SANDRA SUE DYE,

Grievant,

v. **Docket No. 99-DOE-217**

WEST VIRGINIA DEPARTMENT OF EDUCATION,

Respondent.

D E C I S I O N

On May 28, 1999, Sandra Sue Dye (Grievant), submitted this grievance challenging her dismissal from employment by Respondent West Virginia Department of Education (WVDOE) directly to Level IV of the grievance procedure provided for WVDOE employees pursuant to W. Va. Code §§ 18-29-1, et seq. Although W. Va. Code § 18-29-4 makes no provision for appealing a dismissal action directly to Level IV (See footnote 1), WVDOE made no objection to having this matter heard at Level IV. See W. Va. Code § 18-29-3(c). On July 12, 1999, a Level IV hearing was conducted in this Grievance Board's office in Charleston, WestVirginia. (See footnote 2) At the conclusion of that hearing, the parties agreed on a briefing schedule, and this matter became mature for decision on August 25, 1999, following receipt of the parties' written post-hearing arguments.

BACKGROUND

Grievant was employed by Respondent West Virginia Department of Education (DOE) as a Machine Operator in the Print Shop. On May 21, 1999, Grievant received the following written termination notice from Henry Marockie, State Superintendent of Schools:

> Based upon the recommendation of your immediate supervisor, Mrs. Kimberly Nuzum-Lawrence, executive director of the Office of School- Community Relations, it is my decision to dismiss you from employment with the West Virginia Department of Education, effective May 21, 1999.
>
> In August 1998, you received an unsatisfactory evaluation from your supervisor regarding your attendance and were placed on a plan of improvement. After that date, you demonstrated no significant improvement in attendance and received three follow-

> up consultations with your supervisor indicating the same.
>
> According to the Employee Handbook of the West Virginia Department of Education, “Employees with attendance problems are subject to unsatisfactory personnel evaluations and/or disciplinary action including possible termination.”
>
> Additionally, on March 31, 1999, you signed a contract with Mrs. Lawrence indicating that you would not miss any work for a 90-day period (April 1-June 30). You also agreed that if you missed any work during that time period, you would be subject to dismissal from the Department of Education. Since signing the contract, you have missed two days of work: April 23 and May 21.

DOE Ex 2.

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code § 18-29-6; Plumley v. W. Va. Dep't of Educ., Docket No. DOE-88-164 (Dec. 22, 1988). A preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proven is more probable than not. It may not be determined by the number of witnesses, but by the greater weight of all evidence presented, which means that such factors as opportunity for knowledge, information possessed, and manner of testifying determines the weight accorded to testimony rather than the greater number of witnesses. See Black's Law Dictionary 1344-45 (4th ed. 1968); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Based upon the foregoing preponderance of the evidence standard, the following findings of fact are made from the testimony and documentary evidence presented at Level IV.

FINDINGS OF FACT

1. Grievant was employed by the West Virginia Department of Education (WVDOE) as a Machine Operator in the Print Shop. Grievant had been employed by WVDOE since 1972, a period of more than 26 years.

2. Conditions of employment for WVDOE employees are governed, in part, by the WVDOE Employee Handbook, which provides the following with regard to “attendance and punctuality:”

> The Department expects regular attendance from all employees. Employees are required to be on time and ready to work at the beginning of their scheduled work periods.
>
> The director/immediate supervisor is responsible for reviewing the attendance records of all employees under her or his supervision at the end of the month. If an employee's attendance record suggests a problem the director/immediate supervisor must hold a conference with the employee to identify and resolve the problem. Employees with attendance problems are subject to unsatisfactory personnel evaluations and/or disciplinary action including possible termination.

DOE Ex 16.

3. Kim Nuzum-Lawrence has been employed by WVDOE as Executive Director of the Office of School-Community Relations since 1991. In that capacity, she is responsible for the WVDOE Print Shop, and served as Grievant's second-level supervisor.

4. In August 1998, Ms. Nuzum-Lawrence conducted an annual evaluation of Grievant. Ms. Nuzum-Lawrence rated Grievant as “satisfactory” in all categories except attendance, where Grievant was rated as “unsatisfactory.” DOE Ex 3. The evaluation included the following comment:

> Sue consistently maintains a near-zero balance of both annual leave and sick leave. Her absences from work create an additional hardship on an already understaffed Print Shop. She needs to work on her attendance so that she can begin to build up some time in her annual and sick leave bank.

DOE Ex 3.

5. Prior to the August 1998 evaluation by Ms. Nuzum-Lawrence, Grievant had not received a formal evaluation from WVDOE since 1988. Grievant's previous evaluations from 1979 to 1988 were generally favorable (G Exs 2-10), although in 1974 Grievant'sattendance was rated “often absent or late” and her overall rating was “unsatisfactory.” G Ex 1.

6. When Ms. Nuzum-Lawrence presented Grievant with her performance evaluation on August 24, 1998, she verbally counseled Grievant on the need to improve her attendance.

7. On the following day, August 25, 1998, Grievant was absent from work. DOE Ex 51.

8. Shortly after receiving her annual evaluation, Grievant requested more annual leave for a family vacation than she had earned to date. Grievant's sister called Ms. Nuzum-Lawrence in an

effort to persuade her to reverse the initial decision not to permit Grievant to go on vacation. After Grievant agreed to work on building up her annual leave balance, Ms. Nuzum-Lawrence acquiesced, allowing Grievant to “borrow” from her leave to be earned and take annual leave as requested.

9. After returning from vacation in September 1998, Grievant missed at least 7 days of work, and it was necessary to dock her pay when she exceeded her available leave balance. DOE Ex 8. Prior to that incident, on 14 separate occasions dating back to 1989, Grievant's pay had been docked when she exceeded her available leave balance. Including the 3 days in October 1998, Grievant's pay was docked for a total of 32 and 3/4 days during that period. DOE Exs 15, 17, 20, 21, 22, 23, 24, 26, 27, 29, 31, & 36.

10. Grievant was granted a medical leave of absence from December 20, 1990 to February 18, 1991, as a result of injuries sustained in an automobile accident. DOE Ex 15. Grievant was on a medical leave of absence from February 12 to February 27, 1992,as a result of a serious illness. Grievant was on a medical leave of absence from January 22, 1998 to April 27, 1998, as a result of a work-related injury covered by workers' compensation. DOE Ex 15.

11. On October 26, 1998, Ms. Nuzum-Lawrence met with Grievant and warned her that her attendance was still unsatisfactory. Ms. Nuzum-Lawrence further cautioned Grievant that failure to improve her attendance would result in a recommendation that her employment be terminated. Grievant responded by stating that docking her pay was punishment enough. DOE Ex 6.

12. Following the October 26, 1998 meeting, Grievant missed 1 day of work on October 30, and three-fourths of a day in December.

13. In January 1999, Grievant was absent from work for 6 days. DOE Ex 38. In February 1999, she missed a total of 4 days of work. DOE Ex 38. Grievant's absences in January included 3 days of sick leave. During that month, Grievant took 1 day of sick leave on the day immediately preceding 2 days of scheduled annual leave. Another day of sick leave was taken on a Friday, preceding her scheduled weekend off.

14. Cyndi Miller is employed by WVDOE as a Secretary in the Office of School- Community Relations. One of her duties involves serving as timekeeper for the employees in the Print Shop.

15. Ms. Miller received frequent calls from Grievant inquiring as to her sick and annual leave balance. Following such conversations, whenever Grievant determined that she had leave available to take, she would take leave shortly thereafter with such frequency that Grievant's practice became

an “office joke.” 16. Earl Holstine, Grievant's fellow employee in the Print Shop for 23 years, observed that during the past two or three years Grievant would repeatedly take sick leave on the day before or after a weekend or holiday. In addition, Mr. Holstine observed that Grievant would often take leave when the workload in the Print Shop was greatest, particularly when the State Ed newsletter was being issued to the public schools.

17. David Morrison is employed by WVDOE as a Foreman in the Print Shop. He was Grievant's immediate supervisor for 23 years.

18. Mr. Morrison noticed that Grievant would inquire about when the State Ed newsletter would be going out, and thereafter take leave on one or more of those days. From Mr. Morrison's perspective as the Print Shop Foreman, Grievant's penchant for taking sick leave before and after weekends or holidays, and calling in sick when the workload was greatest, had a negative impact on the morale of her fellow employees who were required to assume her work.

19. Mr. Morrison did not observe any improvement in Grievant's leave practices after she was given an unsatisfactory rating on that aspect of her job by Ms. Nuzum- Lawrence in August 1998.

20. Although Mr. Morrison was Grievant's immediate supervisor, since sometime in 1996, Grievant has been required to obtain approval for her leave from Ms. Nuzum- Lawrence.

21. On February 22, 1999, Ms. Nuzum-Lawrence met with Grievant and warned her that her leave usage had still not improved. DOE Ex 7. Grievant had taken 2 days of sick leave the previous Thursday and Friday. Grievant pleaded for another chance andpromised to start building up her leave balance. Although Ms. Nuzum-Lawrence had submitted a recommendation for Grievant's termination to the State Superintendent of Schools, Dr. Henry Marockie, on February 19, 1999, Grievant was afforded another opportunity to improve her attendance. DOE Ex 12.

22. Shortly after the meeting with Ms. Nuzum-Lawrence on February 22, Grievant was absent on Thursday and Friday, February 25 and 26, 1999. DOE Ex 38. At that point, it was necessary to borrow from Grievant's annual leave to cover her requested sick leave.

23. On March 1, 1999, Ms. Nuzum-Lawrence and Grievant met with Tony Smedley, WVDOE's Director of Human Resources, to encourage Grievant to explore the option of retiring or requesting disability retirement, because she was facing termination for unsatisfactory attendance. DOE Ex 8. Grievant discovered that she was not yet eligible for regular retirement, and concluded she would not receive an adequate income, from her perspective, if she elected to take disability retirement.

Grievant told Mr. Smedley that WVDOE could do what it had to do.

24. Following the March 1 meeting, Grievant missed another 7.25 days of work in March. DOE Ex 38. On March 30, 1999, Ms. Nuzum-Lawrence told Grievant she was recommending Grievant's termination to Dr. Marockie. DOE Ex 30.

25. Following that meeting, Grievant went to Superintendent Marockie to plead for another chance. Superintendent Marockie met with Grievant, and they agreed that Grievant would have three months to demonstrate her ability to improve her attendance by not missing any work during that period. Dr. Marockie did not communicate any threats to Grievant, but was cordial to Grievant during their meeting. At Dr. Marockie's direction,Ms. Nuzum-Lawrence prepared an agreement memorializing Grievant's agreement with Dr. Marockie. Grievant had an opportunity to review the agreement and ask questions of Ms. Nuzum-Lawrence and Mr. Smedley. Grievant did not ask any questions and did not request an opportunity to consult with an attorney or union representative. Grievant signed the document on March 31, 1999, which stated the following:

> I, Sandra Sue Dye, agree to the following:
>
> 1) To report to work every day during the months of April, May and June, 1999[.]
>
> I further understand that if I miss any work in that period of time, I may be subject to dismissal from the West Virginia Department of Education.

DOE Ex 4.

26. On April 9, 1999, Grievant took off from work on her birthday. With the knowledge and consent of Ms. Nuzum-Lawrence, Print Shop employees have historically been permitted to take off on their birthday each year without charge to leave. Although Grievant verbally indicated to some co-workers she would not take off on her birthday because she was trying to improve her attendance, she called in on April 9, 1999, and elected to take off that day. Because of the established past practice, WVDOE did not consider this absence to represent a violation of Grievant's attendance agreement.

27. On Friday, April 23, 1999, Grievant's mother called in sick for Grievant and Grievant did not

report to work. DOE Ex 38. Ms. Nuzum-Lawrence informed Grievant's mother that Grievant would need to produce a doctor's excuse for this absence, but any further absence would result in termination of Grievant's employment. 28. When Grievant returned to work, she provided Ms. Nuzum-Lawrence with a doctor's excuse for her absence on April 23, 1999. Grievant's absence was duly recorded as approved sick leave.

29. On Friday, May 21, 1999, Grievant's mother again called in sick for Grievant. Grievant was examined by a physician on the morning of May 21, 1999, and was diagnosed as having vertigo. G Ex 17.

30. By taking sick leave on April 23 and May 21, 1999, Grievant violated the terms of her agreement not to miss any work for three months.

31. Grievant never requested accommodation from WVDOE under the federal Family and Medical Leave Act.

32. In considering an appropriate penalty for Grievant's misconduct, Ms. Nuzum- Lawrence did not believe a suspension would serve any useful purpose as Grievant's pay had been docked on numerous occasions when she exceeded her available leave balance.

33. The WVDOE Employee Handbook contains the following provision concerning disciplinary actions which involve a suspension or dismissal:

> The following procedure shall be utilized in suspension or dismissal cases:
>
> * Recommendations to suspend or dismiss an employee may arise with the immediate supervisor and shall be presented in writing with documented reasons for the action to the Associate or Assistant State Superintendent.
>
> * The Associate or Assistant State Superintendent or designee shall investigate the matter and, if warranted, recommend suspension or dismissal to the State Superintendent.
>
> * Should an employee be suspended or dismissed, proper written notice enumerating the charges shall be sent to the employee by certified mail return receipt requested.

DOE Ex 16.

DISCUSSION

As indicated by the termination notice previously quoted, this grievance comes before this Grievance Board in an unusual posture. Grievant was not terminated for unapproved absences. All of Grievant's absences during her employment were approved. Nonetheless, WVDOE determined that Grievant had a pattern of excessive absences which constituted an abuse of her leave privileges and proposed action to terminate her employment on that basis. Thereafter, Grievant entered into a settlement agreement which required her to report to work each day for 90 days, or face dismissal from her employment. DOE Ex 4. Ultimately, Grievant was terminated for failing to fulfill the terms of this “last chance” agreement.

Grievant challenges the validity of that agreement on several grounds, arguing that she was faced with signing the contract or being terminated. In addition, she was not represented by counsel or a union representative at the time she signed the agreement. Further, because her absences on April 23 and May 21, 1999, were authorized as sick leave, she should not be subject to termination for violating the agreement.

This Grievance Board recognizes that the law generally favors and encourages resolution of controversies by contracts of compromise rather than by litigation, and the law will uphold and enforce such contracts if they are fairly made and not in contravention of some law or public policy. Lowe v. W. Va. Div. of Corrections, Docket No. 99-CORR-095(June 10, 1999); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996). See McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (1994). Further, the burden is upon the party seeking to invalidate a settlement agreement to establish proper grounds to support a determination that the agreement is invalid and should be set aside. See Kyle v. W. Va. Div. of Corrections, Docket No. 99-CORR-077D (Aug. 3, 1999).

In determining whether the contract Grievant entered into with the State Superintendent to resolve her previous proposed termination should be set aside, this Grievance Board will look to ordinary principles of law governing the formation of contracts in West Virginia. See, e.g., Nutter v. Harrison County Bd. of Educ., Docket No. 91-17-081 (Dec. 26, 1991); Nealis v. Berkeley County Bd. of Educ., Docket No. 02-87-231-2 (Dec. 22, 1987). See also Mahoob v. Dep't of Navy, 928 F.2d 1126 (Fed. Cir. 1991). In addition, this Grievance Board sometimes looks to the decisions of other agencies tasked with adjudicating disputes involving public employees, such as the federal-level United States Merit Systems Protection Board (MSPB). See, e.g., R.H.S. v. RESA IV, Docket No. 96- RESA-348

(Mar. 31, 1997); Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

In regard to a settlement agreement which has been entered into to resolve a disciplinary action, the MSPB allows an employee to challenge such an agreement on the basis that the agreement was unlawful, involuntary, or the result of mutual fraud or mistake. Wade v. Dep't of Veterans Affairs, 61 M.S.P.R. 580 (1994). For example, an employee can demonstrate that a settlement agreement was coerced, and therefore involuntary, byshowing that the agency threatened to take a disciplinary action that it knew or should have known could not be substantiated. Schulz v. U.S. Navy, 810 F.2d 1133 (Fed. Cir. 1987). However, the mere fact that an employee must choose between one of two unpleasant alternatives does not make the employee's decision involuntary. Schulz, supra.

In order to successfully plead force or duress, the Grievant must show that the employer constrained or forced her to accept the terms of the settlement. See Asberry v. USPS, 692 F.2d 1378 (Fed. Cir. 1982). Grievant presented insufficient evidence of the kind and type of duress required to set aside the agreement which required her to maintain perfect attendance for three months. Indeed, a preponderance of the evidence indicates when Grievant requested another chance to retain her position with WVDOE, Superintendent Marockie acquiesced by offering her a 90-day “probationary” status, which she readily accepted. The mere fact that the employer reduced this agreement to writing and placed it before Grievant for signature does not make this a unilateral agreement.

Although it may be arguable whether Grievant's termination for excessive leave would have been sustained, the record indicates that the employer had a substantial basis for proposing her dismissal, given that she had not shown any significant improvement in her leave usage after being warned in her annual evaluation that her current pattern of leave use was unacceptable. Thus, it was not established that the employer's threat of termination which led to the agreement at issue was based upon charges which the employer knew or reasonably should have known could not be substantiated.

Likewise, there is insufficient evidence to support a claim of mutual mistake of fact. In determining the intent of the parties at the time they entered into the agreement, theterms of the agreement should first be examined. See Greco v. Dep't of the Army, 852 F.2d 558 (Fed. Cir. 1988). While Grievant may have assumed she was allowed to be absent from work if she had a good and valid reason, such as an illness which prevented her from working, the plain language of the agreement she signed makes no reference to an excused absence for any reason. Grievant's comments to her

co-workers before she took off on her birthday suggest that she understood the terms of the agreement, i.e., that she could not miss a day of work for three months, but was nonetheless willing to take off on that day because she was not technically “scheduled” to work. Indeed, Grievant acknowledged on cross-examination that the agreement meant she was not allowed to miss any days of work for three months.

Ultimately, Grievant was absent not once, but twice, and on each occasion on a Friday before a weekend off, less than two months into her three-month probationary period. Although an employee's absence for medical reasons would ordinarily be treated as ordinary sick leave, Grievant did not have an ordinary attendance record. Moreover, Grievant's employment status under the WVDOE Employee Handbook had been modified by the language of her “last chance” agreement with Superintendent Marockie. Therefore, WVDOE established by a preponderance of the evidence that Grievant violated the explicit terms of her agreement with the State Superintendent, and her employment was terminated in accordance with that agreement.

Grievant argued that WVDOE failed to follow its own policies and procedures as set forth in its Employee Handbook, apparently because there was no written recommendation to an Associate or Assistant State Superintendent that Grievant be dismissed, and therewas no investigation conducted or recommendation made by either an Associate or Assistant State Superintendent before the State Superintendent determined that Grievant would be terminated. It is well settled that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). However, an allegation that an employer failed to follow a specific procedural requirement in accomplishing a disciplinary action is an affirmative defense, and Grievant has the burden of establishing the facts to support such allegation by a preponderance of the evidence. In addition, Grievant must show that the procedural error, more likely than not, influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be considered as “harmless error.” Bradley v. Cabell County Bd. of Educ., Docket No. 99-06- 150 (Sept. 9, 1999); Dadisman v. W. Va. Div. of Rehabilitation Serv., Docket Nos. 98-RS- 023/040 (Mar. 25, 1999). See Vosberg v. Civil Serv. Comm'n, 166 W. Va. 488, 275 S.E.2d 640 (1981); McFadden v. W. Va. Dep't of Health & Human Resources, Docket No. 94- HHR-428 (Feb. 17, 1995). See generally Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980).

In the instant matter, Dr. Marockie had personal knowledge of the terms of Grievant's agreement not to miss any work for three months, and he was subsequently informed by Ms. Nuzum-Lawrence that Grievant had missed two days of work within the first two months of that agreed period for medical reasons. Grievant has not explained why any further investigation contemplated by the Employee Handbook was warranted, or what information such an investigation would have disclosed that would have had any bearingon Dr. Marockie's decision to proceed with termination. Indeed, beyond establishing that these steps were not followed, Grievant presented no evidence to indicate how her interests were prejudiced by any failure to explicitly comply with these internal procedures. See McFarlane v. W. Va. Dep't of Educ., Docket No. DOE-87-132-1 (Nov. 30, 1987). In these circumstances, Grievant was not prejudiced by any violations of WVDOE's written procedures, and none of the argued violations created harmful error in the context of this disciplinary action. See Dadisman, supra; Rodak v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-536 (June 23, 1997); Shoemaker v. W. Va. Dep't of Transp., Docket No. 95-RMA-238 (Sept. 29, 1995).

Grievant also contends WVDOE violated provisions in the Administrative Rule promulgated by the West Virginia Division of Personnel (DOP) which requires agency employers to provide a 15-day written notice to the affected employee before a dismissal becomes effective. (See footnote 3) This Grievance Board has determined that the notice provisions inDOP's Administrative Rule only apply to employees holding positions in the classified service. Alaeddini v. Div. of Envt'l Protection, Docket Nos. 95-DEP-450/580 (Jan. 28, 1998). Grievant offered no evidence at Level IV that her position as a Machine Operator with WVDOE was in the classified service. See Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992).

Although this Grievance Board has not previously addressed this specific issue, it does not appear that WVDOE employees are included in the classified service. W. Va. Code § 18-3-9 expressly grants authority to the State Superintendent of Schools to employ “assistants and such other employees as may be necessary.” There is no language in W. Va. Code § 18-3-9 which indicates those employees are included in the classified service. Indeed, WVDOE has adopted its own system for classifying its employees, rather than following the DOP classification scheme. See Begley v. W. Va. Dep't of Educ., Docket No. 91-DOE-281 (Oct. 24, 1991). Moreover, the apparent reason Grievant testified she was not eligible to retire, when that option was suggested by her supervisor, is because she participates in the state teachers retirement system as a “nonteaching member” under W. Va.

Code § 18-7A-3. (See footnote 4) Finally, in accordance with W. Va. Code § 18-29- 2(a), Grievant is specifically authorized to use the grievance procedure for education employees. Therefore, the undersigned Administrative Law Judge finds that Grievant failed to establish that the position she occupies is in the classified civil service, and DOP'sAdministrative Rule is thus inapplicable to this disciplinary action. See Alaeddini, supra; Parker, supra.

Grievant also asserts she was denied due process because she was not afforded a pre-termination hearing. However, inasmuch as Grievant is not in the classified service, and there was no evidence presented to establish that she had acquired any form of tenure as a WVDOE employee, Grievant has not established any entitlement to due process beyond the termination notice she received which set forth the reasons for her dismissal, and afforded her a post-termination hearing under the grievance procedure for education employees. See Eaton v. City of Parkersburg, 198 W. Va. 615, 617 n.2, 482 S.E.2d 232, n.2 (1996). See also Barazi v. W. Va. State College, 201 W.Va. 527, 498 S.E.2d 720 (1997); Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994).

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code § 18-29-6; Plumley v. W. Va. Dep't of Educ., Docket No. DOE-88-164 (Dec. 22, 1988).

2. An employee may be disciplined for unsatisfactory attendance under an established policy governing excessive absenteeism. See Sisley v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-237 (Jan. 16, 1997); Garcia v. Marshall County Bd. of Educ., Docket No. 25-87-274-3 (Dec. 29, 1987). See also Hatfield v. Div. of Corrections, Docket No. 98-CORR-028 (Apr. 30, 1998). 3. The law generally favors and encourages resolution of controversies by contracts of compromise rather than by litigation, and the law will uphold and enforce such contracts if they are fairly made and not in contravention of some law or public policy. Lowe v. W. Va. Div. of Corrections, Docket No. 99-CORR-095 (June 10, 1999); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996). See McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d

912 (1994).

4. The party seeking to invalidate a settlement agreement has the burden of establishing proper grounds to support a determination that the agreement is invalid and should be set aside. See Kyle v. W. Va. Div. of Corrections, Docket No. 99-CORR-077D (Aug. 3, 1999).

5. Where an employee and agency have entered into a settlement agreement to resolve a proposed or pending disciplinary action, the employee may have the agreement set aside by establishing that the agreement was unlawful, involuntary, or the result of mutual fraud or mistake. See Wade v. Dep't of Veterans Affairs, 61 M.S.P.R. 580 (1994).

6. In order to have a settlement agreement set aside on the basis that the agreement was coerced, and therefore involuntary, the employee may demonstrate that the agency threatened to take a disciplinary action that it knew or should have known could not be substantiated. See Schulz v. U.S. Navy, 810 F.2d 1133 (Fed. Cir. 1987).

7. Grievant failed to demonstrate that the agreement she made with her employer not to miss any work for three months was the result of unlawful duress orcoercion, or was otherwise involuntary, unlawful, or the result of fraud or mutual mistake. See Asberry v. USPS, 692 F.2d 1378 (Fed. Cir. 1982).

8. Where a grievant is alleging that the employer committed a procedural error in regard to a particular disciplinary action, in addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be treated as “harmless error.” Dadisman v. W. Va. Div. of Rehabilitation Serv., Docket Nos. 98-RS-023/040 (Mar. 25, 1999). See generally, Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980).

9. Grievant failed to demonstrate harmful procedural error in regard to WVDOE's alleged failure to follow procedures for recommending and investigating matters involving the proposed dismissal of an employee. See Dadisman, supra; Rodak v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-536 (June 23, 1997).

10. WVDOE employees are not in the classified civil service, and the Administrative Rule promulgated by the West Virginia Division of Personnel is not applicable to this disciplinary action. See W. Va. Code §§ 18-3-9, 18-7A-3, and 18-29-2(a); Alaeddini v. Div. of Envt'l Protection, Docket Nos. 95-DEP-450/580 (Jan. 28, 1998); Parker v. W. Va. Health Care Cost Review Auth., Docket No.

91-HHR-400 (June 30, 1992).

11. Because Grievant did not hold tenured status, she did not have a property interest which entitled her to a pre-termination hearing, and her rights to due process were not violated by the manner in which her employment was terminated. See Eaton v. City of Parkersburg, 198 W. Va. 615, 617 n.2, 482 S.E.2d 232, n.2 (1996).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: September 16, 1999

Footnote: 1

Inasmuch as Grievant was not employed by a county board of education, W. Va. Code § 18A-2-8, providing for a direct appeal of a dismissal matter to Level IV of the education employees' grievance procedure, is not applicable to this grievance. See State ex rel. Kondos v. W. Va. Bd. of Regents, 154 W. Va. 276, 175 S.E.2d 165 (1970). However, W. Va. Code § 18-29-2(a) explicitly provides that WVDOE employees are authorized to grieve such matters under this grievance procedure.

Footnote: 2

Grievant was represented by counsel, Joan G. Hill, with Crandall Pyles Haviland & Turner. Respondent was also represented by counsel, Katherine L. Dooley, with WVDOE's Legal Services Division.

Footnote: 3

Section 12.2 of the Administrative Rule of the West Virginia Division of Personnel, 143 C.S.R. 1 § 12.2 (1998), provides the following guidance on the procedures to be followed in dismissal actions:

> *Dismissals - Fifteen (15) calendar days after notice in writing to an employee stating specific reasons, the appointing authority may dismiss any employee for cause. The appointing authority shall allow the employee a reasonable time to reply to the dismissal in writing, or upon request to appear*

personally and reply to the appointing authority or his or her designee. The appointing authority shall file the reasons for dismissal and the reply, if any, with the Director of Personnel. Fifteen days notice is not required for employees in certain cases when the public interests are best served by withholding the notice or when the cause of dismissal is gross misconduct. An appointing authority may dismiss an employee after oral notice, confirmed in writing, when the dismissed employee's action(s) constitute a threat to the safety or welfare of persons or property.

Footnote: 4

Under the retirement system for state employees, Grievant would have been eligible for retirement in accordance with the "rule of 80." See W. Va. Code § 5-10-22e(f).