

Issue: Access to the Grievance Procedure; Ruling Date: April 25, 2012; Ruling No. 2012-3313, 2012-3314; Agency: Virginia Community College System; Outcome: Access Denied.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of the Virginia Community College System
Ruling Numbers 2012-3313, 2012-3314
April 25, 2012

The grievant has requested a ruling on whether she had access to the grievance procedure when she initiated her February 16, 2012 grievance with her former employer, the Community College. The grievant additionally seeks qualification of her grievance for a hearing. For the reasons set forth below, this Department concludes that the grievant does not have access to the grievance procedure and, therefore, this grievance does not qualify for a hearing.

FACTS

The grievant's 2011 performance evaluation rated her performance as "Below Contributor." Consequently, the grievant was given a Re-Evaluation Plan. Following implementation of that Plan, the Community College rated the grievant's performance as Below Contributor in the Re-Evaluation. The grievant was notified on January 17, 2012 that her employment at the Community College would be terminated as of February 1, 2012. The grievant says she met with human resource professionals on January 18, 2012 to discuss the matter. She was told and agreed to ask if she could resign instead of being terminated. The grievant received a call from the Community College that afternoon and was given the option to resign, which the grievant decided to do. The grievant submitted a letter of resignation dated January 18, 2012, to be effective February 1, 2012. She states she mailed the letter on approximately January 20th. In her February 16, 2012 grievance, the grievant challenges her evaluation and termination.

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 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

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

accordingly may not initiate a grievance.² In this case, the employee initiated her February 16, 2012 grievance after the February 1, 2012 effective date of her resignation. Thus, to have access to the grievance procedure, she must show that her 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 Fourth Circuit decision in *Stone v. University of Maryland Medical System Corporation*.⁵ 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."⁶ 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.⁷ "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 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 resignation."⁸

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 grounds for termination existed."⁹ "[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."¹⁰

Although the grievant could offer reasonable counterarguments to her termination, this does not appear to be a case where the Community College *knew* its threatened disciplinary

² E.g., EDR Ruling No. 2005-1043.

³ E.g., EDR Ruling No. 2010-2510. This Department is the finder of fact on questions of access. See Va. Code § 2.2-1001(4) (iv); see also *Grievance Procedure Manual* § 2.3.

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 *Id.*

¹⁰ *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)).

action could not be supported. The grievant was terminated following a re-evaluation that continued to rate her performance as Below Contributor, which is an acceptable means to terminate an employee under state policy.¹¹ At best, it can be said that the grievant has raised reasonable points to dispute her evaluation. However, in reviewing the stated basis for the grievant's evaluation, this Department cannot find that the Community College had no reasonable basis upon which to base its decision such that it *knew* the re-evaluation and termination were unsupportable. 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.¹²

Understood the Choice

The facts of this case indicate that the grievant, having been informed of the intention to terminate her employment, decided to submit a resignation once that option was offered to her. 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*. Indeed, it appears the grievant sought to resign based on advice she considered from other human resource professionals upon being notified of her termination. Accordingly, it appears the grievant understood the nature of the choice between termination and resignation.

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.”¹³ It does not appear that this is such a case and the grievant has made no such allegation. Rather, the grievant was notified of the termination, considered her situation, and chose to resign once the option was given to her the following day. Further, the grievant states she did not send her resignation letter in immediately, but waited a few days. There is no indication of any time pressure resulting in an involuntary resignation under these facts.¹⁴ In addition, although it is not clear that the grievant chose the effective date of her resignation, the effective date was set approximately two weeks after her resignation, which, again, undercuts any argument that time pressure impacted the grievant's free choice in the matter.

In consideration of the above factors, this Department cannot conclude that the grievant resigned involuntarily. While we understand the grievant's arguments in dispute of her

¹¹ See, e.g., DHRM Policy 1.40, *Performance Planning and Evaluation*.

¹² *Stone*, 855 F.2d at 174.

¹³ *Staats*, 99 F.3d at 1126.

¹⁴ 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).

evaluation and re-evaluation, she elected to resign instead of challenging her termination. The totality of the circumstances in this analysis 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 because she is not challenging an involuntary separation. Because the grievant did not have access to initiate the grievance, qualification for a hearing is not warranted.

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.¹⁵

Claudia T. Farr
Director

¹⁵ See *Grievance Procedure Manual* § 2.3.