JAMES BAILEY

Grievant,

v. DOCKET NO. 98-49-189

THE FRED W. EBERLE TECHNICAL CENTER,

Respondent.

DECISION

James Bailey, Grievant, filed a grievance alleging that he was constructively dismissed from his contractual employment without due process, by being forced to resign and/or not being given an opportunity to withdraw his resignation. Grievant contends that Kenneth Davidson, Director of the Fred Eberle Technical Center (Eberle Center), Respondent, threatened that Grievant would be fired if he did not sign a resignation letter prepared by Mr. Davidson. Grievant signed the letter of resignation on Friday afternoon, May 22, 1998, then attempted to immediately rescind the resignation the following Tuesday, May 26, 1998 (Monday, May 25, 1998 was a holiday). Respondent refused to allow Grievant to rescind his resignation, as did the Administrative Council of the Eberle Center, and his contract of employment was terminated effective at the end of the 1997-98 school year.

On June 24, 1998, Attorney Harry M. Rubenstein, counsel for both Fred W. Eberle Technical Center and the Upshur County Board of Education filed a Motion to Dismiss this grievance on the grounds that Grievant failed to follow grievance procedures properly, because he did not clearly identify his employer as the Fred W. Eberle Technical Center on the grievance form. Instead, counsel for Grievant listed the employer as the Fred W.Eberle Technical Center/Upshur County Board of Education. In a conference call held on July 10, 1998, it was determined that although the Upshur County Board of Education serves as the fiscal agent for the Eberle Center, the Center is not under its direct control and is, instead, overseen by a separate Administrative Council. Employees of such multi- county technical centers are, however, still covered under the education grievance statute. Grievant agreed to voluntarily dismiss the Upshur County Board of Education as a Respondent.

Respondent's Motion to Dismiss also stated that Grievant was not entitled to proceed directly to Level IV pursuant to W. Va. Code § 18A-2-8, since Grievant resigned and was not dismissed or suspended. Respondent maintained that this Grievance Board lacked jurisdiction since Grievant was no longer an employee, and the matter is not technically a dismissal or suspension. However, this Grievance Board has held that a claim of coerced or involuntary resignation is recognizable in the grievance procedure. Smith v. Dept. of Corrections, Docket No. 94-CORR-1092 (Sept. 11, 1995). Based on this Administrative Law Judge's conclusion that the primary issue of the grievance was whether or not Grievant's resignation was voluntary or involuntary, and, if involuntary, a “constructive discharge,” Respondent's Motion was denied.

During the July 10, 1998, pre-hearing conference call, the parties agreed the primary issue of this case was whether, as Respondent contends, Grievant voluntarily and properly resigned his position at the Eberle Center, or, as Grievant maintains, the resignation was coerced and/or he should have been allowed to rescind his resignation and, therefore, he was “constructively discharged.” A Level IV hearing on this issue washeld on July 22, 1998 (See footnote 1) . The parties submitted proposed Findings of Fact and Conclusions of Law on August 3, 1998, at which time this matter became mature for decision.

The following facts, drawn from the testimony, are not in dispute: Grievant was employed by the Respondent as a Forestry Careers Instructor from July 1995 until his “resignation” on May 22, 1998. Grievant was originally hired on a one year probationary teacher contract and continued in such employment on renewed one year probationary contracts until the end of the 1997-98 school year. Grievant was rehired for the 1998-99 school year. The probationary contracts state in part that the contract may be terminated at any time only by mutual consent of the parties or in accordance with W. Va. Code §18A- 2-8.

On May 22, 1998, Grievant was instructed by Mr. Bill Proudfoot, an assistant to Mr. Davidson, to report to Mr. Davidson's office before he left work that day. While there is some disparity between the various witnesses as to the severity and tone of the words used in the meeting, the basic issues are clear. Upon arriving in Mr. Davidson's office, Grievant was admonished by Mr. Davidson for an incident which had occurred in Grievant's classroom the previous day in which a student had left the classroom and became involved in a fight with another student. Mr. Davidson testified that he had spoken with Grievant on two or three occasions over the past three years concerning his need to

improve his classroom discipline and better control his students. Mr. Davidson acknowledges he never put Grievant on a written "improvement plan." Mr. Davidson also testified that in January of 1998 he again verbally informed Grievant that his performance was unsatisfactory due to his inability to control and discipline his students. Mr. Davidson states he advised Grievant that he intended to recommend to the Administrative Council of the Eberle Center that Grievant's employment contract not be renewed for the next year. Mr. Davidson maintains that Grievant then asked for another chance to improve his performance and promised, if he did not improve, he would voluntarily resign. Subsequently, Mr. Davidson did not recommend to the Administrative Council that Grievant not be rehired for the following year. Grievant denies that he ever promised to resign.

During the meeting of May 22, 1998, involving Mr. Davidson, Mr. Proudfoot and the Grievant, Grievant was presented with a letter of resignation that had been previously prepared by Mr. Davidson. Mr. Davidson reminded Grievant of his earlier "promise" to resign if his discipline and control of students did not improve. Mr. Davidson informed Grievant that he had several chances to improve his performance before now, and that "if he did not resign, he would immediately take steps to fire him." Grievant eventually signed the letter in the presence of Mr. Davidson and Mr. Proudfoot before leaving the office that afternoon.

The burden of proving by a preponderance of the evidence that a resignation was involuntary lies with the Grievant. Glasscock v. W. Va. Dept. of Corrections, Docket No. 95- CORR-093 (May 31, 1995); *See also* McClung v. W. Va. Dept. of Public Safety, Docket No. 89-DPS-240 (Aug. 14, 1989). Whether a resignation was voluntary is a question of fact which must be resolved on a case-by-case basis. Paroczay v. Hodges, 297 F.2d 439 (D.C. Cir. 1961). A resignation is presumed to be voluntary. *See* Latham v. United States Postal Serv., 909 F.2d 500, 502 (Fed. Cir. 1990); Christie v. United States, 518 F.2d 584, 587 (Ct. Cl. 1975). The presumption of voluntariness may be rebutted if the employee can establish that the resignation was the product of duress or coercion brought on by the employer, was based on misleading or deceptive information, or if the employee was mentally incompetent. Scharf v. Dept. of Air Force, 710 F.2d 1572, 1574-75 (Fed. Cir. 1983). Resignations that are obtained through coercion or deception are contrary to public policy. Welch v. W. Va. Dept. of Corrections, Docket No. 95-CORR-261 (Jan. 31, 1996).

The common element in all cases of involuntary resignation is that factors have operated on the employee's decision-making process that deprived him of freedom of choice. Scharf, supra; Perlman

v. U. S., 490 F.2d 928 (Ct. Cl. 1974); Heining v. GSA, 68 M.S.P.R. 513, 519 (1995). The voluntariness of a resignation is determined based on whether the totality of the circumstances supports the conclusion that the employee was effectively deprived of free choice in the matter. *See* Braun v. Dept. of Veterans Affairs, 50 F.3d 1005, 1007 (Fed. Cir. 1995); Scharf, 710 F.2d at 1574; Christie, 518 F.2d at 587; Perlman, 490 F.2d at 933; Heining, 68 M.S.P.R. at 519-20. *See also* Smith v. W. Va. Dept. of Corrections, supra. Factors to be considered in the analysis are whether the employee was given time to consider his course of action or to consult with anyone; whether the resignation was abruptly obtained and/or inconsistent with the employee's work history; and whether the employer had reason to believe that the employee was not in a state of mind to exercise intelligent judgment. Vandiver v. GAO, 3 M.S.R.P. 158 (1980). Duress has been found where the employee involuntarily accepted the employer's terms; circumstances surrounding the resignation permitted no other alternative; and thecircumstances were the result of coercive acts of the employer. Vandiver, *citing* Freuhauf Southeast Garment Co. v. United States, 111 F. Supp. 945 (Ct. Cl 1953).

There is no evidence Grievant is mentally incompetent. To the contrary, he appears to be bright and well-educated. There is also no evidence Mr. Davidson, or anyone else, attempted to intentionally mislead or deceive Grievant in order to obtain his resignation. That leaves the question of whether duress or coercion was used to force Grievant into resigning. Admittedly, this is a close call.

The application of the totality of the circumstances test in whether a resignation is voluntary or involuntary must be gauged by an objective standard rather than by the employee's subjective evaluation. *See* Scharf, 710 F.2d at 1575. During the May 22, 1998, meeting, it is clear that Mr. Davidson informed Grievant that if he did not resign, steps would be taken to terminate his contract for next year. Grievant had apparently been rehired by the Administrative Council for the 1998-99 school year a few weeks prior. Grievant testified, and the undersigned finds credible, that it was his subjective belief that Mr. Davidson could fire him effective immediately, that he was not aware there would have to be certain steps taken before he could be dismissed, therefore, he went ahead and resigned. However, there is no evidence Mr. Davidson, or anyone else, told Grievant he would be “fired” immediately if he did not resign, nor did Mr. Davidson physically threaten Grievant in any way.

Most important, Mr. Davidson told Grievant that he could have a few days to think the situation over or to speak with someone before he signed the resignation letter. He also offered the Grievant

an opportunity to make any changes or additions to the resignation letter before signing. In other words, Grievant was not presented with a “take it or leave itnow” proposition by Mr. Davidson. Although Grievant declined the offer, it is important to note that if he had not been given the opportunity to discuss the matter or think it over for a few days, the aforementioned elements of coercion may have applied.

Clearly Grievant understood the ramifications of his actions when he agreed to sign the letter of resignation. Where an employee is faced with merely the unpleasant choice of resigning or being subject to possible removal for cause, such limited alternatives do not make a resulting resignation an involuntary act. Glasscock, supra. It is the opinion of the undersigned Administrative Law Judge that Grievant has failed to prove by a preponderance of the evidence that the actions or inactions of Respondent reached the level necessary to show he was coerced, misled, deceived, under duress or otherwise forced to submit his resignation contrary to his own free will on May 22, 1998.

This leaves one remaining issue. Grievant testified that on May 26, 1998, after signing the resignation letter on the afternoon of Friday, May 22, 1998, the previous school day, and after discussing the matter with other teachers familiar with education personnel procedures that weekend, he informed Mr. Davidson that he wished to rescind his resignation. Mr. Davidson refused Grievant's request to rescind his resignation. Grievant's request to withdraw his resignation was also rejected by the Administrative Council of the Eberle Center on June 3, 1998.

This Grievance Board has previously held that a school employee generally has the opportunity to withdraw his resignation before it is accepted by the governing board. Nealis v. Berkeley County Bd. of Educ., Docket No. 02-87-231-2 (Dec. 22, 1987). More importantly, the West Virginia Supreme Court has also stated that, in the case of school employees, an offer to resign may be withdrawn at any time before such acceptance takesplace. Syl. Pt. 1, LeMasters v. Bd. of Educ. of Grant District, 105 W. Va. 81, 141 S.E. 515 (1928), 4B, M.J., Contracts § 23. In Lemasters, the Court held that the tender of a resignation by a teacher under contract was a mere offer to mutually rescind the contract of employment and was not binding on either party to the contract until its acceptance by the employer. The resignation may be withdrawn at any time before acceptance by the employer, assembled as a board. Id.

The undersigned finds this case to be dispositive. It is clear the Administrative Council of the Eberle Center did not meet and accept Grievant's resignation until June 3, 1998, after Grievant

notified Mr. Davidson and the Council he wished to rescind his resignation. Respondent was not put in any type of detrimental position by the rescinding of Grievant's resignation since no action had yet been taken on his resignation and no one had been hired to replace him. Further, Mr Davidson's refusal to allow Grievant to withdraw his resignation the very next school day after it was received is directly contrary to his prior offer to allow Grievant “a few days to think about it,” and indicates his original offer may not have been in good faith. After a thorough review of the evidence in this case, it is the opinion of the undersigned that Grievant should have been allowed to rescind his resignation on May 26, 1998, before the meeting of the Administrative Council and, therefore, his resignation is invalid.

In addition to the foregoing findings, conclusions and discussion, the following findings of fact and conclusions of law are appropriately made.

Findings of Fact

1. At all times relevant to this proceeding, Grievant was an employee of the Fred W. Eberle Technical Center. Grievant was employed by the Respondent as a Forestry Careers Instructor from July 1995 until his “resignation” on May 22, 1998. Grievant was originally hired on a one year probationary teacher contract and continued in such employment on renewed one year probationary contracts until the end of the 1998 school year. Grievant was rehired for the 1998-99 school year.

2. On May 22, 1998, the Grievant met with Mr. Kenneth Davidson and Mr. Bill Proudfoot at which time Grievant was presented with a letter of resignation that had been previously prepared by Mr. Davidson. Mr. Davidson informed Grievant that he had several chances to improve his performance before now and that “if he did not resign, he would immediately take steps to fire him.” Grievant eventually signed the letter in the presence of Mr. Davidson and Mr. Proudfoot before leaving the office that afternoon.

3. Mr. Davidson told Grievant that he could have a few days to think the situation over or to speak with someone before he signed the resignation letter. He also offered the Grievant an opportunity to make any changes or additions to the resignation letter before signing.

4. Grievant signed the letter of resignation on Friday afternoon, May 22, 1998, then attempted to rescind immediately the resignation the following Tuesday, May 26, 1998.

4. Mr. Davidson refused to allow Grievant to rescind his resignation, as did the Administrative Council of the Eberle Center, and his “resignation” was accepted and his contract of employment was

terminated effective at the end of the 1997-98 school year at the Council's June 3, 1998 meeting.

Conclusions of Law

1. A claim of coerced or involuntary resignation is recognizable in the grievance procedure. Smith v. Dept. of Corrections, Docket No. 94-CORR-1092 (Sept. 11, 1995).

2. The burden of proving by a preponderance of the evidence that a resignation was involuntary lies with the Grievant. Glasscock v. W. Va. Dept. of Corrections, Docket No. 95- CORR-093 (May 31, 1995); *See also* McClung v. W. Va. Dept. of Public Safety, Docket No. 89-DPS-240 (Aug. 14, 1989).

3. Whether a resignation was voluntary is a question of fact which must be resolved on a case-by-case basis. Paroczay v. Hodges, 297 F.2d 439 (D.C. Cir. 1961).

4. A resignation is presumed to be voluntary. Latham v. United States Postal Serv., 909 F.2d 500, 502 (Fed. Cir. 1990); Christie v. United States, 518 F.2d 584, 587 (Ct. Cl. 1975). The presumption of voluntariness may be rebutted, however, if the employee can establish that the resignation was the product of duress or coercion brought on by the employer, or of misleading or deceptive information, or if the employee was mentally incompetent. Scharf v. Department of Air Force, 710 F.2d 1572, 1574-75 (Fed. Cir. 1983). 5. Resignations that are obtained through coercion or deception are contrary to public policy. Welch v. W. Va. Dept. of Corrections, Docket No. 95-CORR-261 (Jan. 31, 1996).

6. The common element in all cases of involuntary resignation is that factors have operated on the employee's decision-making process that deprived him of freedom of choice. Scharf; Perlman v. United States, 490 F.2d 928 (Ct. Cl. 1974); Heining v. GSA, 68 M.S.P.R. 513, 519 (1995). 7. The voluntariness of a resignation is determined based on whether the totality of the circumstances supports the conclusion that the employee was effectively deprived of free choice in the matter. *See* Braun v. Dept. of Veterans Affairs, 50 F.3d 1005, 1007 (Fed. Cir. 1995); Scharf, 710 F.2d at 1574; Christie, 518 F.2d at 587; Perlman, 490 F.2d at 933; Heining, 68 M.S.P.R. at 519-20. *See also* Smith v. W. Va. Dept. of Corrections, Docket No. 94-CORR-1092 (Sept. 11, 1995). Factors to be considered in the analysis are whether the employee was given time to consider his course of action or to consult with anyone; whether the resignation was abruptly obtained and/or inconsistent with the employee's work history; and whether the employer had reason to believe that the employee was not in a state of mind to exercise intelligent judgment. Vandiver v. GAO, 3 M.S.R.P. 158 (1980). Duress

has been found where the employee involuntarily accepted the employer's terms; circumstances surrounding the resignation permitted no other alternative; and the circumstances were the result of coercive acts of the employer. Vandiver.

___8. The application of the totality of the circumstances test in whether a resignation is voluntary or involuntary must be gauged by an objective standard rather than by the employee's subjective evaluation. Scharf, at 1575.

9. The Grievant has not proven by a preponderance of the evidence that his May 22, 1998 resignation was involuntary as a result of coercion, duress, or deception.

10. The Grievant has proven by a preponderance of the evidence that his attempts to rescind his resignation on May 26, 1998, should not have been denied and, therefore, rescission of the resignation is the appropriate remedy and his resignation is not valid. Accordingly, this grievance is **GRANTED** and the Respondent is hereby **ORDERED** to reinstate the Grievant's contract as a Forestry Careers Instructor at the Fred W. Eberle Technical Center for the 1998-99 school year. The Respondent is further **ORDERED** to reimburse the Grievant for the loss of wages he has incurred, if any, since June 3, 1998, less any appropriate set-off, plus interest, and to restore all rights and benefits he would have been entitled to under his contract.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Upshur County, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATE: September 30, 1998 _____

RANDY K. MILLER

Administrative Law Judge

Footnote: 1

Respondent was represented at the hearing by counsel, Harry M. Rubenstein. Grievant was represented by counsel,

Dennis J. Willett.