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**ACCESS RULING**

In the matter of the Virginia Department of Social Services  
Ruling Number 2024-5666  
February 13, 2024

On January 31, 2024, the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) received a dismissal grievance that challenged the grievant's separation from employment at the Virginia Department of Social Services (the "agency"). The agency subsequently requested a ruling from EDR on whether the grievant has access to the grievance procedure due to her resignation.

FACTS

On or about October 13, 2023, the grievant received an overall "Below Contributor" rating on her annual performance evaluation. The grievant met with management on December 15, 2023, at which time she was informed that she was still not at a "Contributor" level of performance. At the conclusion of the re-evaluation period, the agency continued to maintain that the grievant's performance had not reached a "Contributor" level. As such, managers held a virtual meeting with the grievant on January 8, 2024. During this meeting, the grievant was informed that she was to be terminated that day or she could "immediately resign." The grievant submitted a verbal resignation the same day, which she confirmed by email. On or about January 31, 2024, the grievant submitted a dismissal grievance challenging her separation from employment. The agency asserts that the grievant does not have access to the grievance procedure due to her voluntary resignation.

DISCUSSION

The General Assembly has provided that "[u]nless exempted by law, all nonprobationary state employees shall be covered by the grievance procedure . . . ."<sup>1</sup> Upon the effective date of a voluntary resignation from state service, a person is no longer a state employee. Thus, to have access to the grievance procedure, the employee "[m]ust not have voluntarily concluded their employment with the Commonwealth prior to initiating the grievance."<sup>2</sup> EDR has long held that once an employee's voluntary resignation becomes effective, they are not covered by the grievance

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<sup>1</sup> Va. Code § 2.2-3001(A).

<sup>2</sup> *Grievance Procedure Manual* § 2.3.

procedure and accordingly may not initiate a grievance.<sup>3</sup> In this case, the grievant has alleged that her resignation was tendered under duress and thus was not voluntary.

EDR is the finder of fact on questions of access.<sup>4</sup> 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. Generally, the voluntariness of an employee's resignation is presumed.<sup>5</sup> A resignation may be viewed as involuntary only where it was (1) "obtained by the employer's misrepresentation or deception" or (2) "forced by the employer's duress or coercion."<sup>6</sup> In this case, the grievant has not alleged that her resignation was procured by misrepresentation or deception. As such, this ruling will address only the issue of duress or coercion.

A resignation can be viewed as forced by the employer's duress or coercion if "it appears that the employer's conduct . . . effectively deprived the employee of free choice in the matter."<sup>7</sup> Factors to consider are "(1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice [she] was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether [she] was permitted to select the effective date of resignation."<sup>8</sup>

Cases that ordinarily implicate this analysis involve situations where the employer presents the employee with the options that they can resign or be dismissed, which is what apparently occurred in this case. "[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."<sup>9</sup> Here, although the grievant has challenged the agency's evaluation of her performance as unsatisfactory, this case does not appear to be one where the agency *knew* that its plan to terminate the grievant's employment could not be substantiated. There is evidence of some level of reasonably alleged unsatisfactory performance through the appropriate process.<sup>10</sup> Therefore, considering the first *Stone* factor, the alternatives apparently available to the grievant in this case do not support her claim of duress.<sup>11</sup>

As to whether the grievant understood her choice and its consequences, had time to consider her options, or was permitted to select the effective date of her separation, EDR is not persuaded that the facts support a conclusion that her resignation was procured through duress or coercion. The grievant has not asserted that she did not understand her choice or its consequences. To the contrary, she appears to have posed certain questions about the impact of resigning and the agency connected her with a member of the agency's human resources department to answer those

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<sup>3</sup> *E.g.*, EDR Ruling No. 2005-1043.

<sup>4</sup> *See* Va. Code § 2.2-1202.1(5); *see also* *Grievance Procedure Manual* § 2.3.

<sup>5</sup> *See* *Rosario-Fabregas v. Merit Sys. Prot. Bd.*, 833 F.3d 1342, 1346 (Fed. Cir. 2016).

<sup>6</sup> *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 174 (4th Cir. 1988).

<sup>7</sup> *Id.*

<sup>8</sup> *Benjamin v. Sparks*, 986 F.3d 332, 349 (4th Cir. 2021) (citing *Stone*, 855 F.2d at 174) (noting that no single one of the four recognized factors is dispositive of voluntariness); *see, e.g.*, EDR Ruling No. 2013-3564.

<sup>9</sup> *Schultz v. U.S. Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987).

<sup>10</sup> *See* DHRM Policy 1.40, *Performance Planning and Evaluation*.

<sup>11</sup> *See Stone*, 855 F.2d at 174.

questions – principally related to retirement, applying for unemployment, and the ability to apply for other jobs within the Commonwealth. However, the evidence does indeed demonstrate that the grievant was given a limited time to choose between resignation and termination and was not able to select the date of her separation. While it appears that the grievant accordingly made a decision under time pressure, we cannot say that the totality of these facts undermine the presumption of voluntariness. There is no indication that the grievant sought and was denied additional time to make her decision. Further, when the grievant requested to speak with human resources to discuss questions she had, her request was granted and her questions were answered.

Having considered the totality of the circumstances in this particular case, EDR finds that the evidence is insufficient to demonstrate that the agency procured the grievant's resignation by duress or coercion without her exercise of free choice. The grievant had received notice on December 15 that her performance was still unsatisfactory and, accordingly, she should have been aware going into a meeting with management on January 8 that termination of her employment was possible. Although the grievant may understandably regret making a hasty decision, we cannot say that the grievant did not evaluate her options and make an informed decision based on the information available to her in that moment. The facts presented do not support a finding of involuntariness in view of the general presumption of a voluntary resignation. Accordingly, we conclude that the grievant's separation from employment was based on a voluntary resignation, and thus she does not have access to the grievance procedure. The dismissal grievance will not proceed to hearing and EDR's file will be closed.

EDR's rulings on access are final and nonappealable.<sup>12</sup>

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<sup>12</sup> Va. Code § 2.2-1202.1(5).