WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MICHELLE L. FALQUERO,

Grievant,

v. **Docket No. 2008-1596-DEP**

WEST VIRGINIA DEPARTMENT OF

ENVIRONMENTAL PROTECTION,

Respondent,

DECISION

Grievant Michelle Falquero has been employed by the Department of Environmental Protection ("DEP") for more than five years. She was assigned as the secretary for the Public Information Office of the DEP. On May 15, 2008, Ms. Falquero filed a grievance stating the following:

1) No Employee Performance Appraisals (EPAs) for four (4) years.

2) Mandatory functional demotion under threat of termination as of 06/15/08.
Explanation: I was given a new EPA in the 05/08/08 meeting with my supervisor and HR. Duties which I need to get my next job title are beingtaken away. Additional lower level office assistant duties are being added, which time wise, would be impossible to accomplish in addition to my current duties/workload, therefore setting me up for failure. I was told we could not discuss the EPA, I could sign it and stay, or not sign it and leave the agency on 06/15/08.

3) Title and pay is inconsistent with past and present duties performed and taken on from two different Administrative Secretaries that left the agency. I have performed all of these duties in addition to my original duties for the Public Information Office.

4) Forcing me to write a letter regarding a reported hostile work environment situation saying that they had taken care of the problem. No action was taken to resolve the problem after it was reported.

I also believe that the rescinding of my resignation was denied due to the reporting of the situation. As with the signing of the new EPA, if I do not write this letter, I must leave the agency on 06/15/08. The remedy Grievant seeks is "to be made whole, including reclass [sic] as Administrative Secretary."

On June 9, 2008, a level one hearing was held in this matter. On July 28, 2008, the DEP Chief Administrator, Randy Huffman signed an Order adopting the Recommended Order of his Designee which denied the grievance. (See footnote 1) The parties attempted an unsuccessful mediation and the matter was appealed to level three. The level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on October 16, 2008. Grievant was present at the hearing and was represented by Gordon J. Simmons, UE Local 170 representative and John T. Poffenbarger, Esquire. Respondent was represented by Raymond S. Franks II, General Counsel for DEP. At the outset of the hearing it was noted that part of the remedy sought by Grievant was reallocation to a different job classification. In such matters the Division of Personnel must be a party. The parties agreed to limit the hearing to issues related to Grievant's resignation. (See footnote 2) Therefore, the issues to be determined in this matter are whether Grievant's work environment was so intolerable that her resignation may be construed as a constructive discharge and whether DEP properly refused to allow Grievant to rescind her resignation. At the conclusion of the presentation of the evidence all parties declined to make closing statements. Additionally, the parties declined presenting Proposed Findings of Fact and Conclusions of Law in the interest of receiving a decision more quickly. Therefore, this matter became mature for decision at the close of the hearing.

Synopsis

Grievant alleges that her work situation constituted a hostile work environment because of the conduct of the co-workers in her office suite. She alleges that after bringing the issue to the attention of management on three separate occasions, with no relief, she had no viable choice but to resign. She avers that her resignation was a constructive discharge. Grievant also claims that she rescinded her resignation before DEP took any action to accept it and since her offer to resign was not accepted before it was withdrawn DEP could not accept it after she rescinded it. DEP responds that Grievant had not exhausted all reasonable remedies for the perceived hostile work environment. Respondent notes that the day before Grievant resigned, management informed her that she was going to be moved to a comparable office, closer to her work, and away from the co-workers who

were allegedly creating the hostile work environment. DEP also avers that the environment was not so intolerable that a reasonable person would be compelled to quit. Finally, DEP argues that Grievant's resignation was binding upon being tendered to her supervisor and DEP was under no obligation to accept Greivant's recision of her resignation.

Unless the employment contract is “at will,” an employee's resignation is an offer to end the contract that does not become effective until it is accepted. Grievant rescinded her resignation prior to it being accepted by DEP. Therefore, the offer to resign was withdrawnbefore it was accepted and the resignation is void. The grievance is granted to the limited extent that the resignation of the Grievant is void and she remains an employee of the DEP. A hearing must be scheduled to resolve the remaining issues. *See* Footnote 2, *supra.*

The following Findings of Fact result from a thorough review of the complete record in the matter.

Findings of Fact

1 1. Grievant has been employed by DEP for approximately five years and was most recently classified as a Secretary 2. Grievant has never received an evaluation or any other indication that her performance was less than satisfactory.

2. At all times relevant to this matter, Grievant was assigned as the secretary for the DEP Public Information Office.

3. Since 2004, Grievant has been working in the Executive Office Suite of the DEP offices in Kanawha City. Two other secretaries also work in that suite of offices and provide support services to the DEP Cabinet Secretary, General Counsel and at least one other manager. The other secretaries have been in the Executive Office Suite since 2004 as well.

4. Grievant complains that the other secretaries are abusive in their behavior toward her and that their actions have created a hostile work environment. Examples of the behavior include the following:

1 *

When Grievant entered a room where the other secretaries were chatting, they would giggle/snigger as Grievant was leaving.

2 *

When walking by Grievant's office, the secretaries would make loud comments, aimed at Grievant, related to matters such as leave abuse or that they were being required to do Grievant's work.

3 *

The other secretaries would always eat lunch together while Grievant covered the phones, however, if Grievant needed to switch her lunch time, neither of the other secretaries would agree to cover the phones in her absence.

4 *

Twice, the other secretaries took annual leave at the same time without putting it on the leave calendar. Grievant showed up to work and found she was the only secretary on duty.

5 *

One of the secretaries would bring the Public Information Office mail to Grievant and toss it on her desk in a way that it usually ended up falling on the floor.

6 *

The secretaries would not share information with Grievant and would generally respond to her questions by stating “I don't know”.

7 *

On one occasion, the other secretaries organized a Christmas gift exchange without telling Grievant and then made comments about Grievant's failure to purchase a gift for her supervisor.

8 *

The other secretaries would set the thermostats in common rooms at the highest settings. When Grievant would reset the thermostats at the medium settings the co-workers would change them back to the hottest setting. (See footnote 3)

5. In late 2007, on two separate occasions, Grievant discussed with Debbie Hughes, the problems she was having with the other two secretaries and how the situation was affecting her.

Debbie Hughes works in the DEP Office of Human Resources and at that time, was the EEO and Grievance Coordinator.

6. During these two occasions, Grievant also spoke with Ms. Hughes about her desire to be reclassified as an Administrative Secretary because she had assumed the duties of an Administrative Secretary who had left the office and not been replaced. 7. Ms. Hughes advised Grievant of her right to file a grievance. Ms. Hughes also offered to speak with Grievant's supervisor about the situation.

8. Grievant declined to file a grievance out of concern that she would be subjected to reprisal. She also declined Ms. Hughes' offer to speak to Grievant's manager because her manager was already aware of the situation. Grievant felt her manager could do nothing about the problem since she did not supervise the other secretaries.

9. On February 22, 2008, Grievant met with Randy Huffman to discuss the perceived hostile work environment and her desire to be reclassified. At that time, Mr. Huffman was the Assistant Cabinet Secretary for DEP. (See footnote 4) Mr. Huffman indicated to Grievant that he would discuss the work situation with Grievant's new supervisor, Kathy Cosco, and with the Human Relations Office.

10. Grievant met with her supervisor, Kathy Cosco on February 27, 2008, to discuss the same issues she had raised with Ms. Hughes and Mr. Huffman. Grievant asked Ms. Cosco if Mr. Huffman had spoken to her about her work environment and Ms. Cosco responded that he had not.

11. In response to Grievant's concerns about the hostile work environment, Ms. Cosco informed Grievant that she and Cabinet Secretary Timmermeyer had held a conversation about two weeks earlier about changing some of the offices. At the end of the legislative session, in early March, Secretary Timmermeyer intended to move her assistant into Grievant's office, in the Executive Suite on the third floor and move Grievant to an office on the first floor, where she would be closer to the Public Information Office.In response to questions from Grievant, Ms. Cosco assured her that the office Grievant would move to would be a private office and comparable to the office Grievant presently occupied.

12. On February 28, 2008, Grievant Falquero gave Ms. Cosco a copy of her letter of resignation that stated: “This letter serves as notice that I am resigning from my position at the West Virginia Department of Environmental Protection. My last day of work will be June 15, 2008.” Grievant told Ms. Cosco that things would never change at DEP and that Grievant had set that date of her

departure more than three months in the future so that she could look for another job. Ms. Cosco's only response was to say “okay”.

13. No other action was taken regarding Grievant's resignation for a month.

14. After spending time in her new office, Grievant realized that she was no longer subject to the perceived hostile environment in the Executive Suite. Grievant spoke with Ms. Cosco on March 26, 2008, regarding whether she could rescind her resignation. Mr. Cosco indicated that she did not know. On March 27, 2008, Grievant submitted a memorandum to Kathy Cosco and Sandy Kee (See footnote 5) which stated: “As of today I am rescinding my resignation. Thank you.”

15. On April 1, 2008, Ms Cosco gave Grievant a letter stating:

“The West Virginia Department of Environmental Protection (DEP) accepted your February 28, 2008, letter resigning your position as a Secretary II with the DEP's Public Information Office. On March 27, 2008, you notified me in writing that you were rescinding your resignation. I regret to inform you that the DEP has decided to deny your request and that your last day of employment will be June 15, 2008, as you initially indicated in your letter of resignation.”

This was the first communication the DEP had with Grievant regarding the acceptance of her resignation.

16. Over the next month, Grievant and Ms. Cosco exchanged correspondence related to Grievant's request to know who, in DEP, denied her request to rescind her resignation and why it was denied. During this period, Randy Huffman was appointed as the new Cabinet Secretary for DEP. *See* Footnote 4, *supra.*

17. Ms. Cosco met with Randy Huffman and he suggested that she develop a staffing plan for the Public Information Office that reflected her view about how the employees could best be utilized. In that meeting, Ms. Cosco asked Mr. Huffman if he wanted to reconsider Ms. Timmermeyer's decision to reject Grievant's effort to rescind her resignation. Mr. Huffman indicated that he would allow Grievant to rescind her resignation based upon certain conditions.

18. Ms. Cosco scheduled and held a meeting with Grievant on May 8, 2008, for the purpose of discussing Grievant's resignation. Debbie Hughes was also at that meeting.

19. At the May 8th meeting, Ms. Cosco gave Grievant an Employee Performance Appraisal-1 Form (“EPA”) (See footnote 6) that contained the duties and responsibilities that Ms. Cosco envisioned Grievant would be performing in the new staffing plan. Ms. Cosco told Grievant that the DEP would

allow her to rescind her resignation if she agreed to the following two conditions:

1 *

Grievant would sign the EPA, indicating her acceptance of the new duties envisioned for her position in the new staffing plan. 2 *

Grievant would draft a respectful letter acknowledging that she was no longer in a hostile work environment.

20. Grievant indicated to Ms. Cosco that she didn't believe that she would be able to perform the duties as listed in the EPA and expressed dissatisfaction that most of the administrative duties that she had been performing were being taken away. Ms. Cosco stated that they should leave the duties as written and if problems arose, adjustments could be made. Grievant left the meeting without signing the EPA.

21. On May 15, 2008, Debbie Hughes sent an e-mail to Grievant to confirm a conversation between the two of them and to communicate information to Grievant from Randy Huffman. The gist of the message was that in order to continue her employment with the DEP, Grievant had to meet the conditions set out in the May 8th meeting. If Grievant failed to submit the required documents to Ms. Cosco, “the resignation [she] submitted to the agency dated February 28, 2008, [would] be processed as requested by [her].” *See* Grievant's Exhibit 1

22. Ms. Falquero filed this grievance on May 15, 2008.

23. On May 20, 2008, Cabinet Secretary Huffman e-mailed a letter to Grievant stating that Grievant had until May 30, 2008, to sign the EPA and return it to Ms. Cosco. The condition that Grievant would need to write a letter regarding the hostile work environment was specifically withdrawn. Mr. Huffman also stated that signing the EPA would not prejudice Grievant's rights to contest the duties listed therein, through the grievance process. Finally, it was noted that failure on the part of Grievant to submit the signed EPA as written, by the specified date, would “foreclose any possibility that theDepartment [would] reconsider its decision to deny [Grievant's] rescission request.” *See* Grievant's Exhibit 2.

24. For the reasons set out her grievance statement, Grievant did not sign the EPA prepared by Ms. Cosco and she was no longer considered employed by the DEP as of June 15, 2008.

Discussion

The parties agreed to limit the issues in this decision to matters related to the Grievant's resignation. There are two main issues that are apparent from the record: whether Grievant's work

environment was so intolerable that her resignation may be construed as a constructive discharge and whether the DEP properly refused to allow Grievant to rescind her resignation. (See footnote 7) As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

I. Constructive Discharge

The starting point for examining resignation grievances is that, "a resignation is, by definition, a voluntary act on the part of an employee seeking to end the employer-employee relationship. . . " *Smith v. W. Va. Dept. of Corrections*, Docket No. 94-CORR- 1092 (Sept. 11, 1995). *See Welch v. W. Va. Dept. of Corrections*, Docket No. 95-CORR- 261 (Jan. 31, 1996); *Jenkins v. Dep't of Health and Human Resources/Mildred Mitchell- Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002). To determine whether an employee's act of resignation was forced by others, rather than voluntary, the circumstances surrounding the resignation must be examined in order to measure the ability of the employee to exercise free choice. *McClung v. W. Va. Dep't of Public Safety*, Docket No. 89-DPS-240 (Aug. 14, 1989); *See Adkins v. Civil Serv. Comm'n*, 171 W. Va. 132, 298 S.E.2d 105 (1982). In order to prove a constructive discharge, a grievant must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary that a grievant prove that the employer's actions were taken with a specific intent to cause her to quit. *Slack v. Kanawha County Housing*, 188 W. Va. 144, 423 S.E.2d 547 (1992); *Preece v. Public Serv. Comm'n*, Docket No. 94-PSC-246 (Apr. 25, 1997); *Coster v. W. Va. Div. of Corrections*, Docket No. 94-CORR-600 (Aug. 12, 1996); *Jenkins v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002). The trier of fact must be satisfied that the working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir.1977); *Slack, supra.* In discussing the “reasonable person” standard, the West Virginia Supreme Court of Appeals has described a reasonable person as, “neither an automaton nor an exceptional man, but an ordinary member of the community. Being

an ordinary person, the law makes allowance for mere errors in his judgment and does not visualize him asexercising extraordinary care. Normality is the quintessence of this characterization." Syl. Pt. 6, *Patton v. City of Grafton*, 116 W.Va. 311, 180 S.E. 267 (1935); *Honaker v. Mahon,* 210 W.Va. 53, 552 S.E.2d 788 (2001).

Two former DEP employees testified that the work atmosphere among the secretaries in the DEP executive offices led them to find work elsewhere. However, only one of the former employees worked with all the same individuals as Grievant and she has not worked in the Executive Suites since 2004. Moreover, the other former employee testified that one of the people who caused her the most difficulty no longer works in the DEP executive offices and has not worked there for four years. In 2004, Grievant began working with the two secretaries, who she claims created the hostile environment, but did not make any formal complaints until 2007. The testimony of the former employees regarding the work environment they encountered in the DEP executive offices three or more years earlier, is not particularly relevant to the office environment of Grievant when she made formal complaints in 2007.

That being said, there is ample evidence that the work environment experienced by Grievant was very unpleasant. The actions of her co-workers toward her appeared to be petty, sophomoric and generally not consistent with reasonable and appropriate office behavior. While the behavior described by Grievant would be hurtful and trying, it was not so intolerable that it would lead a reasonable person to believe that she had no other recourse but to quit. Even Grievant characterized the actions as "juvenile and childish behavior, [that] will seem rather petty." No doubt the cumulative effect of such behavior could be frustrating, but there were avenues open to Grievant to address these issues short of quitting. Debbie Hughes instructed Grievant that the grievance process wasavailable to her and offered to have a discussion with managers in an attempt to help resolve the difficulties she was experiencing. Grievant rejected both of those potential solutions, believing that they would be ineffective or could lead to reprisal. However, since the alternative was to leave employment, there was nothing to be lost in exploring these options.

Finding a constructive discharge is made even more difficult by the timing of Grievant's resignation. Grievant was discussing the perceived hostile work environment with her new supervisor, Kathy Cosco, on February 27, 2008. Ms. Cosco revealed to Grievant that she would soon be moved to a different office, away from the Executive Suite where she was having problems. Ms.

Cosco further assured Grievant that the office she was moving to would be comparable to the one she presently occupied and Grievant would be closer to the Public Information Office that she served. While it is certainly understandable that Grievant would be wary of this move, it is unlikely that a reasonable person would believe that she had no choice but to resign, given the very real possibility that her work environment could change drastically for the better.

Given the totality of the circumstances, Grievant did not prove that her working conditions were so intolerable that a reasonable person in the same situation would be compelled to quit. Consequently, her constructive discharge claim must fail.

II. Rescinding a Resignation

The remaining issue is whether Grievant took the necessary steps to rescind her resignation. This Grievance Board has held that a professional school employee generally has the opportunity to withdraw her resignation before it is accepted by the employer. *See Bailey v. The Fred W. Eberle Technical Center*, Docket No. 98-49-189 (Sept. 30, 1998);*Nealis v. Berkeley County Bd. of Educ.*, Docket No. 02-87-231-2 (Dec. 22, 1987); *Quigley v. Kanawha County Board of Education,* Docket No. 01-20-105 (Aug. 30, 2001). The West Virginia Supreme Court of Appeals 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, *Le Masters v. Bd. of Educ. of Grant District*, 105 W. Va. 81, 141 S.E. 515 (1928). In *Le Masters*, 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. *Id*. This reasoning is not unique to teaching positions, but applies the concept of mutuality of assent which is an essential element of all contracts. In order for this mutuality to exist, it is necessary that there be a proposal or offer on the part of one party and an acceptance on the part of the other. *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.*, 158 W.Va. 935, 216 S.E.2d 234 (1975). In *Le Masters supra*, the Supreme Court adopted the reasoning set forth in the Iowa case of *Curttright v. Independent School District, etc.,*111 Iowa 20*,* 82 N.W. 444, which stated:

The [resignation] was simply a tender-an offer-to resign, to terminate the contract, and, until accepted, was not binding upon either party. If it had been accepted, both parties would have consented to the termination of the contract; but, if not accepted, both would continue to be bound by

it. Being a mere offer, the plaintiff had the right to withdraw it at any time before it was acted upon by the defendant's board, and this he did; wherefore it was as if no such offer or tender had been made, and at the time the board acted, it had no such offer to act upon. . .The principles involved in this inquiry are so elementary as to require no further citations. *Le Master, supra. at* 516.

There is one Grievance Board decision that has reached a different conclusion. In the case of *Copley v. Logan County Health Dept.*, Docket No.90-LCHD-531 (May 22, 1991), the Administrative Law Judge ("ALJ") held that a county health department employee's recision of her resignation was not controlling even if it was withdrawn before it was accepted. (See footnote 8) In distinguishing *Le Masters* the ALJ noted:

Grievant fails to recognize that while a teacher's contract is for a definite term of employment, the school year, requiring the teacher to fulfill his or her duties for that year, a civil servant's employment has no definite term and, while a formal agreement may be required to rescind a teacher's contract, "When a contract of employment is a [sic] indefinite duration it may be terminated at any time by either party to the contract." Syl. Pt. 2, *Wright v. Standard Ultramarine & Color Co.*, 141 W.Va. 368, 90 S.E.2d 459 (1955). *Copley supra.*

The distinction that the ALJ attempts to make between education employees and other public employees does not hold up under close examination. First, the *Wright* decision, upon which the distinction is premised, is a case about "at will" employment contracts. The Supreme Court specifically noted that, "as the contract of employment of the plaintiff by the defendant,. . . was a contract of employment at the will of the parties, it was terminable by either of them at any time. The plaintiff could have quit his employment,. . . without any liability of any kind on his part to the defendant." *Wright, supra*. The rule related to termination of at will contracts is that they may be terminated at any time, with or without cause, at the will of either party to the contract of employment. *Bell v. South Penn Natural Gas Company*, 135 W.Va. 25, 62 S.E.2d 285; 56 *C.J.S.*, *Master and Servant*, § 31, *Wright v. Standard Ultramarine & Color Co.*, 141 W.Va. 368, 90 S.E.2d459 (1955). Significantly, the West Virginia Supreme Court has also recognized that contractual provisions relating to discharge or job security may alter the at will status of a particular employee. *Cook v. Heck's, Inc.*,176 W.Va. at 373, 342 S.E.2d at 458 (1986). Such is the case with classified, state employees once they have served their probationary period.

The Administrative Rules for the West Virginia Division of Personnel state that for a classified,

state employee, ”Permanent [employment] status begins the first day following the expiration of the probationary period.” 143 C.S.R. 1 § 10.1. The Procedural Rules also require that an appointing authority may only terminate the employment of a classified employee for cause. Before being dismissed the employee must be given notice of the reasons for termination and a reasonable opportunity to respond to the charges. 143 C.S.R. 1 § 12.1. Thus, a classified, state employee does not have an employment contract of an indefinite term as described in *Copley, supra.* Rather, the contract of employment is continuing, unless terminated for cause. In this respect, the employment of classified state employees is similar to that of education employees. Both professional and service personnel, employed by county boards of education, have continuing contracts of employment once they have completed their probationary periods. (See footnote 9) Additionally, education employees may only be dismissed for reasons specified in statute and are also entitled to notice and an opportunity to be heard, before their employment is terminated. (See footnote 10) Because neither education employees nor classified, state employees have at will employment contracts, there is no reason for a different rule regarding the effect of recision of resignations by these two groups of employees. Standard contract principals should apply in both instances. Therefore, an offer to resign by a classified, state employee may be withdrawn at any time before it is accepted by the employer. The tender of a resignation by such employee is a mere offer to mutually rescind the contract of employment and is not binding on either party to the contract until its acceptance by the employer. *Le Masters v. Board of Education of Grant District*, 105 W.Va. 81, 141 S.E. 515 (1928); *Bailey v. The Fred W. Eberle Technical Center*, Docket No. 98-49-189 (Sept. 30, 1998); *Nealis v. Berkeley County Bd. of Educ.*, Docket No. 02-87-231-2 (Dec. 22, 1987); *Quigley v. Kanawha County Board of Education,* Docket No. 01-20-105 (Aug. 30, 2001). To the extent that *Copley v. Logan County Health Dept.*, Docket No.90-LCHD-531 (May 22, 1991) is inconsistent with this decision, it is overruled.

The remaining question is whether DEP accepted Grievant's resignation before she rescinded it. The evidence demonstrates that Grievant withdrew her resignation before it was accepted. Kathy Cosco testified that when she received Grievant's resignation all Ms. Cosco said was “okay”. At the level one hearing, Grievant testified; “I didn't get any feedback that there was anything, that it was not going to be accepted or there was a chance that it wouldn't be accepted or that there was a decision process that it would be accepted or not. I mean, I didn't get any feedback one way or the other.” (See footnote 11) Under cross examination at the level three hearing, Grievant stated: “Other people

who have resignedhave received letters accepting their resignation. I didn't receive one of those. In the level one hearing you claim that the denial letter was also an acceptance letter which was dated April the 1st. I rescinded my resignation on March the 27th. How can you [Respondent's counsel] accept a resignation once it has been rescinded?" Clearly, Grievant received no indication that DEP had accepted her offer to resign until she received the April 1, 2008, letter from Ms. Cosco, which was given to her five days after she had submitted her letter rescinding her resignation.

Perhaps most telling is the language in the May 15, 2008, e-mail from Debbie Hughes to Grievant. Ms. Hughes states that, through the e-mail, she was communicating information to Grievant from Cabinet Secretary Huffman. Ms. Hughes spelled out certain conditions that Grievant must meet to have her resignation rescinded and then stated: "If Kathy does not receive this information, the resignation you submitted to the agency dated February 28, 2008, *will be processed* as requested by you." (*Emphasis Added*). The obvious implication is that DEP had taken no action regarding Grievant's resignation but would do so if she did not comply with the specified conditions. There is no evidence that DEP accepted Grievant's offer to resign her employment until after she rescinded the offer. Once the offer to resign was withdrawn prior to acceptance, the offer to resign became void. *Le Master supra.* Since Grievant's offer to resign was rescinded before it was accepted, the resignation is void and Grievant remains an employee of DEP. To that limited extent the grievance is granted.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2 "A resignation is, by definition, a voluntary act on the part of an employee seeking to end the employer-employee relationship. . ." *Smith v. W. Va. Dept. of Corrections*, Docket No. 94-CORR-1092 (Sept. 11, 1995). *See Welch v. W. Va. Dept. of Corrections*, Docket No. 95-CORR-261 (Jan. 31, 1996); *Jenkins v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002).

3. To determine whether an employee's resignation was forced by others, rather than

voluntary, the circumstances surrounding the resignation must be examined in order to measure the ability of the employee to exercise free choice. *McClung v. W. Va. Dep't of Public Safety*, Docket No. 89-DPS-240 (Aug. 14, 1989); *See Adkins v. Civil Serv. Comm'n*, 171 W. Va. 132, 298 S.E.2d 105 (1982).

4. In order to prove a constructive discharge, a grievant must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary that a grievant provethat the employer's actions were taken with a specific intent to cause her to quit. *Slack v. Kanawha County Housing*, 188 W. Va. 144, 423 S.E.2d 547 (1992); *Preece v. Public Serv. Comm'n*, Docket No. 94-PSC-246 (Apr. 25, 1997); *Coster v. W. Va. Div. of Corrections*, Docket No. 94-CORR-600 (Aug. 12, 1996); *Jenkins v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002).

5. The “reasonable person” standard, contemplates a reasonable person to be, “neither an automaton nor an exceptional man, but an ordinary member of the community. Being an ordinary person, the law makes allowance for mere errors in his judgment and does not visualize him as exercising extraordinary care. Normality is the quintessence of this characterization.” *Syl. Pt.* 6, *Patton v. City of Grafton*, 116 W.Va. 311, 180 S.E. 267 (1935); *Honaker v. Mahon,* 210 W.Va. 53,552 S.E.2d 788 (2001).

6. Grievant did not prove, by a preponderance of the evidence, that her working conditions were so intolerable that a reasonable person, in the same situation, would be compelled to quit.

7. An offer to resign by a classified, state employee may be withdrawn at any time before it is accepted by the employer. The tender of a resignation by such employee, is a mere offer to mutually rescind the contract of employment and is not binding on either party to the contract until its acceptance by the employer. *Le Masters v. Board of Education of Grant District*, 105 W.Va. 81, 141 S.E. 515 (1928); *Bailey v. The Fred W. Eberle Technical Center*, Docket No. 98-49-189 (Sept. 30, 1998); *Nealis v. Berkeley County Bd. of Educ.*, Docket No. 02-87-231-2 (Dec. 22, 1987); *Quigley v. Kanawha County Board of Education,* Docket No. 01-20-105 (Aug. 30, 2001). 8. Grievant rescinded her resignation before it was accepted by her employer. Therefore, her resignation was void and she remains an employee of the DEP.

Accordingly the grievance is GRANTED to the limited extent that she remains an employee of the DEP. The Department of Environmental Protection is Ordered to immediately reinstate Grievant

Falquero to her position as secretary for the Public Information Office at the Classification of Secretary 2 and to pay to Grievant all pay she would have received from June 15, 2008, until the date of her reinstatement plus statutory interest. The parties are directed to confer with one another and provide the Grievance Board, no later than January 6 **,** 2009 **,** with at least three mutually agreeable dates for scheduling a hearing to resolve the remaining issues involved in the grievance.

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. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: December 16, 2008

_____

William B. McGinley

Administrative Law Judge

Footnote: 1

The level one Recommended Ordered was issued on July 23, 2008, by Jack C. McClung. Mr McClung was the Designee appointed by the DEP Chief Administrator to conduct the level one hearing.

Footnote: 2

The parties agreed that if the resignation does not stand an additional hearing will be held regarding the remaining issues in the grievance and the Division of Personnel will be joined as a party. If the resignation is confirmed there will be no need for an additional hearing.

Footnote: 3

See Joint Exhibit 3. These examples were uncontested by the DEP.

Footnote: 4

On May 1, 2008, Randy Huffman replaced Stephanie Timmermeyer as the Cabinet Secretary for DEP.

Footnote: 5

Sandy Kee is the Manager of the DEP Office of Human Relations.

Footnote: 6

It was understood by all of the parties that the EPA given to Grievant was not intended to be an evaluation of her performance. The EPA was used solely as a vehicle for setting out Grievant's responsibilities under the new staffing plan.

Footnote: 7

Since the parties declined to make closing arguments or submit post-hearing proposals, the undersigned identified the two main issues in this matter based upon the statements of the parties, the level one decision and the evidence presented at both hearings.

Footnote: 8

While this issue was addressed, the ALJ in Copley supra, ultimately concluded that the resignation was accepted by the employer before it was rescinded.

Footnote: 9

See W. Va. Code § 18A-2-2, for professional personnel and W. Va. Code § 18A-2- 6, for service personnel.

Footnote: 10

See W. Va. Code § 18A-2-8 and Board of Educ. of County of Mercer v. Wirt, 192 W.Va. 568, 453 S.E.2d 402 (1994)

Footnote: 11

Level One Transcript, page 55