THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ERIC CARDER,
Grievant,

v. **Docket No. 2008-0403-McDED**

MCDOWELL COUNTY BOARD OF EDUCATION,
and DEPARTMENT OF EDUCATION,
Respondents.

DECISION

Eric Carder, Grievant, was an employee of the McDowell County Board of Education, assigned as the principal of Mt. View High School, located near Welch, WV. He filed this grievance on September 7, 2007, asserting his resignation from employment was not voluntary. Grievant seeks reinstatement to the principal position as his relief. The parties agreed to waive levels one and two of the grievance process. In addition, the parties stipulated that the hearing of this grievance be bifurcated and that the first issue to be heard be limited to the issue of whether the resignation was voluntary.

A level three hearing was conducted on May 8, 2008, and July 8, 2008, before Administrative Law Judge Thomas J. Gillooly in the Grievance Board's Beckley office. Following those proceedings of the level three hearing, the case was reassigned to the undersigned Administrative Law Judge for administrative reasons. The level three hearing was concluded on September 4, 2008, before the undersigned in the Grievance Board's Beckley office. Grievant was represented by Barry L. Bruce, Esquire. The McDowell County Board of Education was represented by Kathryn Reed Bayless, Equire. The West Virginia Department of Education was represented by Heather R. Deskins, Esquire. This

case became mature for decision on January 15, 2009, upon receipt of the last of the parties' submissions of Findings of Fact and Conclusions of Law.

Synopsis

Grievant was contacted by State Superintendent Steven Paine to discuss his multiple difficulties which arose during his short tenure of employment. Grievant was aware that he would likely be suspended, even perhaps terminated from his employment. During this discussion, Grievant decided he would rather resign. Grievant tendered a written resignation to Dr. Paine. By agreement of the parties, the sole issue to be decided is whether the resignation was voluntary. Grievant failed to prove his resignation was involuntary. Grievant was not forced to resign. This grievance is denied.

After a thorough review of the entire record, the undersigned makes the following Findings of Facts:

Findings of Fact

1. Grievant was an employee of the McDowell County Board of Education, assigned as the principal of Mt. View High School, located near Welch, WV. Grievant's employment in that position began on July 2, 2007, and ended on July 20, 2007.

2. Prior to his employment in McDowell County, Grievant had accumulated approximately 28 years of experience in education. He earned the bulk of that experience in Ohio County, West Virginia, where he served as a high school administrator from 1981 to 2001. In 2001, Grievant resigned from employment with the Ohio County, West Virginia, school system, and sought employment as an educator in Florida.

3. In November 2001, the West Virginia Board of Education intervened in the

operation of the McDowell County Board of Education due to multiple deficiencies existing in the operation of that system. As a result of that intervention, and as a result of the state board's delegation of authority to the state superintendent, all personnel hiring in the McDowell County school system must be made by the state superintendent of schools.

4. The state superintendent, Dr. Steven Paine, had hired Suzette Cook as the McDowell County superintendent of schools effective July 1, 2007. In June 2007, Dr. Paine began working with Ms. Cook to fill the vacant principal's position at Mt. View High School. Bob Dunlevy, a member of the state board of education and personal friend of Grievant, had suggested that consideration be given to Grievant. After the completion of an application form and a telephone interview, Dr. Paine hired Grievant as the principal. Grievant was aware that the state had intervened in the operation of the county school system.

5. Grievant reported for work and, within eight days of employment, encountered multiple difficulties. Grievant discussed some of the allegations with his immediate supervisor, Peggy Freeman, Assistant Superintendent, including two separate meetings the day he resigned. Criminal complaints were being prepared which charged Grievant with assault on a police officer. Ms. Freeman was aware of other criminal complaints against Grievant, and eventually transmitted to the state department the information she had obtained.

6. On July 20, 2007, Dr. Paine telephoned Grievant to discuss the information which had been provided to him by various sources and had been largely compiled by John Morrison, investigator for the state department of education.

7. Mr. Morrison had been contacted by the Prosecuting Attorney of McDowell County, Sid Bell, and was made aware that police officer Pat McKinney had encountered Grievant at 5:05 a.m. on July 18, 2007, when Grievant's car was found straddling railroad tracks. Mr. Morris spoke to Magistrate Steve Cox and was made aware that criminal complaints, alleging assault against a police officer, would be issued by Magistrate Cox as a result of the encounter.

8. Present with Dr. Paine for the telephone conversation with Grievant, and listening by speaker phone, were Mr. Morrison, Dr. Jack McClanahan, Assistant Superintendent, and Sherri Goodman, legal counsel.

9. Grievant had spoken to Peggy Freeman and Bob Dunlevy and knew he would be receiving a call from Dr. Paine on July 20, 2007. Grievant was concerned about his employment because of the railroad track incident, and the impact that might have on his employment. Grievant had already spoken to an attorney prior to meeting the second time with Ms. Freeman, and knew he was at risk as far as his continued employment was concerned.

10. Dr. Paine discussed a number of issues with Grievant. Mr. Morrison also asked some questions of Grievant. Grievant either denied the substance of each issue raised by Dr. Paine or gave a different explanation of what had occurred. Given the number of allegations that had been made in a very short period of time and the resulting loss of confidence in Grievant, Dr. Paine gave Grievant the opportunity to resign. At no time did Dr. Paine threaten to terminate Grievant if he chose not to resign.

11. Dr. Paine did review with Grievant what would occur if he chose not to resign. He advised Grievant that he would be suspended without pay; a recommendation of

termination would be made; he would have a hearing on that recommendation and could grieve his suspension and/or termination.

12. Grievant offered to resign his employment, acknowledging that he did not want to embarrass Dr. Paine or the state board, and he offered to take a written resignation to the central office of the McDowell county school system.

13. During the telephone conference, Grievant acted in a professional manner; he did not seem particularly agitated and was not irrational. He did not ask for additional time to consider his resignation. Grievant, while understandably defensive during the telephone call, was not hesitant when he offered his resignation and did not ask for time to consult with an attorney.

14. Grievant took his written resignation to the central office on July 20, 2007; he wrote and signed the resignation prior to delivering it. Superintendent Cook, upon being advised by Dr. Paine that Grievant had tendered his oral resignation and that he was bringing a written resignation to the central office, made arrangements to ensure that someone would be there to accept the written resignation.

15. On July 26, 2007, Grievant sent a letter to the McDowell County Board of Education wherein he communicated he wished to rescind his resignation.

16. By letter dated August 10, 2007, Heather Deskins, General Counsel for the West Virginia Department of Education, communicated that Grievant's resignation was approved by the State Superintendent of Schools, acting on behalf of the West Virginia Board of Education, on July 24, 2007.

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. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

The parties have agreed to limit the issue in this decision to whether Grievant's resignation was voluntary. The burden of proving by preponderance of the evidence that a resignation was involuntary lies with the Grievant. *Harvey v. Summers Co. Bd. of Educ.*, Docket No. 01-45-360 (Sept. 20, 2001); *Glasscock v. W. Va. Dep't of Corrections*, Docket No. 95-CORR-093 (May 31, 1995). Whether a resignation is voluntary is a question of fact which must be resolved on a case-by-case basis. *Id*.

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. Dep't of Corrections*, Docket No. 94-CORR-

1092 (Sept. 11, 1995). *See Welch v. W. Va. Dep't 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).

The totality of the circumstances must be reviewed to determine whether an employee was deprived of free choice in determining to tender a resignation. *Harvey*, *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. *Id*. (citations omitted). Where an employee is faced with merely the unpleasant choice of resigning or being subject to possible removal for cause, such limited alternatives do not make a resulting resignation an involuntary act. *Bailey v. Eberle Technical Center*, 98-49-189 (Sept. 30, 1998); *McClung v. W. Va. Dep't of Public Safety*, Docket No. 89-DPS-240 (Aug. 14, 1989).

As a general rule, an employee may be bound by his oral representations that he is resigning when they are made to a person or persons with authority to address such personnel matters. *See Welch v. W. Va. Dep't of Corrections*, Docket No. 95-CORR-261

(Jan. 31, 1996) and *Copley v. Logan County Health Dep't*, Docket No. 90-LCHD-531 (May 22, 1991). The representations must be such that a reasonable person would believe that the employee intended to sever his relationship with the employer.

When viewing the totality of the circumstances of the instant grievance, the undersigned concludes that Grievant voluntarily tendered his resignation. Though the conversation with Dr. Paine lasted only about twenty minutes, Grievant was given an opportunity to hear Dr. Paine fully explain the reasons his resignation was being sought and was given the opportunity to respond. Prior to the conversation with Dr. Paine on July 20, Grievant had spoken to a number of individuals about the various incidents discussed by Dr. Paine. Grievant spoke to Assistant Superintendent Freeman on the morning of July 20 about the railroad incident and some of the other allegations against him. Grievant explained to Assistant Superintendent Freeman that he was worried that he could lose his job even if acquitted of the criminal charges, and that he had consulted with an attorney. In that same conversation, Grievant also explained that he was going home to wait for a call from Dr. Paine, or call Dr. Paine himself. Grievant appreciated the impact that the pending criminal charges and other allegations would have on his employment; Grievant was not surprised when Dr. Paine called him about the allegations; in addition, Grievant had already sought legal advice in handling the matters.

Nothing from the record indicates that Grievant appeared overly distraught or irrational on July 20. Rather, the record demonstrated that Grievant, an experienced educator with administrative experience and knowledge of the grievance process, knew that the railroad incident of July 18 would have some type of adverse impact on his employment; that he began immediately taking steps to protect his interests; that he spoke

with Assistant Superintendent Freeman multiple times about the allegations against him; and that he thought to contact an attorney in advance of speaking with Dr. Paine.

Grievant was aware that Dr. Paine was the sole hiring authority and likewise the person with the authority to terminate employment of school employees in McDowell County. Grievant expressed that he did not want to embarrass the person who had hired him nor did he want to embarrass the state board of education, including his friend, Mr. Dunlevy. Grievant prepared his letter of resignation and voluntarily took it to the central office. Grievant was aware that, absent resignation, he would be suspended, perhaps terminated, and that the grievance process was available to him. Grievant did not act under duress, was not deceived, and did not request additional time to consider his options. Grievant consulted an attorney prior to tendering his resignation; appeared to be in a state of mind to exercise ordinary judgement; and, in summary, exercised his own free will in making the decision to resign.

The following conclusions of law support the decision reached.

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. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved

is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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. 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. Dep't of Corrections*, Docket No. 94-CORR-1092 (Sept. 11, 1995). *See Welch v. W. Va. Dep't 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 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).

4. Grievant's resignation was voluntarily given.

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. *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: February 26, 2009

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Ronald L. Reece
Administrative Law Judge