THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GRACE SMITH,

Grievant,

v. **Docket No. 2009-1542-DHHR**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Respondent.

DECISION

Grievant Grace Smith was employed by the Department of Health and Human Resources ("DHHR") and assigned to Lakin Hospital as a Nursing Assistant. Grievant was classified as a Health Service Trainee. On May 11, 2009, Grace Smith filed a grievance against the DHHR. As her Statement of Grievance she wrote:

> I was back from a suspension, which was found not substantia[ted]. As a precaution I put in my two weeks notice. I was informed I could [rescind] it after the suspension. I did so three days later and was told it was o.k. Then on the 30th the assistant D.O.N[1]. informed me that today was my last day. I told my situation and was told there's nothing they can do. I feel I am being discriminated against. I also know two other people who put in their two weeks notice and they kept their job

As relief, Grievant wants to be reinstated to her job.

A level three hearing[2] was held in the Charleston Office of the Public Employees Grievance Board on September 21, 2008. Grievant appeared in person and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union.

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[1] D.O.N. is a commonly used abbreviation for Director of Nursing.

[2] Since this grievance involves the termination of Grievant's employment it may be heard originally at level three. *See* W. VA. CODE § 6C-2-4 (a) (4).

Respondent DHHR was represented by B. Allen Campbell, Esquire, Senior Assistant Attorney General. Following the presentation of the evidence, the parties agreed to present Proposed Findings of Fact and Conclusions of Law. Both parties submitted proposals, the last of which was received at the Grievance Board on October 23, 2009. This matter became mature for decision on that date.

Synopsis

Grievant turned in her resignation after an incident that led to an investigation concerning possible abuse of a patient. Grievant placed the resignation in her supervisor's mailbox at the end of the evening shift. Two days later, Grievant asked to rescind her resignation. The management of the Hospital decided not to allow Grievant to rescind her resignation and Grievant's last day of work was April 30, 2009. Grievant asserts that she rescinded her offer to resign before Respondent accepted it and therefore the resignation is void. However, Grievant's supervisor accepted her resignation and Respondent was thereafter under no obligation to allow Grievant to rescind it.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Grace Smith began working for DHHR at Lakin Hospital as a temporary employee in September 2008. On December 22, 2008, Grievant became a full-time probationary employee of the Hospital.

2. Grievant worked as a Nursing Assistant in the Health Service Trainee classification. She was involved in the daily care of the patients at the Hospital.

3. Grievant had problems with tardiness during the course of her employment at the Hospital. In her first performance appraisal, dated February 23, 2009, she received a "Fair, But Needs Improvement" rating. It was noted that she needed to arrive at the scheduled time and that Grievant had been counseled about writing the accurate time of her arrival on her sign-in sheet. Respondent's Exhibit 3.

4. Grievant received the same rating on her March 27, 2009, appraisal and tardiness was again noted as a problem. Respondent's Exhibit 4.

5. On March 30, 2009, Grievant received a written reprimand for being tardy and for falsifying her time sheets to indicate that she had arrived on time. Respondent's Exhibit 5. She was suspended for five days by letter dated April 13, 2009, for the same type of infractions. The days for the suspension were scheduled between April 21, 2009 and April 30, 2009. Respondent's Exhibit 6. Grievant did not contest any of these disciplinary actions.

6. During her shift on the evening of April 14, 2009, Grievant left her assigned floor for a break. Unknown to Grievant, an ambulatory patient was in the shower when she left the floor. Because a patient was left in the shower with no attendant on the floor a complaint was made that Grievant may have abused or neglected a patient.

7. Grievant found out about the complaint while she was on her shift. At the end of the shift, Grievant placed a signed resignation in her supervisor's mailbox. The resignation was addressed "To, Vicky Berkley or Kim Billups" and stated the following:

> I would like to resign my position here at Lakin State Hospital as a Health Service Trainee. So therefore I would like to put in for my two weeks.

Respondent's Exhibit 1.

8. Vicky Berkley is an Assistant Director of Nursing at Lakin Hospital and was Grievant's direct supervisor. Kim Billups is the Director of Nursing at the Hospital and is the supervisor for Ms. Berkley and Grievant.

9. Director of Nursing, Kim Billups, found Grievant's resignation the next morning and noted on it, "Received 4/15/09, KB." The normal procedure for processing resignations at Lakin Hospital is for the supervisor to make a copy for the file and send the original to the Hospital Human Resources Office for processing. Director Billups followed that procedure.[3]

10. On April 16, 2009, Grievant was informed by Director Billups that she was placed on leave without pay pending investigation into the allegation of abuse stemming from the patient in the shower. This was not a disciplinary suspension. *See* 143 C.S.R. 1 § 12.3. On April 17, 2009, Grievant received a letter documenting her suspension while the investigation was underway. Respondent's Exhibit 2.

11 On April 17, 2009, Grievant told Director Billups that if the allegation of abuse was unsubstantiated she wanted to rescind her resignation. Ms. Billups told Grievant that Billups would have to talk with Ms. Berkley before that decision could be made and that they would get back to her.[4]

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[3] Director Billups testified that she believed that she sent the resignation to Human Relations that morning but because of the passage of time, she could not state precisely when she sent it. However, it is apparent that she did forward the resignation to the Human Relations Office.

[4] The date of this conversation is not entirely clear but Grievant testified that it took place a couple of days after she resigned. In her Grievance Statement, she said three days had passed between submitting the resignation and this conversation. Additionally, Grievant testified that Ms. Billups said that "it should be no problem" for Grievant to rescind her resignation. Ms. Billups did not remember making that statement.

12. Grievant was informed on April 17 or 18 that the allegation of abuse was unsubstantiated and her suspension was over.

13. Due to her five day disciplinary suspension and her regular days off, Grievant's next duty shift was on April 30, 2009. When Grievant arrived to work she noted that her name was not on the schedule for May 2009. Grievant asked Assistant Director Berkley why Grievant's name was not on the schedule for May and Grievant was told this shift was her last day of work due to her resignation. Grievant asserted that she had rescinded her resignation and was told that her request to rescind her resignation was denied.

14. The Chief Executive Officer ("CEO") of Lakin Hospital is Wanda Kinnaird. After a resignation has been accepted by a supervisor at Lakin Hospital, CEO Kinnaird is the only person authorized to approve a request to rescind it. No one is ever given a written confirmation that their resignation has been accepted. Once the resignation is received by the supervisor, it is considered accepted.

15. On May 1, 2009, CEO Kinnaird received an e-mail from the Hospital Director of Human Resources, Wanda Smith, advising Kinnaird that Grievant had resigned. The e-mail also recounted that Grievant had asked to rescind her resignation and it was the recommendation of the management that the request be denied. CEO Kinnaird concurred.

16. There have been other employees at the Hospital who have been allowed to rescind their resignations and some who have not. The decision regarding granting a request to rescind a resignation is made on a case by case basis depending on the specific facts of each situation. No witness could recall any employee who had been previously disciplined who was allowed to rescind his or her resignation.

Discussion

This grievance does not involve a disciplinary matter. Consequently, 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 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 avers that the tender of her resignation was an offer to end her employment with Respondent. Grievant's position is that she rescinded her offer to resign before Respondent accepted the resignation and her resignation has no effect. DHHR counters that they accepted Grievant's resignation through the actions of the supervisors and once the resignation was accepted, Respondent was under no obligation to allow Grievant 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).

Grievant is not claiming that she was forced to resign. She admits that her resignation was voluntary but made in haste. She tendered her resignation on the chance that she might be dismissed due to the allegation of patient abuse. She desired to withdraw the resignation and continue her employment if the allegation was not substantiated. The issue in this case is whether Respondent accepted Grievant's resignation before she rescinded it. The Grievance Board has held 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 by the appointing authority 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 that led to the ruling in *Falquero* were rather unique. It does not take much for an employer to accept the resignation of a state employee. The resignation must

only be tendered and taken by a person with authority to address such personnel matters. *See Welch, supra.*

The facts in this grievance are different from *Falquero*. Grievant submitted her resignation to Director Billups, her supervisor. Ms. Billups processed the resignation in the typical fashion for the Hospital. Grievant and Ms. Billups had a conversation two days later wherein Grievant stated that she wanted to rescind her resignation and Director Billups said that she would talk about it to Ms. Berkley. Director Billups did not make any definite statement that Grievant would be allowed to rescind her resignation. The testimony indicated that the practice of the Hospital was that a resignation was accepted once it was received by the employee's supervisor. Once that acceptance took place, it could only be reversed by the CEO. Director Billups accepted the written resignation of Grievant and passed it on to the Human Relations Office. At that point, the offer was accepted.

There is conflicting evidence as to what Director Billups said when Grievant asked to rescind the resignation. However, even if Director Billups had said "there should be no problem" she was without authority to allow the resignation to be rescinded. That authority rested with the CEO. It is well-settled that a supervisor's promises cannot be binding against an agency where the supervisor does not possess the authority to actually make that determination. *Johnson v. W. Va. Univ.,* Docket No. 2008-0331-WVU (Jan. 27, 2009). *But see Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711(2007)(per curiam) (applying the doctrine of equitable estoppel to enforce such promises in very limited circumstances where the act is not in violation of rule or statute, or where justice so requires). The statements made by Director Billups were not definite enough for Grievant

to reasonably rely upon them to her detriment. In *Falquero,* the agency director indicated that if certain conditions were met the resignation would not be accepted. There was no such equivocation by the appointing authority in this case.

Grievant also points out that Respondent did not accept her resignation in writing. Grievant infers that because the resignation was not accepted in writing the offer to end the employment relationship was rescinded before it was accepted. However, Respondent is under no obligation to accept, in writing, Grievant's resignation. Verbal acceptances of resignations have been previously held to be sufficient to bind the parties. *Nugen v. Div. Of Motor Vehicles,* Docket No. 2009-0431-DOT (Mar. 10, 2009); *See also Albright v. Dep't of Health and Human Resources*, Docket No. 00-HHR-130 (Dec. 27, 2000). The record in this case is clear that Grievant submitted a written resignation to her supervisor and that resignation was accepted and acted upon prior to her attempt to rescind it. 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. *Nugen supra.*

Finally, Grievant asserts that other employees at the Hospital were allowed to rescind their resignations after the resignations were accepted and Respondent's refusal to allow her to do the same constitutes unlawful discrimination. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

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

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52 (2007). *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Morgan v. Dep't of Transp./Div. of Highways,* Docket No. 2008-1714-DOT (May 13, 2009).

Grievant had no personal knowledge of other employees who were allowed to rescind their resignations and was relying totally upon anecdotes that were relayed to her by fellow employees. She could not identify the employees who had supposedly resigned. These stories were not specific enough to serve as reliable evidence and were given no weight. However, Assistant Director of Nursing Berkley testified that she was aware of such incidents. Ms. Berkley has been employed at Lakin Hospital for twelve years; six years as an Assistant Director of Nursing. During her tenure a number of employees have resigned. Most merely turned in their resignations, worked their notice period and did not return. She remembered that some employees did seek to rescind their resignations. Some were allowed to rescind and others were not. Each time, the decision whether to allow the employee to rescind the resignation was made by the CEO, based upon an examination of the circumstances related to the resignation and the employee's work history. On examination by Grievant's representative, Assistant Director Berkley was specifically asked whether any employee who had been disciplined prior to resigning was

allowed to rescind his or her resignation. Ms. Berkley replied, "Not that I recall." No evidence was presented to the contrary.

It was not proven that Grievant was similarly situated to other employees who were allowed to rescind their resignations. An examination of the particular situation and job history was performed in each instance before the decision was made. Grievant did not demonstrate that her situation was similar to any of the employees who were allowed to rescind their resignations. More to the point, Grievant had a history of disciplinary issues prior to submitting her resignation. Employees with prior discipline were not allowed to rescind their resignations. Respondent did not discriminate against Grievant by not allowing her to rescind her resignation. Consequently, the Grievance is DENIED.

Conclusions of Law

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

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).

3. 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).

4. 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).

5. Respondent DHHR accepted Grievant's written resignation prior to her effort to rescind it. The resignation was accepted and became binding upon both the employer and the employee. *Nugen v. Div. Of Motor Vehicles,* Docket No. 2009-0431-DOT (Mar. 10, 2009).

6. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she 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 the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52 (2007). *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Morgan v. Dep't of Transp./Div. of Highways,* Docket No. 2008-1714-DOT (May 13, 2009).

7. Grievant did not prove that she was treated differently from similarly situated employees who were allowed to rescind their resignations.

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: NOVEMBER 10, 2009.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE