the grievant was told the University would let her know at a May 27th meeting their determination as to what action would be taken. The next day, May 26th, the grievant e-mailed members of management and asked if she could resign or retire. Again, the following day, May 27th, prior to the scheduled meeting, the grievant e-mailed management and human resources, stating that if the University was going to terminate her employment, she would like to resign and retire. At the May 27th meeting, the University informed the grievant that her employment would be terminated, but, based on her wishes, her request to resign and retire was being honored. The University gave the grievant until the following Tuesday, May 31st, to make her final decision. However, because the grievant would no longer be returning to work with the University in her current position, she was walked to her desk to obtain her personal items and depart. The grievant did not attend the scheduled May 31st meeting. However, she submitted a letter on June 1st, stating that she retired effective May 31st.

Thereafter, the grievant filed her June 17, 2011 grievance to challenge “involuntary dismissal.” The University determined that the grievant did not have access to the grievance procedure because she had retired. The grievant now appeals that determination to this Department arguing that she was fired and/or that her retirement was involuntary.

¹ This is the date that appears next to the grievant’s signature on her Grievance Form A. However, the agency has noted that the grievant did not actually submit the grievance until June 21, 2011. The actual date of initiation has no bearing on the determinations in this ruling.

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 calendar-day 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

Did the grievant resign?

The grievant appears to state that she did not actually resign. However, this argument does not appear to be supported by the facts. Rather, preceding the final determination meeting, the grievant asked in two separate e-mails to be permitted to resign and retire. Consequently, at the May 27th meeting, the University informed the grievant that it would honor her request and that it would not issue further disciplinary action against her if she resigned and retired. She was given additional time to make a decision, at which point she submitted a letter indicating her intent to retire. The grievant secured a clean separation record based on the University's offer and consistent with her prior requests. Her choice of retirement is effectively the same as a voluntary resignation for purposes of access to the grievance procedure. Whether the grievant's choice was voluntary will be assessed below.

Involuntary Retirement

To demonstrate that she has access to the grievance procedure to challenge her separation from employment, the grievant must show that her retirement was not voluntary. The determination of whether a retirement is voluntary is based on an employee's ability to exercise a free and informed choice in making a decision to retire. Generally, the voluntariness of an employee's resignation or retirement is presumed.⁴ A retirement may be viewed as involuntary only (1) "where [the retirement was] obtained by the employer's misrepresentation or deception" or (2) "where forced by the employer's duress or coercion."⁵ The grievant has not raised any allegations under the misrepresentation theory. Therefore, only the duress or coercion theory will be addressed.

A separation can be viewed as involuntary, if it appears that the employer's conduct effectively deprived the employee of free choice in the matter.⁶ "Factors to be considered are:

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

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 *Stone*, 855 F.2d at 174.

(1) whether the employee was given some alternative to [retirement]; (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 [retirement].”⁷

Alternative Choice

That the choice facing an employee is resignation/retirement or discipline 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 [retiring] or being subject to removal for cause, such limited choices do not make the resulting [retirement] 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

Although the grievant may argue that her termination was unwarranted, this does not appear to be a case where the University *knew*, as of May 27, 2011, that its threatened disciplinary and/or performance-based actions could not be supported. Thus, while the grievant may have perceived her choice as between two unpleasant alternatives (resignation/retirement or termination), that alone does not indicate that her retirement was induced by duress or coercion.¹⁰

Understood the Choice

The facts of this case indicate that the grievant, having been informed of the University’s intention to terminate her employment, decided to submit her intent to retire instead. She elected to secure a certain outcome, a voluntary retirement, rather than risk the unpredictable result of a grievance hearing to which she was automatically entitled under the grievance procedure. Accordingly, it appears the grievant understood the nature of the choice between termination and retirement. This Department has reviewed no other evidence that would suggest that the grievant did not understand her choice.

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

⁷ *Id.*

⁸ *Id.*

⁹ *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)).

¹⁰ *Stone*, 855 F.2d at 174.

decision.”¹¹ It does not appear that this is such a case. From the first meeting, the grievant was given nearly a week to make a choice for her job separation. Once the University informed the grievant that her employment would be terminated, she was given a three-day weekend to further consider her options. The extensive amount of time provided the grievant was clearly reasonable.¹² The grievant then also chose to list the effective date of her retirement as May 31, 2011.

In consideration of the above factors, this Department cannot conclude that the grievant retired involuntarily. While we understand the grievant’s argument that she wanted to continue her job, she elected to retire prior to the University taking any further disciplinary action against her. She secured a clean separation record instead of being terminated. The totality of the circumstances in this analysis indicates that the grievant’s retirement was voluntary.¹³ 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 because she is not challenging an involuntary separation.

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.¹⁴

Claudia T. Farr
Director

¹¹ *Staats*, 99 F.3d at 1126.

¹² *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); *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).

¹³ The grievant has submitted documentation regarding her unemployment claim, which determined that her separation was involuntary. However, the Virginia Employment Commission applies a different test for voluntariness for purposes of unemployment than this Department utilizes for matters of access to the Commonwealth’s grievance procedure.

¹⁴ *See Grievance Procedure Manual* § 2.3.