WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAUL J. NUGEN,
Grievant,

v. **Docket No. 2009-0431-DOT**

WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,
Respondent.

DECISION

Grievant Paul Nugen had been employed by Division of Motor Vehicles ("DMV") for nine years prior to submitting his resignation on September 12, 2008. On September 30, 2008, Mr. Nugen filed a level one grievance form alleging that he "withdrew [his] resignation based on assurances by management, only to have [the] rescinding rejected by Respondent in [a] letter of September 29, 2008." As relief, "Grievant requests to be made whole, including restoration to [his] former position with back pay, tenure, and interest." Grievant requested that the matter be heard directly at level three and there was no objection by Respondent to this request.[1] On January 30, 2009, a level three hearing was held at the Public Employees Grievance Board office in Charleston, West Virginia. Grievant was present at the hearing and was represented by Gordon Simmons, West Virginia Public Workers Union, UE Local 170. DMV was represented by Gretchen A. Murphy, Assistant Attorney General. The parties submitted Proposed Findings of Fact and

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[1] W. VA. CODE § 6C-2-4(a)(4) allows grievances to advance directly to level three based upon certain circumstances. Among those circumstances are when the parties agree and when an employee is discharged. There is no written agreement from the parties in the record. Grievant contends that Respondent discharged him when DMV chose not to accept the recision of his resignation. In any case, since all parties participated in the level three hearing without objection, it will be assumed that the parties agreed to have the grievance heard directly at level three.

Conclusions of Law, the last of which was received on February 23, 2009. This matter became mature for decision on that date.

Synopsis

Grievant admits that he voluntarily resigned his employment with the DMV to accept a position with another employer. However, he asserts that he rescinded his resignation before DMV accepted it. If Grievant withdraws his offer to resign before it is accepted, the resignation has no effect. However, the evidence shows that Respondent accepted Grievant's offer to resign and the resignation was binding on both parties. The grievance must be denied.

The following findings of fact are based upon a thorough review of the record in this grievance.

Findings of Fact

1. Grievant has been employed for nine years as a Customer Service Representative (CSR) at the DMV's Kanawha City office. Grievant's assignment was to serve as a Title Clerk.

2. On September 12, 2008, Grievant gave a written resignation to Roger Beane, Manager of the DMV Kanawha City office. The written notice stated: "This is to inform you that Tuesday, 30th September 2008 will be my last day at Kanawha City Regional DMV Office." Respondent's Exhibit 1.

3. Grievant told Mr. Beane that he intended to accept a job offer from McJunkin-Redman Corporation ("McJunkin") at a higher rate of pay. Mr. Beane told Grievant that he

would be sorry to lose Grievant as an employee, but he understood why Grievant wanted to take a better job and wished him luck.

4. Upon receiving the resignation, Mr. Beane informed his supervisor, Zoe Bender, that Grievant had resigned. Beane also forwarded the resignation to Monica Price, Executive Secretary to the Commissioner of DMV. Ms. Price received the resignation on September 15, 2008 and forwarded it to the DMV Human Resources Division that day. This is the regular course of business for accepting a resignation at DMV.

5. Pete Lake is the DMV Director of Regional Office and Call Center Services and also one of Roger Beane's Supervisors. Once Mr. Lake became aware of the impending departure of Grievant, he made an assessment as to which DMV office most needed a CSR position. Mr. Lake decided to post the position vacated by Grievant in the Parkersburg office rather than the Kanawha City office. The position was posted in a Statewide Weekly Vacancy Report Bulletin # 630 on September 23, 2008, with October 1, 2008, listed as the date of vacancy. Grievant was listed as the incumbent for that position and his last day of employment was to be September 30, 2008. Respondent's Exhibit 3.[2] 6. Grievant reported to McJunkin for training and orientation on

[2] In the same Bulletin # 630 there was also a CSR position listed at the Kanawha City office with no incumbent listed. The vacancy date for that position was listed as September 20, 2008, nine days prior to when Grievant was scheduled to leave employment at DMV. The testimony indicated that there is regular turn over in all the offices, but moving Grievant's position to the Parkersburg office resulted in that office having one more CSR and the Kanawha City office having one less. In any case, the posting took place prior to DMV receiving any notice that Grievant intended to rescind his resignation and there is no indication that DMV had a nefarious motive for listing Grievant as the incumbent for the Parkersburg vacancy.

September 18, and 25, 2008, his regular days off from the DMV. He was scheduled to start regular employment with McJunkin on October 1, 2008.

7. On the morning of September 26, 2008, Grievant informed Mr. Beane that he wished to rescind his resignation and continue working at the DMV. Mr. Beane immediately sent an e-mail to his supervisors, Zoe Bender, Pete Lake and Angela Lovejoy, stating: "Paul has decided to remain at the DMV. He turned down the job at McJunkin. Please withdraw his resignation. I am glad he will remain a part of the family."
This e-mail was sent at 8:41 a.m. Grievant's Exhibit 1.

8. At 8:56 a.m., Pete Lake sent a return e-mail to Mr. Beane stating: "Do Not make any obligations on this issue." *Id.* (Emphasis on "not" in original).

9. Mr. Lake made follow-up telephone calls to Mr. Beane to make sure that Beane and Grievant understood that Mr. Beane did not have authority to accept Grievant's offer to rescind his resignation.

10. Upon hearing from Mr. Lake, Mr. Beane told Grievant that he did not have authority to accept his offer to rescind his resignation and that Grievant would have to wait until they heard from the Commissioner's office before a decision could be made upon his recision.

11. Around 3:00 p.m. on September 26, 2008, Grievant met with his immediate supervisor, David Hughs and Mr. Beane, in Mr. Beane's office. At that meeting, Roger Beane informed Grievant that the DMV was not going to allow Grievant to rescind his resignation and that his employment would end on September 30, 2008, as scheduled.

12. Grievant sent a letter to McJunkin on September 26, 2008, informing them that he would not be coming to work for them because he did not believe he would be

happy doing the work the job required. Grievant made no subsequent efforts to contact McJunkin to tell them he would accept the job.

13. In October 2008, Grievant was once again offered the same job by McJunkin. He worked for McJunkin all day on October 20 and resigned at midday on October 21, 2008. Grievant accepted employment as an Office Assistant in the DMV mail room on November 3, 2008, and remains employed in that capacity.[3]

14. Grievant's representative hand delivered his grievance to the Public Employees Grievance Board for filing at 8:53 a.m.,[4] on September 30, 2008.

Discussion

This grievance does not involve a disciplinary matter. Consequently, 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). 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).

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[3] The testimony was unclear regarding what specific level of the Office Assistant series Grievant is presently placed in. Though not specific, the testimony indicated that Grievant is employed in the same pay grade as his CSR classification but that his actual salary is somewhat lower.

[4] The grievance form at DMV was date stamped on October 1, 2008. Consequently, Respondent filed a Motion to Dismiss the grievance, alleging that Grievant had no standing to file the grievance on October 1, 2008 because on that date, he was no longer an employee as defined in the W. VA. CODE § 6C-2-2(e)(1). After counsel for DMV became aware of the grievance form that was hand delivered on September 30, 2008, the Respondent chose not to pursue the Motion to Dismiss and that issue will not be addressed herein.

Grievant argues that he did not receive a written notification from DMV accepting his resignation before he rescinded it and therefore the resignation was void. Respondent counters that it accepted Grievant's resignation in its normal course of business and that they were not required to accept the resignation in writing. They conclude that having accepted Grievant's resignation they were under no obligation to allow him to rescind it.

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); *Jenkins v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002). As a general rule, an employee may be bound by his representations that he is resigning when the representations are made to a person with the authority to address such personnel matters. *See Welch v. W. Va. Dept. of Corrections*, Docket No. 95-CORR-261 (Jan. 31, 1996). 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 this case, Grievant does not argue that he was forced to resign. He submitted a written resignation with the stated intention of accepting other employment. The issue in this case is whether the DMV accepted Grievant's resignation before he rescinded it. It has been recently affirmed by the Grievance Board that 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. *Falquero v. W. Va. Dep't of Envtl. Protection,* Docket No. 2008-1596-DEP (Dec. 16, 2008); *Le Masters v. Board of Education of Grant District*, 105 W.Va. 81, 141 S.E. 515 (1928). In *Falquero,* the grievant's supervisor merely said "Okay" when she received the grievant's resignation. More importantly, the grievant was told that if she didn't submit certain documents to her supervisor her resignation would be processed as requested. Clearly the agency had not accepted her resignation at that point, which was after the date she rescinded it.

The facts in this grievance are much different. Mr. Beane expressed his regret at Grievant's resignation but noted that he understood why Grievant was taking a better paying job. Mr. Beane then forwarded the written resignation to his supervisors and to the Commissioner's Executive Secretary, Monica Price. Ms. Price immediately forwarded the resignation to the DMV Human Relations Division for appropriate action. Regional Director Lake then determined that the position Grievant was going to vacate could be better utilized in the Parkersburg office and posted the position accordingly, on September 23, 2008, with a starting date of October 1, 2008. All of these events took place prior to Grievant's efforts to rescind his resignation on September 26, 2008. Unlike in *Falquero*, DMV clearly accepted Grievant's resignation prior to his decision to rescind it.

Respondent is under no obligation to accept Grievant's offer in writing. Verbal acceptances of resignations have been previously held to be sufficient to bind the parties. *See Albright v. Dep't of Health and Human Resources*, Docket No. 00-HHR-130 (Dec. 27,

2000).[5] Additionally, the Division of Personnel Administrative Rule contains the following requirement related to resignations of state classified employees such as Grievant:

> Section 12. Separations, Suspension, and Reinstatement
> 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.

143 C.S.R. 1 § 12.1.

There is no requirement in the Rule that Respondent must accept Grievant's resignation in writing.

The record in this case is clear that Grievant submitted a written resignation to his manager and that resignation was accepted and acted upon by the agency prior to his attempt to rescind his prior action. Under these circumstances, the resignation is binding upon both parties and the Respondent was under no obligation to honor Grievant's request to rescind his resignation. *Falquero, supra.* Grievant has not proven that he rescinded his resignation prior to DMV's acceptance of it. Consequently, the grievance is denied.

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). The preponderance standard generally requires proof that a reasonable person would accept

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[5] The West Virginia Supreme Court of Appeals has held, as a general principal of contract law, that an unconditional verbal acceptance of an offer, before the offer is withdrawn, converts the offer into a binding contract. *Crowley v. Vaughan*, 88 W. Va. 233, 106 S.E. 539 (1921).

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); *Jenkins v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002). As a general rule, an employee may be bound by his representations that he is resigning when made to a person with the authority to address such personnel matters. *See Welch v. W. Va. Dept. of Corrections*, Docket No. 95-CORR-261 (Jan. 31, 1996).

3. 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); *Falquero v. W. Va. Dep't of Envtl. Protection,* Docket No. 2008-1596-DEP (Dec. 16, 2008).

4. Respondent DMV accepted Grievant's written resignation prior to his effort to rescind it. The resignation was accepted and became binding upon both the employer and the employee. *Le Masters, supra.*

5. Grievant failed to prove, by a preponderance of the evidence, that he rescinded his resignation before it was accepted by the DMV.

Accordingly, the 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: March 11, 2009

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE