# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DEANDRE' L. HOUSE,**

**Grievant.**

**v.** **Docket No. 2008-0719-DHHR**

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ BUREAU FOR CHILDREN AND FAMILIES**,

**Respondents.**

## DECISION

DeAndre' L. House ("Grievant") was employed by the Department of Health and Human Resources/Bureau for Children and Families ("DHHR") as an Economic Service Worker when he was dismissed from employment on October 12, 2007. Grievant was dismissed because he removed a question from the application he submitted to obtain his position. When Grievant was notified that he was to be dismissed, he requested that he be allowed to resign instead. That request was denied and Mr. House filed a level one grievance on October 28, 2007.[1] Grievant's main assertion is that other DHHR employees who were faced with dismissal were allowed to resign instead of being fired and to not allow him to do the same constituted unlawful discrimination.

By a decision dated December 4, 2007, the grievance was denied at level one and an Order of Unsuccessful Mediation was entered at level two on March 30, 2008. A level three hearing was held on August 3, 2009, at the Charleston office of the Public

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[1] WEST VIRGINIA CODE § 6C-2-4(a)(1) requires that a state employee provide a copy of the level one grievance to the Division of Personnel as well as his employer and the Grievance Board. There is no indication that Grievant did not follow that procedure in this matter.

Employees Grievance Board. Grievant House appeared pro se[2] and DHHR was represented by Jennifer Akers, Assistant Attorney General. The parties agreed to submit post-hearing written arguments to be postmarked no later than August 24, 2009. The last submission was received by the Grievance Board on August 27, 2009. This grievance became mature for decision on that day.

**Synopsis**

Grievant was dismissed from employment with the DHHR on October 12, 2008. Grievant did not contest his dismissal but requested that he be allowed to resign rather than have his employment terminated. The Commissioner for Bureau for Children and Families initially rejected Grievant's request and Grievant filed a grievance arguing that other similarly situated employees were allowed to resign rather than be dismissed. At level one, Respondent decided to allow Grievant to resign but was told by a representative of the Division of Personnel that the Division would not allow Grievant to resign and he had to be dismissed. Based solely upon the determination of the Division of Personnel, Respondent refused Grievant's request and would not allow him to resign. Since Respondent's decision was based solely upon the misapprehension that it was legally required to follow the directive of the Division of Personnel, the decision was arbitrary and capricious. Accordingly, the grievance is Granted.

The following Findings of Fact are based upon a thorough review of the entire record in this grievance.

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[2] Grievant's brother and infant niece attended part of the hearing without objection from the Respondent. They were introduced but took no part in the proceedings.

## Findings of Fact

1. Grievant House had been working for the DHHR for five years prior to his dismissal. He had a good employment record up to the time of the termination of his employment.

2. Grievant was initially employed by the DHHR as an Office Assistant and was assigned to various divisions, all of which were located in the Diamond Building.[3]

3. In the Spring of 2007, Grievant was working as an Office Assistant for the DHHR Bureau for Public Health and applied for the position of Economic Service Worker with the Respondent's Bureau for Children and Families ("BC&F").

4. On the application for the Economic Service Worker position there was a question that asked whether the applicant had been convicted of a felony within the past seven years. Grievant deleted that question from the application form before he completed his application and submitted his completed application without that question and answer. The question had not been on the applications Grievant has completed for his Office Assistant jobs with DHHR.

5. Grievant had pled to a felony charge in 2000. The charge was for a non-violent offence that did not involve drugs or weapons and Grievant was sentenced to two years of probation after his plea was accepted on June 1, 2000.

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[3] The Diamond Building is a large edifice in downtown Charleston that once housed the Diamond Department Store. The store went out of business and the building is now leased by the state to hold numerous offices for state agencies.

6. Grievant deleted the question regarding prior convictions from the application because he knew that other clerical staff would see the application and he did not want his prior record to effect how his co-workers in the building perceived him.

7. Grievant was employed in the position of Economic Service Worker in June of 2007.

8. Respondent requested a routine background check for Grievant from the Criminal Investigation Bureau ("CIB") as part of the process of employing Grievant as an Economic Services Worker.

9. Upon receipt of the CIB report, Respondent's Exhibit 1, the BC&F became aware of Grievant's prior guilty plea and then discovered that he had altered the application form for the Economic Services Worker position.

10. Grievant was called into a meeting with DHHR Manager, James Kautz,[4] in late September or early October, 2007, to discuss the CIB report and the discrepancy in his application. Mr. Kautz informed Grievant that some form of disciplinary action would be taken but he was not certain what it would be at that time.

11. After the meeting with Mr. Kautz, Grievant was away from work on sick leave due to the stress of his employment uncertainty. During that time, Grievant had conversations with DHHR employees but did not return to duty until he was dismissed on October 12, 2007.

12. Mr. Kautz and the Commissioner for the BC&F, Mr. Najmulski, discussed the appropriate level of discipline for Grievant with at least one other manager and with a

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[4] Mr. Kautz is now retired from employment with the DHHR.

representative of the Division of Personnel, Steve Forsythe. Mr. Forsythe informed the DHHR managers that Grievant's infraction rose to the level of dismissal.

13. In a meeting with Mr. Kautz on October 12, 2007, Grievant was informed verbally and in writing that he was dismissed from his employment as an Economic Services Worker with the DHHR.

14. Grievant made a verbal request and a written request that he be allowed to resign rather than be dismissed from employment.

15. Commissioner Najmulski denied Grievant's request to resign and Grievant was dismissed from employment.

16. Harriet Fitzgerald is the DHHR Director of the Office of Human Resources Management. During the time surrounding Grievant's dismissal, Ms. Fitzgerald was the DHHR Employee Relations Manager. In that role she was involved in discussions related to the charges against Grievant and the appropriate discipline to be taken.

17. In a conversation with Grievant between the time he was apprised of his charges and the day he was dismissed, Ms. Fitzgerald told Grievant that it was the policy of the DHHR to usually allow employees faced with dismissal to resign rather than be terminated. When asked about that statement at the hearing, Ms. Fitzgerald verified it as true and stated "the Division of Personnel has changed the policy on that."

18. The Commissioner of the DHHR Bureau for Public Health allowed M. B.[5] to resign when she was faced with dismissal for making a false statement on a document

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[5] The former employee's initials are used in this decision because she was not directly involved in the charges in this matter. Nothing is gained by embarrassing her by revealing her identity since the parties all know who she is and there is no dispute in the evidence related to her.

related to benefits for an applicant for assistance. However, after she was employed in another position in state government, the Division of Personnel revoked M.B.'s resignation and reinstated her termination. As a result of this action, M. B. was removed from her new employment.[6]

19. Director Fitzgerald and Commissioner Najmulski decided to accept Grievant's resignation at level one. After deciding to accept Grievant's resignation, they were told by the Division of Personnel that they could not implement that decision.[7]

**Discussion**

Grievant is not contesting Respondent's action related to his dismissal. Rather he claims that Respondent's decision to not accept his resignation was improper. Therefore, even though this grievance flows from a dismissal it is not a disciplinary matter and Grievant bears the burden of proving his 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

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[6] There is no issue related to the validity of any of the actions taken related to M. B. since she is not a party to this grievance.

[7] At the level three hearing Harriet Fitzgerald was asked:

> If it were up to you, without the Division of Personnel involved, would you and the Commissioner have allowed Mr. House to resign?

Ms. Fitzgerald responded:

> Yes. . . at our level we agreed that it would be acceptable and we were going to allow it to occur when Mr. House had his level one hearing. It was about that time when we learned that the Division of Personnel would not authorize it.

Level three testimony of Harriet Fitzgerald.

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).

Grievant claims that Respondent improperly refused to allow him to resign from his employment rather than be dismissed. The tender of a resignation by a classified state employee is an 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); *Falquero v. W. Va. Dept. Of Envtl. Prot.,* Docket No. 2008-1596-DEP (Dec. 16, 2008). The employer, DHHR, has discretion as to whether to accept Grievant's offer to rescind the employment contract through resignation. However, Respondent's discretion is not without limitation. Arbitrary and capricious exercise of discretion will not be permitted. *See Beverlin v. Board of Education of Lewis County*, [158] W.Va. [1067], 216 S.E.2d 554 (1975); *Neal v. Board of Education of Putnam County*, 116 W.Va. 435, 181 S.E. 541 (1935); *Wilmoth v Randolph Co. Bd. of Educ.*, Docket no. 07-42-344 (June 30, 2008); *See also Godby et al.* v. DHHR 04-HHR-146(G) (Oct. 31 2007). The West Virginia Supreme Court has indicated that an abuse of discretion may be proven upon a showing of caprice, passion, partiality, fraud, arbitrary conduct, some ulterior motive or misapprehension of the law. *State ex rel. Withers v. Board of Education of Mason County*, 153 W.Va. 867, 172 S.E.2d 796 (1970); *State ex rel. Payne v. Board of Education of Jefferson County*, 135 W.Va. 349, 63 S.E.2d 579 (1951).[8]

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[8] In these cases, the Supreme Court found that Mandamus would lie to control the exercise of discretion by county boards of education in such situations.

Grievant demonstrated that DHHR has regularly allowed employees to resign when faced with dismissal, until recently. He specifically pointed to the case of M.B. as an example. Grievant avers that allowing others to resign under these circumstances, but not him, constitutes discrimination. To establish a claim of discrimination under W. VA. CODE § 6C-2-2 (d) (2008) a Grievant must prove:

> (a) that he has been treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees, and;
> (c) that he did not agree in writing to the difference in treatment.

*Frymier v. Higher Educ. Policy Comm'n*, 221 W. Va. 306, 655 S. E. 2d 52 (2007).

The difficulty with Grievant's argument is that the facts for each dismissal situation tend to be discrete and unique. For example, M. B. was disciplined for allegedly falsifying a document which is somewhat similar to the Grievant's situation. However, she was in a different job and in a different Bureau within the DHHR. There is no indication that the action of M. B. would have similar repercussions as Grievant's. Additionally, M. B. made an active false statement on a document while Grievant simply removed a question from an application. The nature of the job and the actual offense are among several factors that the Respondent could take into consideration in deciding how to exercise its discretion in applying discipline to each situation, including whether to accept a resignation. Given the discrete and varied circumstances of dismissal actions and the lack of specific evidence in this record the Grievant failed to prove that he was similarly situated to the other DHHR employees who were allowed to resign. Since this is one of the essential elements to

support a discrimination claim Grievant's allegation must fail. There still remains the issue of whether the decision to deny Grievant's request to resign was arbitrary or capricious for some reason other than discrimination.[9] Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). As stated previously, a discretionary action may also be reversed if it is based upon a misapprehension of the law. *State ex rel. Withers, supra*.

The testimony of Harriet Fitzgerald, DHHR Director of Human Resources, was clear and unequivocal. The DHHR had a regular practice of allowing employees, who were faced with dismissal, to resign. In this instance, Respondent decided to grant Grievant's request and allow him to resign. The sole reason Respondent did not accept Grievant's resignation was their belief that the Division of Personnel would not authorize it.

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[9] Grievant did not use the terms "arbitrary and capricious" in his grievance and mainly claimed that Respondent's decision was the result of discrimination. However, it is clear from the grievance that Grievant (who appears pro se) alleges that the decision to refuse to allow him to resign was improper. Given the West Virginia Supreme Court's instructions in *Spahr v. Preston County Bd. of Educ*, 182 W.Va. 726, 391 S.E.2d 739 (1990) that the legislature did not intend the grievance process "to be a procedural quagmire where the merits of the cases are forgotten," it is appropriate to explore whether the contested decision was arbitrary and capricious. *Spahr,* 182 W.Va. at 730. 391 S.E.2d at 743.

The Division of Personnel Legislative Rules state the following with regard to the resignation of a classified state employee:

> 12.1. Resignations - An employee who resigns shall present the reasons for the resignation in writing to the appointing authority. The appointing authority shall forward a copy of the resignation to the Director of Personnel who shall record the resignation. If a written resignation cannot be obtained, the appointing authority shall notify the Director of Personnel in writing of the resignation of the employee and the circumstances of the resignation.

143 C.S.R. 1 § 12.1.

The appointing authority is the entity that receives the resignation and has the discretion to accept or reject it. The only role of the Director of Personnel in the process is to record the document.

The Division of Personnel is an administrative agency created by statute. *See* W. VA. CODE § 29-6-5. "An administrative agency is but a creature of statute, and has no greater authority than conferred under the governing statutes." *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Envtl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002), (citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)); *Clutter v W. Va. Dept. of Agric.*, Docket No. 2009-1372-AGR (May 28, 2009). The powers and duties of the Director of Personnel are set out in W. VA. CODE § 29-6-7. The only power or duty enumerated in that section that appears to give the Director of Personnel authority over the appointing authorities related to their employees is the following:

> "(b) the director shall: . . . "(5) Supervise the employee selection process and employ performance evaluation procedures."

*Id.* Additionally, WEST VIRGINIA CODE § 29-6-12 requires:

> All officers and employees of the state shall comply with and aid in all proper ways in carrying out the provisions of this article and the rules and orders

> there under. All officers and employees shall furnish any records or information which the director may request for any purpose of this article.

The only duty required of the appointing authority with relation to resignation of their employees is to provide the Director of Personnel with a copy of the resignation. Nothing in either of these statutes gives the Director of Personnel express or implied authority to interfere with the appointing authority's exercise of discretion related to accepting a resignation.

Respondent points to the Legislative Rules of the Division of Personnel which provide in part that:

> (a) The Director [of Personnel] may refuse to examine an applicant, or after examination, may disqualify the applicant or remove his or her name from a register or certification, or refuse to certify any eligible on a register if:
> 4. he or she has made a false statement of material fact or has misrepresented his or her qualifications in his or her application;
> 5. he or she has previously been dismissed from any public service for delinquency, misconduct, or other similar cause; . . .

143 C.S.R. 1 § 6.4. This provision applies only to the Director of Personnel's authority related to selection of classified employees. It has no relevance to resignation or the termination of employees.[10]

Respondent was under the misapprehension that it was legally required to follow the directive of the Division of Personnel to refuse Grievant's resignation and dismiss him from employment. However, Respondent had discretion to accept Grievant's resignation and decided to do so. The Division of Personnel had no authority to interfere with the exercise of that discretion. Since the sole reason Respondent refused to accept Grievant's

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[10] The rule cited by Respondent may affect Grievant's ability to be rehired by the state but has no impact on the appointing authority's discretion to accept his resignation.

resignation was the belief that it was prohibited from doing so by the Division of Personnel, that decision was based upon a misapprehension of law and not on appropriate criteria. Accordingly, the Respondent's decision to reject Grievant's application was arbitrary and capricious and must be overturned. *See State ex rel. Withers, supra,* and *Bedford County Memorial Hosp., supra*. Therefore, the grievance is GRANTED and the dismissal of Grievant is null and void. Respondent is bound by its decision to accept Grievant's resignation and is directed to reflect that Grievant's employment was ended by resignation in all records related to Grievant's employment.

**Conclusions of Law**

1. This grievance is not a disciplinary matter and, Grievant bears the burden of proving his 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. To establish a claim of discrimination under W. VA. CODE § 6C-2-2 (d) (2008) a Grievant must prove:

> (a) that he has been treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees, and;
> (c) that he did not agree in writing to the difference in treatment.

*Frymier v. Higher Educ. Policy Comm'n*, 221 W. Va. 306, 655 S. E. 2d 52 (2007).

3. Grievant did not prove that he was so similarly situated to other employees who were allowed to resign by Respondent that the rejection of his resignation constituted discrimination under WEST VIRGINIA CODE § 6C-2-2 (d) (2008).

4. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). A discretionary action may also be reversed if it is based upon a misapprehension of the law. *State ex rel. Withers, supra*.

5. Respondent's decision to reject Grievant's resignation was based upon a misapprehension of the law and solely upon criteria that were inappropriate for consideration. Therefore, the action was arbitrary and capricious.

Accordingly the Grievance is GRANTED. The dismissal of Grievant from employment is null and void. Respondent is ORDERED to remove any reference to Grievant's dismissal and reflect that Grievant's employment was ended by resignation, in all records related to Grievant's employment.

**DATE: SEPTEMBER .17, 2009**

**WILLIAM B. MCGINLEY**
**ADMINISTRATIVE LAW JUDGE**