TERRY QUIGLEY,

Grievant,

v. Docket No. 01-20-105

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Terry Quigley, was employed as a custodian, with the Kanawha County Board of Education ("KCBOE"). He filed two grievances directly at Level IV. The first grievance, filed March 26, 2001 states: (See footnote 1)

> **Statement of Grievance: Resigned - forced resignation. Told to quit or get fired for not calling in a sub. Custodian - resigned March 6, 2001**
>
> **Relief Sought: Reinstated**

Grievant filed the second grievance on May 10, 2001. (See footnote 2) **This Statement of Grievance reads:** (See footnote 3)

> **Harassment - refused to tell why docked sick leave days and, also docked pay check.**
>
> **Relief Sought: Want my job back, money back and sick leave days back.**

A Level IV hearing was held on June 1, 2001. At the hearing, Respondent objected to Grievant raising the issue of alleged attempts to rescind his resignation, and argued this request was not on the grievance form. Also, at the hearing, Grievant objected toRespondent's raising the issue of job performance, and the reasons for the numerous conferences with Grievant. The undersigned Administrative Law Judge allowed the presentation of evidence on

both issues, and both parties were given an opportunity to continue the hearing to present additional evidence. Respondent elected not to do so, and Grievant's representative informed the undersigned Administrative Law Judge by letter dated June 13, 2001, that he had determined he did not need to take additional testimony on the job performance issue. This case became mature for decision on August 2, 2001, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 4)

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. At the first of the 2000 - 2001 school year, Grievant was employed in two half-time custodial positions; one at Clendenin Middle school ("CMS") and the other at Piedmont Elementary School ("PES"). (See footnote 5)

2. Grievant has been a long-term member of his union, the West Virginia Federation of Teachers.

3. The principal at PES, Steve Knighton, was concerned about the cleanliness of the school, and since he had had little success correcting the problem, he asked for the assistance of Karen Williams, Coordinator of Human Resources. He was also concernedbecause of Grievant's frequent absences, and his failure to call the substitute system ("TSSI") when he was going to be gone, so a substitute could be called to perform the work in his absence.

4. Principal Knighton sent a letter dated November 8, 2000, to the custodians informing them of the upcoming meeting scheduled for November 13, 2000. He included in this letter the issues and concerns that would be discussed.

5. This meeting was held at PES at the scheduled time. Principal Knighton had drawn up a checklist identifying each custodian's duties and wanted the custodians to document that they had completed the assigned tasks. The custodians were also asked to document their arrival and leaving time. Additionally, Principal Knighton wanted Grievant to call him personally when he was going to be absent as well as notify the TSSI system.

6. Grievant did not want to complete the checklist and stated he would rather resign.

Since the meeting took place at PES, Ms. Williams did not have any of the required forms. She asked Grievant to come to the Central Office the following day to fill out his resignation.

7. Grievant came to the Central Office the following day and stated he had a change of heart and no longer wished to resign. Ms. Williams instructed Grievant to inform Principal Knighton and to make sure he did his assigned duties. He was also told he must call-in if he were going to be absent.

8. Principal Knighton continued to remind Grievant of the necessity of following the call-in procedures. He called Ms. Williams in December to inform her that Grievant'sjob performance had improved, but he was still frequently absent and still not calling the TSSI system, nor completing the necessary paperwork to document his absences.

9. Ms. Williams put these concerns in a letter dated January 2, 2001. She clearly informed Grievant regular attendance was "a must," and he must notify the TSSI call-out system and his principal prior to all absences. The absences had begun to form a pattern, and Grievant was frequently absent on Fridays. This letter went on to inform Grievant that if he failed to improve in these areas, the result would be unsatisfactory evaluations, a formal plan of improvement, and subsequent termination.

10. This letter went on to explain Ms. Williams's willingness to work with Grievant, as well as explaining to Grievant his pay had been docked for his failure to follow the above instructions on days he was not in attendance and had failed to call.

11. Ms. Williams did not receive any response to this letter.

12. Grievant resigned the position at CMS when his pay was docked, and he did not have enough money for gas. He was also angry about his decreased pay and believed the actions had been unfair. He did not grieve this docked pay. He told the senior custodian at CMS his last day would be Friday, January 19, 2001. On or about January 17, 2001, Grievant left a signed note on the school secretary's desk stating. "Friday will be my last day." **(See footnote 6)**

13. Grievant attempted to return to work at CMS on the following Monday and Tuesday, and he found another custodian performing his former duties. He gave his keysto this employee. He did not file a grievance over this resignation, nor did he ask to return to work.

14. Grievant received a negative evaluation from Principal Knighton in mid- January

2001.

15. Principal Knighton informed Ms. Williams that Grievant's attendance had not improved, and he still failed to call-in when he was going to be absent.

16. Grievant did not come to work, nor did he call-in, on February 2, 8, 9, 16, 23, 26, and 27, 2001. He was absent every Friday in February. (See footnote 7)

17. On March 1, 2001, Ms. Williams wrote Grievant informing him there were still concerns about his attendance and gave him notice of a meeting with herself and Mr. Bill Courtney, Director of Personnel, on March 6, 2001.

18. Grievant did not come to work nor did he call-in on March 1, 2, 5, 6, and 7, 2001.

19. At this meeting on March 6, 2001, Ms. Williams and Mr. Courtney attempted to find out, without success, why Grievant was frequently absent, and why he would not call the TSSI system and Principal Knighton.

20. Grievant told Ms. Williams and Mr. Courtney he had "been done wrong," had had enough, and "couldn't take it any more."

21. Mr. Courtney asked Grievant if he meant he wanted to resign and Grievant said yes. Ms. Williams got Grievant a resignation form, and Grievant completed it. Grievant indicated his reasons for the resignations were "personal," and the resignation was to be effective that day, March 6, 2001.

22. Contrary to Grievant's testimony, neither Ms. Williams nor Mr. Courtney put any pressure on Grievant to resign, nor did they tell him he would be fired if he did not resign. The focus of the meeting was to find out why Grievant was not following the clear directions of his supervisor.

23. Grievant called Mr. Courtney the next day and told him he wanted to file a grievance because he had "been done wrong." Mr. Courtney informed Grievant he did not have standing to file a grievance because he was no longer an employee. Grievant did not ask to take back his resignation.

24. Mr. Courtney brought up the subject of whether Grievant wanted to rescind his resignation. Mr. Courtney informed Grievant that if he did rescind his resignation, there would probably be a hearing, to go through the termination process. (See footnote 8)

25. Grievant never sent a letter stating he wanted to rescind his resignation, nor did he

call again to inform Mr. Courtney what he wanted to do.

26. Grievant did not return to his position at PES during the following days.

27. KCBOE accepted Grievant's resignation on March 15, 2001. Resp. Ex. No. 6, at Level IV.

28. The Payroll Department processed Grievant's paperwork on March 21, 2001.

29. Grievant took no further action until he was informed by someone at the Unemployment Office that he should or could file a grievance.

30. Grievant filed this grievance on March 26, 2001. (See footnote 9)

Issues and Arguments

Grievant argues he did not feel like he had a choice when he submitted his resignation, and he was told he would be fired if he did not resign. He also argues he wanted to rescind his resignation the next day and was not allowed to do so. He further asserts Respondent should not now be allowed to dismiss him, if the original plan was to place him on an Improvement Plan. Additionally, Grievant maintains he should have the same due process rights he would have had prior to the resignation, and to uphold Grievant's dismissal at this point would be an act of retaliation. Grievant noted in his post- hearing submissions that Grievant had "certain limitations," but these were not discussed at hearing other than Grievant's difficulty with spelling.

Respondent argues Grievant quit his employment of his own accord and was aware of the consequences, as he had resigned from his other part-time position earlier in the year. (See footnote 10) **Respondent maintains Grievant was frustrated and chose to resign rather than deal with an Improvement Plan and perform the requirements of the position. Respondent also maintains Grievant called asking to file a grievance, and was told by Bill Courtney, Director of Personnel, that since he was no longer an employee, he did not have standingto file a grievance. Mr. Courtney then asked Grievant if he wanted to rescind his resignation, and Grievant indicated this would be acceptable. Grievant's main focus was in complaining about "being done wrong," and he wanted the situation at work to be corrected. Mr. Courtney indicated that if Grievant wanted to rescind his grievance that KCBOE would probably take action to terminate him. Grievant never contacted Mr. Courtney again to indicate what he**

wanted to do, nor did he submit anything in writing. Grievant also did not return to work.

Discussion

___As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id. The issues raised by the parties will be discussed separately.

I. Credibility

A key issue to resolve is the question of witness credibility, because the testimony of the witnesses varied widely. The testimony of Ms. Williams and Mr. Courtney andGrievant as to what happened at the March meeting is so different as to make clear someone who was a party to the conversation is incorrect.

An Administrative Law Judge is charged with assessing the credibility of the witnesses that appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95- 23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3)

the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.

The undersigned Administrative Law Judge had an opportunity to observe the demeanor of these witnesses and to assess their words and actions during their testimony. The undersigned Administrative Law Judge finds Grievant to be less than credible in his testimony. He denied he had voluntarily quit his position at CMS until the letter he wrote was placed into evidence. Additionally, his version of what happened at the March meeting is just not plausible. He had been informed in the January letter that if his performance did not improve it would affect his evaluation, and he would be placed on anImprovement Plan. He received a negative evaluation several weeks later, and still his attendance did not improve; in fact it deteriorated. The letter notifying Grievant of the March meeting noted Grievant's work had improved, but there were still concerns about his attendance.

It is clear the purpose of this meeting was to impress upon Grievant the need to follow procedures, and an Improvement Plan was in the offing. The meeting never got that far because Grievant decided to quit. He felt he was being treated unfairly. Grievant is untruthful went he says both Ms. Williams and Mr. Courtney stated they would "fire" him or in any way indicated he would be terminated, if he did not resign. Further, neither of these employees had the power to terminate any employee; that power rests with KCBOE. Accordingly, the undersigned Administrative Law Judge does not find Grievant's testimony to be truthful.

II. Whether Grievant's resignation was involuntary?

This Grievance Board has held that a claim of coerced or involuntary resignation is recognizable in the grievance procedure. Smith v. Dep't of Corrections, Docket No. 94- CORR-1092 (Sept. 11, 1995). See Bailey v. Eberle Tech. Center, Docket No. 98-49-189 (Sept. 30, 1998). (See footnote 11) **The burden of proving by a preponderance of the evidence that a resignation was involuntary lies with the Grievant. Glasscock v. W. Va. Dep't ofCorrections, Docket No. 95-CORR-093 (May 31, 1995); See also McClung v. W. Va. Dep't of Public Safety, Docket No. 89-DPS-240 (Aug. 14, 1989). A resignation is, by definition, a voluntary act on the part of an employee seeking to end the employer-employee relationship. Smith, supra. See Welch v. W. Va. Dep't of Corrections, Docket No. 95- CORR-261 (Jan. 31, 1996); Copley v. Logan County Health Dep't, Docket No. 90-LCHD- 531 (May 22, 1991); 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). 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).

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. Dep't 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, supra.

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. Dep't 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, 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 the circumstances 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)).

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. "A resignation is 'not voluntary where an agency imposes the terms of an employee's resignation, the employee's circumstances permit no alternative but to accept, and those circumstances were the result of

improper acts of the agency'" Latham, supra (citing Schultz v. United States Navy, 810 F.2d 1133, 1136 (Fed. Cir. 1987). In this case there is no evidence anyone told Grievant he would be "fired" immediately if he did not resign, nor did anyone threaten Grievant in any way. Neither Ms. Williams nor Mr. Courtney indicated Grievant was about to be terminated. The purpose of the meeting was to discuss Grievant's failureto come to work and his failure to follow the call-in procedure. Respondent did not engage in "improper acts."

Grievant was not presented with a "take it or leave it now" proposition. The resignation was his idea. Clearly, Grievant understood the ramifications of his actions when he signed the letter of resignation. He had resigned from a position just two months earlier, and he knew that his position was filled right away by a substitute. Just because an employee is faced with the "unpleasant choice" of being placed on an improvement plan and being required to follow the rules applicable to everyone else, does not make the resulting resignation an involuntary act, nor does it indicate the employer engaged in "improper acts." Glasscock, supra; Latham, supra. The undersigned Administrative Law Judge finds Grievant has failed to prove by a preponderance of the evidence that his resignation was coerced, that he was misled or deceived, or that he was placed under duress or otherwise forced to submit his resignation contrary to his own free will on March 6, 2001.

III. Constructive discharge

The Grievance Board considers potential constructive discharge cases, as similar in nature to those cases in which a respondent has terminated a grievant's employment. It has been previously held that "whether an employer's conduct constitutes a constructive discharge and the grievant's status as an employee are inextricably intertwined." Ball v. W. Va. Alcohol Beverage Control Comm., Docket No. 90-ABCC-027 (June 15, 1990). See Daniels v. W. Va. Dep't of Health and Human Resources, Docket Nos. 94-HHR-1135/95- HHR-053 (May 31, 1995). In order to prove constructive discharge in West Virginia, the employee must "establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit." Slack v. Kanawha County Housing & Redevelopment Auth., 188 W. Va. 144, 423 S.E.2d 547 (1992). It is not necessary for the employee to show the employer's actions were taken with a specific intent to cause the employee to quit. Slack, supra. As previously stated, to "determine whether an employee's act

of resignation was the result of coercion, rather than a voluntary act, the circumstances surrounding the resignation must be examined in order to measure the ability of the employee to exercise free choice." McClung, supra. See Adkins v. Civil Serv. Comm'n, 171 W. Va. 132, 298 S.E.2d 105 (1982). See also Schultz, supra; Dumas v. Merit Systems Protection County Bd. of Educ., 789 F.2d 892 (Fed. Cir. 1986). Moreover, whether working conditions are intolerable must be assessed by the objective standard of whether a "reasonable person" in the employee's position would have felt compelled to resign. Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985). See J.P. Stevens & Co. v. NLRB, 461 F.2d 490 (4th Cir. 1972); McKinney v. K-Mart Corp., 649 F. Supp. 1217 (S.D. W. Va. 1986). A grievant alleging a constructive discharge has the burden of proving his allegations by a preponderance of the evidence. McClung, supra. See Coster v. W. Va. Div. of Corrections, Docket No. 94-CORR-600 (Aug. 12, 1996).

The undersigned Administrative Law Judge finds the argument of constructive discharge to be without merit. The discussion in the previous Section is applicable here. Grievant did present any evidence to "establish that working conditions created by orknown to the employer were so intolerable that a reasonable person would be compelled to quit." Slack, supra.

IV. Right to rescind

The remaining issue is whether Grievant took the necessary steps to rescind his resignation. This Grievance Board has held that a professional school employee generally has the opportunity to withdraw his resignation before it is accepted by the employer. Bailey, supra; Nealis v. Berkeley County Bd. of Educ., Docket No. 02-87-231-2 (Dec. 22, 1987). The West Virginia Supreme Court has also stated that, in the case of school professional employees, an offer to resign may be withdrawn at any time before such acceptance takes place. Syl. Pt. 1, LeMasters v. Bd. of Educ. of Grant District, 105 W. Va. 81, 141 S.E. 515 (1928). 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.

After a thorough review of the evidence in this case, it is the opinion of the undersigned

Administrative Law Judge that Grievant did not take the necessary steps to inform Respondent that he wanted to rescind his resignation. It is true Grievant called Mr. Courtney and discussed the matter, but after Mr. Courtney informed Grievant of the alternatives, Grievant never stated he wanted to rescind the resignation. Grievant never told anyone in authority he wanted to rescind his resignation, and take his chances with a termination proceeding. He did not file a grievance at that time, or submit anything inwriting. He did not ask Mr. Courtney what steps he needed to take. He did not return to work, he did not talk to Principal Knighton about the situation, and he did not recall Mr. Courtney. KCBOE acted on Grievant's resignation on March 15, 2001. The first time Respondent was informed Grievant was actually contesting his resignation was when he filed this grievance on March 26, 2001. Given this set of facts, Grievant did not give KCBOE notice of his intent to rescind his resignation until after KCBOE had accepted it; thus, he no longer had the right to rescind.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. A claim of coerced or involuntary resignation is recognizable in the grievance procedure. Smith v. Dep't of Corrections, Docket No. 94-CORR-1092 (Sept. 11, 1995).

3. The burden of proving by a preponderance of the evidence that a resignation was involuntary lies with the Grievant. Glasscock v. W. Va. Dep't of Corrections, Docket No. 95-CORR-093 (May 31, 1995); See also McClung v. W. Va. Dep't of Public Safety, Docket No. 89-DPS-240 (Aug. 14, 1989). 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. Dep't of Air Force, 710 F.2d 1572, 1574-75 (Fed. Cir. 1983).

5. 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).

6. 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. Dep't 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. Dep't 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 resignationpermitted no other alternative; and the circumstances were the result of coercive acts of the employer. Vandiver.

7. Resignations that are obtained through coercion or deception are contrary to public policy. Welch v. W. Va. Dep't of Corrections, Docket No. 95-CORR-261 (Jan. 31, 1996).

8. 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. United States, 490 F.2d 928 (Ct. Cl. 1974); Heining v. GSA, 68 M.S.P.R. 513, 519 (1995).

9. 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.

10. Grievant has not proven by a preponderance of the evidence that his March 6, 2001 resignation was involuntary or the result of coercion, duress, or deception. Grievant did not demonstrate any improper act on the part of Respondent. Grievant voluntarily resigned his position in writing.

11. In order to prove constructive discharge in West Virginia, the employee must

"establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit." Slack v. Kanawha County Housing & Redevelopment Auth., 188 W. Va. 144, 423 S.E.2d 547 (1992). 12. Grievant has failed to "establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit." Slack, supra.

13. Grievant has not demonstrate by a preponderance of the evidence that he notified KCBOE he wanted to rescind his resignation, nor did his subsequent actions inform KCBOE of his desires.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any 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.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 30, 2001

Footnote: 1

This grievance was filled out by Valerie Rist, Administrative Officer, with the Grievance Board's office as Grievant stated he had difficulty with writing and spelling. Grievant did not testify that the information on the grievance form was incorrect.

Footnote: 2

The parties agreed not to address the second grievance during the Level IV hearing, as the outcome of this grievance might very well determine whether the second grievance was moot.

Footnote: 3

This grievance form was completed by Cricket Powell, Secretary II, with the Grievance Board's office.

Footnote: 4

Grievant was represented by Rosemary Jenkins and Steve Angel from the West Virginia Federation of Teachers, and Respondent was represented by Attorney James Withrow.

Footnote: 5

There was no evidence about the length of Grievant's employment, so it is unknown whether Grievant was a continuing or probationary employee.

Footnote: 6

This Finding of Fact is contrary to Grievant's testimony. He stated the other custodian must have told the principal he would not be returning. Grievant changed this testimony when confronted with his note.

Footnote: 7

From the testimony at the Level IV hearing, it appeared Grievant believed that as long as he had sick leave he could take it whenever he wanted, and he did not need to call anyone.

Footnote: 8

Mr. Courtney believed Grievant's main concern was to complain about his work situation and treatment, and he did not care what procedure he followed.

Footnote: 9

He did not call his union, the West Virginia Federation of Teachers, until after he filed this grievance. His stated reasons were he thought things would work themselves out.

Footnote: 10

Grievant did not file a grievance about this resignation.

Footnote: 11

The Grievance Board considers potential constructive discharge cases, similar in nature to cases in which a respondent has terminated a grievant's employment. It has been previously held that "whether an employer's conduct constitutes a constructive discharge and the grievant's status as an employee are inextricably intertwined." Ball v. W. Va. Alcohol Beverage Control Comm., Docket No. 90-ABCC-027 (June 15, 1990); See Daniels v. W. Va. Dep't of Health and Human Resources, Docket Nos. 94-HHR-1135/95- HHR-053 (May 31, 1995). Accordingly, a grievant may file a grievance in this situation.