ARBITRATION DECISION NO.:
666

UNION:
OCSEA. Local 11, AFSCME, AFL-CIO

EMPLOYER:
Ohio Department of Rehabilitation and Correction

DATE OF ARBITRATION:
February 19, 1998

DATE OF DECISION:
April 4, 1998

GRIEVANT:
O.G. Steele

OCB GRIEVANCE NO.:
27 23 (97 03 04) 0486 01 04

ARBITRATOR:
Phyllis Florman

FOR THE UNION:
Carrie M. Casady, Associate General Counsel
Mark Linder, Assoc. General Counsel
Time Shaffer, Staff Representative

FOR THE EMPLOYER:
John McNally, Labor Relations Specialist
Lou Kitchen, L.R. Specialist
Michelle Williams, LRO/RCI

KEYWORDS:
Arbitrability
Constructive Discharge
Right to Union Representation
Resignation
Voluntary Quit

ARTICLES:
Article 1 – Recognition
§1.01 – Exclusive Representation

Article 24 – Discipline
§24.03 – Supervisory Intimidation
§24.04 – Pre-Discipline

Article 25 – Grievance Procedure
§ 25.01 – Process

FACTS:

The grievant was employed by the Department of Rehabilitation and Correction (DR&C) from September 19, 1994 to February 18, 1997. He worked as an Activity Therapy Specialist at the Ross Correctional Institution (RCI). On February 18, 1997, the warden at RCI summoned the grievant from a training session in order to hold a private meeting with him. Directly following the meeting between the grievant and the warden, the warden directed the grievant to the RCI Personnel Office where the grievant tendered his written resignation.

The grievant attempted to rescind his resignation with the warden by telephone on February 19, 1997 and in writing on February 20, 1997. The warden denied both of the grievant's requests to rescind his resignation, and as a result, the Union filed this grievance.

EMPLOYER'S POSITION:

The Employer first argued that the grievance was not substantively arbitrable because the grievant was not an employee at the time the grievance was filed. Once the grievant resigned, he lost his right to Union protection under the Contract. Second, the Employer argued that the Union had the burden of proving that there was no voluntary termination of employment, and that the grievance should be denied because the Union was unable to produce any evidence that the grievant's resignation was involuntary or that the Employer constructively discharged the grievant.

Also, the Employer maintained that there was no violation of the Article 24.02 right to Union representation nor of the *Weingarten* decision because there was no investigatory interview, no attempt to use information gained from the meeting to discipline the grievant, and no discipline threatened. In addition, the Employer contended that there could not be a. constructive discharge because courts have held that the resignation is voluntary where an employee is permitted to resign as an alternative to being removed for just cause, Finally, the Employer argued that it was not under any duty to allow the grievant's resignation to be rescinded.

UNION'S POSITION:

The Union first claimed that the grievance was arbitrable because the grievant did not voluntarily resign, and that in fact the Employer constructively discharged the grievant. The Employer coerced the grievant into resigning by informing that his life and the lives of his children may be in Jeopardy if he remained employed at RCL The grievant involuntarily resigned because of the feelings of fear the Employer had instilled in him. As a result of what the Employer told him, the grievant acted rashly and irrationally in tendering his resignation.

The Union also contended that a determination as to whether the grievant resigned voluntarily must be determined by looking at the totality of the circumstances. In this case, the warden failed to present evidence and any first hand knowledge of any wrongdoing on the part of the grievant, he failed to verify information obtained from inmates. Finally, the Union asserted that the resignation was rescinded before it became effective and that the warden lacked authority to effectuate the resignation.

ARBIRATOR'S OPINION:

The Arbitrator found that the grievance was arbitrable because the Contract does not State that only an

employee may file a grievance. "Grievance" is defined in Article 25.01 as, "any difference, complaint, or dispute between the employer and the Union or any employee . . .” Here, a Union chapter president filed the grievance, and therefore, the case at bar fit the definition of "grievance" found in Article 25.01.

The Arbitrator found that the Employer had not violated Article 24.04 by holding the February 18, 1997 meeting with the grievant. The employee did not have reasonable grounds to believe information obtained in the interview may have been used to support disciplinary action against him, nor was the February 18, 1997 meeting between the warden and the grievant one that could be considered investigatory. Therefore, even if the grievant's question, "Do I need Union representation?" was construed as a request for Union representation pursuant to Article 24.04, the Employer did not violate Article 25.01 by holding the February 18 meeting.

The Arbitrator did not find that the grievant was constructively discharged. In order to hold that an employer constructively discharged an employee, the employee must be able to show that the decision to resign was the result of working conditions so intolerable, difficult, or unpleasant that a reasonable person would feel compelled to resign. The Arbitrator found that the facts of this case did not indicate that the grievant's work situation was intolerable, and therefore, a finding that the Employer constructively discharged the grievant would be improper.

Looking at the definition of "involuntary quit" used in a 1952 arbitration decision, the Arbitrator did not find that Article 24.03 had been violated. A finding that a quit was not voluntary must be based on evidence of coercion, duress, incapacity, or unawareness. The Arbitrator saw that the proper inquiry to be whether the employer had good cause to believe that grounds existed to support what it presented to the grievant. Although the Union contended that the Employer did not have good cause to believe what it presented to the grievant, the warden's allegations were not shown to be unfounded. The information on which he based his statements to the grievant came from a member of a task force responsible for investigating and advising the warden. Finally, the Arbitrator did not find any evidence that the grievant had a contractual or legal right to demand that the Employer recognize his request to rescind his resignation.

AWARD:

The Arbitrator denied the grievance, and as a result, she found that the Employer had no obligation to honor the grievant's request to rescind his resignation.

TEXT OF THE OPINION: *** * ***

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ARBITRATION OPINION AND AWARD

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In the Matter of Arbitration between:

STATE OF OHIO
DEPT OF REHABILITATION
AND CORRECTION

Gr.27 23 970304 0486 01 04

and O.G.STEELE (ROSS CI)

OCSEA/AFSCME/LOCAL 11

APPEARANCE:

For the Employer:

John A. McNally, L.R.Specialist
Lou Kitchen, L.R. Specialist
Michelle Williams, LRO/RCI

For the Union:

Carrie M. Casady, Assoc. General Counsel
Mark Linder, Assoc. General Counsel
Tim Shaffer, Staff Rep.

ARBITRATOR: **PHYLLIS E FLORMAN**
Louisville, Kentucky

* * *

By the terms of the Agreement between the State of Ohio ("the Employer") and OCSEA/AFSCME /Local 11 ("the union") disputes between the parties are to be settled in accordance with the grievance and arbitration procedures provided therein. Pursuant to such procedures Phyllis E Florman was selected as the arbitrator to hear a dispute concerning the resignation of the Grievant.

A hearing was held on February 19, 1998 at the Ross Correctional Institution ("RCI") in Chillicothe, Ohio at which the parties were afforded full and equal opportunity to make statements and arguments, introduce evidence, and examine and cross examine witnesses. The proceedings were not transcribed. Post hearing briefs were submitted by March 17, 1998. **1**

ISSUE

Whether the Grievant voluntarily quit or was constructively discharged on February 18, 1997 when he tendered a written resignation? whether the qrievant effected rescinded his resignation? if the grievant was constructively discharged, or if he effectively rescinded his resignation, what is the appropriate remedy?

CONTRACT PROVISIONS

ARTICLE 1.01. EXCLUSIVE REPRESENTATION

. . . The Employer recognizes the Union as the sole and exclusive bargaining representative in all matters establishing and pertaining to wages, hours, and other terms and conditions for all full and part-time Employees*. . .*

ARTICLE 24.03, SUPERVISORY INTIMIDATION

. . . An employer representative shall not use the knowledge of an event giving rise to the

imposition of discipline to intimidate, harass or coerce an Employee.

ARTICLE 24,04, PRE DISCIPLINE

. . . An Employee shall be entitled to the presence of a Union Steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

ARTICLE 25.01, PROCESS

. . .[a grievance is] any difference, complaint, or dispute between the employer and the Union or any Employee regarding the application, meaning, or interpretation of this Agreement.

STIPUIATED FACTS

1 *Grievant was employed with the Department of Rehabilitation and Correction from September 19, 1994 to February 18, 1997, as an Activity Therapist Specialist at the Ross Correctional Institution*.

2 Warden Edwards summoned Grievant from an In Service Training on February 18, 1997 for the purpose of having a private dialogue with Grievant.

3 Directly following the meeting between Warden Edwards and Grievant, Warden Edwards directed Grievant to Sandy Price, Personnel Officer.

4 Grievant signed a written resignation from his position as an Activity Therapist Specialist at Ross Correctional Institution on February 18, 1997.

5 Grievant attempted to rescind his resignation on February 19, 1997, during a phone call with Warden Edwards.

6 Grievant attempted to rescind his

resignation through a written request to Warden Edwards on February 20, 1997.

7 *Warden Edwards denied both of the Grievant's requests to rescind his resignation*.

ADDITIONAL STATEMENT OF FACTS

The grievance was filed by Local Union President John Horton. It is dated February 26, 1997 and reads:

Grievant maintains that he was intimidated, coerced, threatened & lied to, in order to induce him to resign. He wants to rescind his resignation & the Warden refuses.

Step 3 Hearing officer Charles Adams' Response of July 7, 1997 states in part:

It is the opinion of the Hearing Officer, that regardless of the allegations made by the Warden, the only coercion or inducement made to the Grievant was the inducement and coercion upon himself based upon the allegations made. It seems to the Hearing Officer that if the Grievant was free of any activity or complicity in such activities, that there would be absolutely no reason to affect a resignation other than to perhaps leave where somebody may be spreading rumors about an individual. However, there did not have to be any coercion on the part of anybody for the Grievant to resign. The resignation was purely his act and his alone. *Furthermore, management has no contractual responsibility to rescind a resignation, after the effective date of that resignation, and the Grievant did not call the Warden until 2 days after the resignation. And therefore the Warden had no contractual responsibility to do anything at all after the effective date of the resignation. Therefore, the grievance can only be and should be denied.*

At the arbitration hearing the Grievant testified that his duties were to set up activities for inmates; that his relationship with his supervisors was good; that his evaluations were above average; that his only discipline was two verbal reprimands for Sick Leave; that he was selected for a Disturbance Control Team; that the only time he was asked to submit to a urinalysis test for illegal drug use was when he was hired; and that the usual security procedure for coming into RCI did not change, and no one asked him suspicious questions, close in time to February 15, 1997.

The Grievant recalled that on February 18, 1997 the Warden motioned to him to come out of the eight hour Inservice Training Class at about 3:15 pm and asked him to come to his office; that in the office the Warden said words to the effect:

> *Your name is hot. inmates are mentioning your name. With drugs coming in, some inmates over dosed and inmates are mentioning your name. I know you have two boys. Your lives may be in jeopardy. I need to get you out of here. I don't know what inmates are capable of doing. I need you to go downstairs and resign before things start happening.*

The Grievant noted that the Warden was rushing and did not ask for his side of the story, that when he said, "You're making accusations. Don't you think I need Union representation" the Warden said, "*No, I'm doing this on my own*"; that he had no time to think except to say, "*If you say my life and my kids life are in jeopardy, why not transfer me to CCI*," and the Warden replied to give it two weeks and he would give a good recommendation; and that after five minutes in the Warden's office, he went to the Personnel Office.

The Grievant emphasized that in the Personnel Office he told Ms. Sandy Price he was there to sign the resignation form; that per the Warden's instructions he wrote he was resigning "*effective 2 18 97 for personal reasons*"; that the forms were all ready; that no exit interview was conducted; and that in the two or three minutes he was with Ms. Price she did not suggest he think about what he was signing.

The Grievant added that in the evening he spoke with a lawyer; that on February 19, 1997 he contacted the Union and called the Warden's office to rescind the resignation; that he showed up at work at his next regularly scheduled work day of February 20, 1997 and showed Institute Inspector Baker a letter which he then gave to Union Representative Taylor reading:

> *On Tuesday afternoon, February 18, 1997, you advised me to submit a resignation stating 'personal reasons', because you told me my life or safety and that of my family might be in danger. I did as you suggested, although I had no intention of resigning my job.*
>
> *When I called you on Wednesday (yesterday) to tell you I was rescinding my resignation, you* **5**
>
> *told me you would not let me do it. I am advising you in writing that I do not wish to resign my job.*

The Grievant acknowledged that he read the Resignation and Release of all claims forms before he them; that Ms. Price reviewed the COBRA information with him and he elected to take the information home and make a decision later; that he had no physical or mental problems and was not taking medication at the time; that since no discipline was pending there was no right to a predisciplinary hearing before resigning; and that the Warden did not, threaten to go forward with drug allegations if he did not resign, but added he felt he had no alternative except to follow directives.

Warden Ronald D. Edwards testified that a Task Force from the Ohio State Highway Patrol, the Ross County Sheriff's Department, and the Chillicothe Sheriff's Department was investigating drug trafficking; that the Task Force gave information to RCI Institutional Investigator Baker that the Grievant was involved in a drug smuggling operation; that Mr. Baker set up a sting phone number and a call came in from a woman who was arranging to bring drugs to the Grievant for $800; that the Task Force in Mr. Baker's presence arrested Carrie Knoederer, the spouse of an inmate, after she

purchased one pound of marijuana for $800 from an undercover officer; and that Ms. Knoederer confessed she and the Grievant planned by phone for him to bring the drugs into RCI and sell them to inmates as had been done eight or nine times before.

Warden Edwards explained that on February 18, 1997 for 30 minutes in his office he told the Grievant he just received information from the Task Force that he was implicated in ongoing plans to bring in contraband; that he wanted the Grievant to know how deeply involved he was and that it was very risky and harmful for RCI; that the Grievant said he wanted the situations to cease, he did not want to embarrass his family, and he asked how he could "*walk*"; that he offered to let him walk away from the situation by resigning for personal reasons and in exchange the Warden would end the internal investigation; and that he advised him he had no control over the Task Force's criminal investigation. **6**

Warden Edwards emphasized that he did not mention The Grievant's family being in danger; that the Grievant is intelligent; that he never threatened disciplinary action if the Grievant did not resign; that he told the Grievant he could make the offer because although a subpoena for the Grievant's phone records was being issued, he had no evidence in hand yet; that no Union representative was needed because it was not an investigatory interview and he had no intention of using the information for disciplinary purposes; and that before the Grievant left his office at about 4:00 pm he called Personnel to "*hold up*" because Ms. Price leaves at 4:05 pm.

Warden Edwards stated that within 72 hours the Grievant sought to rescind his resignation; that he has authority to reconsider and rescind a resignation but he has never done it; that his resignation was effective the date it was signed; and that he wrote the Grievant on February 21, 1997:

> *I am in receipt of your correspondence dated February 20, 1997 requesting to rescind your Resignation. You have made several allegations . . . that are untrue. Your resignation has been formally accepted and processed. You advised me that you wanted to resign on February 18, 1997; that request was granted. We have begun the process to post and ill the vacancy. if you have any further questions. . . .*

Warden Edwards acknowledged that he did not talk to Ms. Knoederer or her spouse/inmate, but noted his presence commands great attention so for him to talk to an inmate puts the inmate at risk and can jeopardize a criminal investigation; that it is the Institutional Investigator's job to gather information and advise him; that Investigator Baker has being doing it for over 20 years; and that information had been corroborated by the three law enforcement agencies comprising the Task Force; that he has authority to talk to inmates and can place them in protective custody, but noted it is a last resort; and that in random tests 26% of inmates tested positive.

Warden Edwards acknowledged he can only recommend an Employee be fired and the appointing authority has to sign **7**

off, but said it is different with a resignation; that is personal philosophy and practice is to be proactive with regard to potential acts of Employee misconduct; and while the phone number on the subpoena which was issued February 12, 1997 was the one RCI had from the Grievant, it was agreed it was no longer the Grievant's correct address or number.

Personnel Director Sandy Price testified that on February 18, 1997 the Warden called her around 4:00 pm to "*stick around*"; that the Grievant came in and said he wanted to resign; that she took out a prepared packet which did not have any information filled in; that she went over the forms with him and he declined to have an exit interview; that it was requested on February 20, 1997 to have the vacancy posted; and that the Grievant did not seem upset and spent 15 to 20 minutes with her.

Ms. Price acknowledged that she could not recall what time the Grievant came to her office; that the Warden told her the Grievant asked to rescind his resignation, but added no one has ever been allowed to do it; and that the Personnel Action Form does require approval of appointing authority, but said the form is used for every personnel action and the Warden is the releasing or appointing authority where resignation is concerned.

POSITION OF THE EMPLOYER

First, having submitting seven cases to support its position the employer argues that because the Grievant was not an Employee at the time the grievance was filed, the grievance is not substantively arbitrable. It stresses Article 1.01 only covers full and part time Employees, and Article 25.01 defines a grievance as dispute between the employer and an Employee. Once he lost his status as a full time Employee, the Grievant lost his right to exclusive representation protection.

Next, the employer claims the burden of persuasion lies with the Union to show that there was no voluntary termination of employment. It insists the Union failed to produce evidence of coercive tactics, or duress, or lack of comprehension. It cannot be said he was constructively discharged. **8**

Third, the employer maintains there was no violation of the Article 24.02 right to Union representation or of the Weingarten decision. It asserts there was no investigatory interview, no attempt to use information gained to discipline him, and no discipline threatened. The Grievant did not seek predisciplinary processes. Union representation was not required.

.Fourth, the employer insists there can be no finding of a constructive discharge. Cases establish circumstances where Employees are found to have knowingly and voluntarily resigned. Courts have ruled that where an Employee is permitted to resign as an alternative to being removed on charges which are meritorious, the resignation is voluntary.

Fifth, the employer emphasis it was not under any duty to allow the Grievant's resignation to be rescinded. The Warden had the right to accept his resignation. And he had the right to refuse to allow the Grievant to rescind it.

POSITION OF THE UNION

First, having submitted 17 cases to support is position, the Union claims the grievance is arbitrable because principles of just cause have relevance. Constructive discharge, a well recognized concept in arbitration, has as its purpose preventing an employer from unfairly forcing an Employee to resign. Since the Grievant did not voluntarily resign, the matter is arbitrable.

Second, the Union argues the Grievant was coerced forced, or harassed to resign. He signed a resignation form but had no intent to resign when he came to work. The Grievant involuntarily resigned out of fear for his children's lives, acting rashly and without giving it rational thought. It asserts he reacted numbly and trustingly, was coerced and tricked, and had no option.

Third, the Union argues that one must determine whether a resignation was voluntary based upon the totally of the circumstances, including whether an employer induces the resignation as the only alternative to a removal based upon unfounded charges. Here, the Warden failed to present founded evidence, hand no first hand knowledge, failed to verify inmates' information, acted four days before the

subpoenaed phone records were printed, and needed a scapegoat for the outrageous drug problem.

Fourth, the Union maintains it was an investigatory interview requiring Union representation. The Grievant asked about it. And the Warden purposefully designed circumstances to trap him, to rush him, and to confuse him. Further, the employer breached Article 24.03 by seeking to force the Grievant to choose between resignation or discipline. A reasonable prison Employee knows an allegation of drug trafficking is severe.

Fifth, the Union asserts the resignation was rescinded before it became effective. The Warden lacked authority to effectuate the resignation. Nothing in the agreement or in Ohio law gives the Warden the right to do so. The Director of the Department did not sign off until February 24, 1997.

DISCUSSION

The argument that the grievance is not substantively arbitrable because the Grievant was not an Employee at the time it was filed cannot prevail.

The Agreement does not direct that only an Employee may file a grievance. It does not state that an Employee personally do the filing or that the Union cannot have access to the grievance machinery. Article 25.01 defines a grievance as *"any difference, complaint, or dispute between the employer and the Union or any Employee*. . .”

Here, the Local Union President filled it. It is conceivable that the Union viewed this *"difference, complaint, or dispute*" as involving an important contractual interpretation having impact on the entire workforce. The lack of an Employee as the Grievant, if that turns out to be the case, is not fatal to the Union's right to proceed with this grievance.

Additionally, whether or not the Grievant is still an Employee is the issue. As recognized by Arbitrator Dworkin in *Cedar Coal Co*, 79 LA 1028 (1982) and Arbitrator Cohen in *Franco Julianelli and Ohio Dept of*

Taxation, OCB #781 (1992), given what the issue is, it would be improper to conclude the Grievant is not entitled to arbitrate this dispute if he is **10**

found to be an Employee. Such a finding requires reviewing the merits of the grievance and making a decision on them.

The argument that Article 24.04 was violated because no Union Steward was present must be rejected.

In plain and clear language the parties guaranteed Union representation to an Employee upon the occurrence of three events. One, an investigatory interview is being conducted. Two, the Employee requests representation. And three, the Employee has reasonable grounds to believe the interview may be used to support disciplinary action against him or her. All three events must be present.

Here, the Grievant asked if he needed Union representation. The Warden replied he did not. Even if that were construed as a "request" pursuant to Article 24.04, the two other events are lacking.

In Ellen Jenkins and Ohio Dept of Youth Services, OCB #539 (1991) Arbitrator Riviera rejected the argument a Union Steward should have been present, noting "*the investigation was still unfocused. Driver Fiske was still to be polygraphed*." In our case, the subpoenaed phone records were not yet obtained.

There was no reasonable ground to believe it was an investigatory interview or that information obtained might be use to support disciplinary action. Warden Edwards characterized it as a meeting to let the Grievant know how deeply he was involved in the Task Force's activities, and to offer a way to walk away from the situation. The Grievant did not dispute that. He did not claim he believed suspension, discharge or other form of discipline was going to be issued. His focus was on the outside criminal investigation. So was the Warden's.

The assertion that the Grievant was construct discharged cannot stand.

Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987) holds that a person claiming constructive discharge must show their decision to resign was the result of working conditions so intolerable, difficult, or unpleasant that a reasonable person would feel compelled to resign. *Pepsi Cola Bottling* **11**

Co., 70 LA 434 (Blackmar 1978) states this concept applied to
cases in which the employer forces the Employee to quit, not by asking for his resignation but, by making his work situation intolerable. This does not conform to our fact situation.

The assertions that Article 24.03 was violated and it was an involuntary quit must be rejected.

A voluntary quit has been defined in *Kohler & Cambell Inc*., 18 LA 184 (Rosenfarb 1952) as occurring:

> * * * *Only if the employees manifest by words or actions an intent to terminate and abandon finally his employment accompanied by an overt act carrying out the Intent. The element of finality is indispensable as is the one of intent*.

A finding that a quit was not voluntary must be based on evidence of coercion, duress, incapacity, or unawareness. The cases relied upon by the Union for a finding of an involuntary quit are significantly factually distinguishable.

In *Kohler & Campbell*, Inc., 18 LA 184 (1952), the Employees walked off their jobs in the middle of the day, in the heat of anger, refusing to perform the jobs in the manner ordered by their foreman; they never told anyone in management they quit; they did not remove their belongings; and they reported the incident to the Union immediately. Arbitrator Rosenfarb held there was neither intent to quit nor an accompanying act to carry out the intent.

In *Pepsi Cola Bottling Co*., 70 LA 434 (Blackmar 1978), the Employee had no personal reasons for wanting to leave his employment after being confronted with substantial charges; and he was threatened with discharge unless he resigned. In *In Re: Appeal of Bidlack*, 445 N.E.2d 722 (Ohio 1982) the Employee was told he would have to resign or face suspension and demotion. In State Ex. Re. Gribben, 188 NE 654 (Ohio 1933), undated resignations were solicited from all appointees for purposes of completing a reduction in force.

In Hargray v. City of Hallandale, 57 F.3d 1560 (11th Cir. 1995) the issue was whether a resignation from public **12**

employment which was requested by the employer as sufficiently involuntary to trigger the protection of the due process clause. In *Parker v. Board of Regents*, 981 F.2d 1159 (10th Cir. 1992) the court held the Employee must show there was a clearly established law which gave her a right to a hearing prior to deciding whether to resign or to participate in the termination process.

In making a determination as to whether a resignation is voluntary the factors to be considered are set out in *Hargray, supra:*

> *As an initial matter, Employee resignations are presumed to be voluntary. [cites omitted]. This presumption will prevail unless the Employee comes forward with sufficient evidence to establish that the resignation was involuntarily extracted. . .*
>
> *Those circuits that have addressed whether a resignation was involuntary agree that the court must examine the surrounding circumstances to test the ability of the Employee to exercise free choice. [cites omitted].*
>
> *The relevant cases reveal that there are two situations in which an Employee's resignation will be deemed involuntary. . . : (1) where the employer forces the resignation by coercion or duress . . . ; OR (2) where the employer obtains the resignation by deceiving or misrepresenting a material fact to the Employee. . . .*

The Hargray court explained that under the coercion or duress theory, the question is whether, under the totality of the circumstances, the employer's conduct in obtaining the resignation deprived the Employee of free will in choosing to resign. Factors to be considered include:

> *. . (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; (4) whether*

the Employee was permitted to select the effective date of the resignation; and (5) whether the Employee had advice of counsel.

> *. . The assessment of whether real alternatives were offered is gauged by an objective standard. . . . that [he] may perceive his only option to be resignation . . . is irrelevant.*
>
> Resignations can be voluntary even where the only alternative . . . is facing possible termination for cause or criminal charges. . . . [He] could stand pat and fight. The one exception to this rule is where the employer actually lacked good cause to believe that grounds for termination and criminal charges existed. ***Stone*** and ***Christie*** cited in ***Hargray***.

Applying *Hargray's* coercion or duress factors to our facts, it cannot be said the employer's conduct deprived the Grievant of free will. This is because the Grievant's alternative was to stay on and allow the internal investigation to proceed; he understood the offer; he was not threatened with immediate discipline should he fail to resign; he had articulated personal reasons for electing to resign; the fact that he did not come to work that day with an intent to resign ignores the fact that when he came to work he was unaware of the information which the Warden had been provided; he had enough presence of mind to tell the Personnel Officer he wanted time to review the COBRA information at home before making a decision and to refuse an exit interview, and at the same time he could have elected to also take the resignation papers home before signing them; and he asked to remove his belongings.

By both words and actions he manifested his intent to quit his employment. By an objective assessment of whether he had "real alternatives"! it is apparent he did. As the above citations state, a resignation can still be voluntary even where the only alternative is to face criminal charges or termination for cause. Under our facts neither of these alternatives was actually a reality on the day he resigned. He could have chosen to wait and "stand pat and fight".

Applying *Hargray's* deception or misrepresentation factors to our facts, it cannot be said the resignation was involuntary. The inquiry is whether the employer actually lacked good cause to believe that grounds existed to support what it presented to the Grievant. The Union insists the employer did not.

However, the Warden's allegations were not shown to be unfounded. He did not misrepresent the situation as he knew it. His information came from the person with responsibility for investigating and advising him and from the task force. Investigator Baker had been part of the sting operation. The Warden's reasons for not personally first interviewing inmates are reasonable and significant especially because no disciplinary action was contemplated at the time.

The facial faultiness of the subpoena being issued was not then known to him and goes to a question of whether the subpoenaed documents would have been admissible in a court of law. It does not establish a lack of good cause to believe that grounds existed to support the allegations.

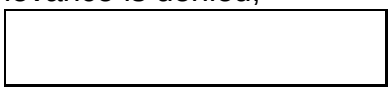
The claim that the resignation was rescinded before it became effective cannot prevail.

No evidence was introduced to refute the Warden's and the Personnel Officer's testimony that for purposes of resignations he is the releasing or appointing authority. The form used is used for all personnel actions. When the Grievant signed his resignation, it became effective.

The Grievant has neither a contractual or a legal right to demand that his request to rescind it be granted. Nor does the Warden have a contractual or a legal obligation to do so. Testimony established that once an Employee resigns, his or her supplementary request to rescind it is never granted. There was no disparate treatment shown.

AWARD

DATED: April 4, 1998 The grievance is denied,



PHYLLIS E FLORMAN
15 Arbitrator