

Issue: Access to the Grievance Procedure; Ruling Date: September 30, 2011;
Ruling No. 2012-3091; Agency: Virginia Department of Health; Outcome: Access
Denied.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of the Department of Health
Ruling Number 2012-3091
September 30, 2011

The grievant has requested a ruling on whether he has access to the grievance procedure with respect to his July 7, 2011 grievance with the Department of Health (the agency). For the reasons set forth below, this Department concludes that the grievant does not have access to the grievance procedure.

FACTS

According to the grievant's appeal to this Department (EDR), the grievant was placed on pre-disciplinary leave on or about May 6, 2011, pending an administrative investigation into his workplace behavior. On May 26, 2011, the grievant was issued a due process memorandum detailing allegations of the grievant's misconduct, which include "threatening, harassing, intimidating and/or retaliatory behavior." The grievant was given until May 31, 2011 to provide a response to the memo. The grievant provided a response, dated May 28, 2011.

On or about June 8, 2011, the grievant was sent a Group III Written Notice with termination, effective June 10, 2011. The grievant states he attempted contact with the agency on June 8th and 9th, asking questions including whether he could resign. The grievant was told that he had until June 10th to determine whether he would resign his position. The grievant asked for more time and was allowed until June 13, 2011 to consider his options. The grievant also contacted this Department's (EDR's) AdviceLine on June 13, 2011. He participated in another conference call on the same day with Department of Health employees to discuss the situation. Ultimately, the grievant submitted a written resignation on June 13, 2011, to be effective at close of business June 9, 2011. On July 7, 2011, he submitted a Grievance Form A to the Department of Health asserting that his termination was based on his race. He now seeks access to the grievance procedure to challenge the proposed disciplinary action and termination, and asserts that his June 13th letter of resignation had been involuntary.

DISCUSSION

The General Assembly has provided that "[u]nless exempted by law, all nonprobationary state employees shall be covered by the grievance procedure."¹ Upon the effective date of a

¹ Va. Code § 2.2-3001(A); Grievance Procedure Manual § 2.3.

voluntary resignation from state service, a person is no longer a state employee. Thus, this Department has long held that any grievance timely initiated by an employee *prior to* the effective date of his or her voluntary resignation may, at the employee's option, continue through the grievance process. However, this Department has also long held that once an employee's voluntary resignation becomes effective, he or she is not covered by the grievance procedure and accordingly may not initiate a grievance.² In this case, the employee initiated his July 7, 2011 grievance after the June 9, 2011 effective date of his resignation. Thus, to have access to the grievance procedure, he must show that his resignation was involuntary.³

The voluntariness of an employee's resignation is presumed.⁴ To determine whether a grievant has rebutted this presumption, EDR has long followed the 1988 Fourth Circuit decision in *Stone v. University of Maryland Medical System Corporation*.⁵ In a "quit or be fired" fact situation, the court in *Stone* determined that 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."⁶ In his appeal to this Department, the grievant asserts only that his resignation was rendered involuntary by alleged misrepresentations by EDR and the agency. The grievant apparently alleges that he was told by EDR that in a "quit or be fired" scenario, he could both choose to resign *and* grieve the proposed discipline; the grievant also alleges misrepresentation on the part of the agency because it purportedly failed to advise him otherwise.

The court in *Stone* recognized that "[u]nder 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."⁷ A misrepresentation is material if it concerns either the consequences of the resignation or the alternative to resignation.⁸ A resignation is involuntary if it is obtained by agency misinformation or deception.⁹ 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."¹⁰ 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."¹¹ The misleading information can be negligently or even innocently provided.¹² If

² *E.g.*, EDR Ruling No. 2005-1043.

³ *E.g.*, EDR Ruling No. 2010-2510 (concluding that this Department is the finder of fact on questions of access). *See also* Va. Code § 2.2-1001(4) (iv); *Grievance Procedure Manual* § 2.3. The grievant cites to EDR Ruling No. 2008-2052, an earlier "quit or be fired" case in which this Department granted an employee access to the grievance procedure on the basis that she had raised "a sufficient question" as to whether her resignation had been involuntary. However, as explained in EDR Ruling No. 2010-2510, to determine access, EDR has since required the grievant to show that his or her resignation had been involuntary for purposes of EDR's access ruling, rather than having a grievance hearing solely on the question of whether the resignation was involuntary.

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 (4th Cir. 1988).

⁶ *Id.* at 174.

⁷ *Id.*

⁸ *Id.*

⁹ *Covington v. Dept. of Health and Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984).

¹⁰ *Id.* (quoting *Scharf v. Dep't of the Air Force*, 710 F.2d 1522, 1575 (Fed. Cir. 1983)).

¹¹ *Id.*

the employee materially relies on the misinformation to his/her detriment, his/her resignation is considered involuntary.¹³

Importantly, under the misrepresentation theory of *Stone*, the allegedly involuntary resignation must be obtained by the **employer's** misrepresentation,¹⁴ not a third-party such as EDR. Consequently, the grievant's arguments about information provided by EDR do not support his claim of involuntary resignation. However, even if information provided by EDR was relevant to the *Stone* analysis, we find the grievant's claims unpersuasive.

The grievant states that he consulted EDR's Frequently Asked Questions (FAQs) available on EDR's website and EDR's AdviceLine for information regarding his situation. The grievant's attorney states that the grievant was told by the AdviceLine consultant that if an employee resigns, the employee does not have access to the grievance procedure. However, again according to the grievant's attorney, the grievant was told by the AdviceLine consultant that "if presented with a different set of facts, such as a 'quit or be fired,' it was possible to grieve the action." The grievant, therefore, apparently concluded that he could resign and still be allowed to grieve the underlying action if it was a "quit or be fired" scenario.

The grievant's apparent assertions to his attorney as to what he was told on EDR's AdviceLine are not plausible or credible. It is entirely possible that the grievant was told he could attempt to submit a grievance if he were to allege involuntary resignation in a "quit or be fired" scenario. However, what is missing in the grievant's attorney's description, and what is consistently provided to callers by EDR's AdviceLine, is that in a "quit or be fired" situation, a grievance that is submitted can only proceed if the grievant can show that the resignation was involuntary under the Fourth Circuit analysis in *Stone*. Additionally, EDR's FAQs, which were also consulted by the grievant, expressly state that "if you voluntarily quit your job, you no longer have access to the grievance procedure." Further, the FAQs, through a highlighted link, describe an involuntary separation as one "which is not of free will; [a] resignation obtained through misrepresentation, deception, duress, coercion, or time pressure,"¹⁵ a description that reflects the factors used in the *Stone* analysis. Indeed, the definition of involuntary separation is also readily available in the *Grievance Procedure Manual* on EDR's website.¹⁶ This information is consistent with information that is conveyed on the AdviceLine whenever an issue of involuntary resignation is discussed.

Consequently, based on the information available from and provided by EDR, it would be unreasonable for the grievant to have concluded that -- in the absence of misrepresentation, deception, duress, coercion, or time pressure -- he could proceed with a grievance despite having resigned. The grievant's subjective interpretations or perceptions are immaterial under the *Stone* analysis, and cannot dispel the objectively accurate information available and provided. There is

¹² *Id.*

¹³ *Id.* ("[W]hether the employee made an informed choice is the touchstone of our analysis.").

¹⁴ *Stone*, 855 F.2d at 174.

¹⁵ Grievance FAQs Nos. 8 & 9, at <http://www.edr.virginia.gov/faqs.htm>.

¹⁶ *Grievance Procedure Manual* § 9, at http://www.edr.virginia.gov/gpm_nine.htm.

insufficient evidence that EDR made any material misrepresentation(s) that led to the grievant's resignation.

The grievant also alleges that the agency did not tell him that he would lose access to the grievance procedure if he resigned. Similarly, the grievant states the agency did not "definitively" answer some of his questions about information that would be conveyed to future employers. The agency disputes the grievant's accounts and explains what information was provided by affidavits from those involved. We find the affidavits to be persuasive. The grievant's allegations do not support a finding of misrepresentation of any material fact by the agency. Indeed, the grievant does not allege that any incorrect information was provided. Further, to show a misrepresentation by nondisclosure, there must be "a knowing and deliberate decision not to disclose a material fact."¹⁷ Neither the grievant's submissions nor the affidavits of the agency employees even suggest the type of intentional act of nondisclosure that would be required to meet this definition. In short, the grievant's allegations do not support a claim that his resignation was obtained through misrepresentation by the agency.

Given the totality of the circumstances, we conclude that the grievant has failed to demonstrate that his resignation was involuntary. As such, we find that the grievant voluntarily resigned, was not an employee of the Commonwealth of Virginia when he 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.¹⁸

Claudia T. Farr
Director

¹⁷ Lambert v. Downtown Garage, Inc., 262 Va. 707, 714, 553 S.E.2d 714, 718 (2001). While *Stone* requires no such intentional act of deception for misrepresentations of material facts, we find this Virginia precedent as persuasive authority in considering an allegation of misrepresentation by nondisclosure of material facts.

¹⁸ See *Grievance Procedure Manual* § 2.3.