THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOHN RODRIQUES,
Grievant,

v. **DOCKET NO. 2008-0960-GraED**

GRANT COUNTY BOARD OF EDUCATION,
Respondent,

and

DELMER BERG,[1]
Intervenor.

DECISION

Grievant, John Rodriques, filed a grievance against his employer, the Grant County Board of Education, on December 11, 2007. The statement of grievance reads, "I was forced/coerced to sign away seniority rights." As relief, Grievant sought to "[r]etain seniority date." A hearing was held at level one on February 28, 2008, and the grievance was denied at that level. On April 3, 2008, the parties agreed to waive level two, and a level three hearing was held before the undersigned Administrative Law Judge on August 1, 2008, in Elkins, West Virginia. Grievant was represented by Anita Mitter, West Virginia Education Association, Respondent was represented by Dennis V. DiBenedetto, Esquire, Grant County Prosecuting Attorney, and Intervenor, Delmer Berg, was represented by John

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[1] Mr. Berg's name was misspelled as "Delmar" in the case style previously. Mr. Berg stated at the level three hearing that his first name is spelled Delmer, and the undersigned has corrected this error in the case style.

Everett Roush, Esquire, West Virginia School Service Personnel Association.[2] This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law, on September 22, 2008.

Synopsis

Grievant is a substitute bus operator for Respondent. In September 2005, he obtained full-time employment with another employer. Grievant informed the Transportation Supervisor, Delmer Berg, that he would have to resign, because he would not be available to accept assignments on a regular basis. The Grant County Board of Education has a policy which states that declining an assignment because of other employment is a refusal, and a substitute may be terminated from employment if he refuses too many assignments. Mr. Berg tried to find a way to let Grievant stay on the substitute list to work when he could, as he had very few substitute bus operators, but there was a concern about Grievant retaining his seniority over other substitutes. Mr. Berg and the Director of Human Resources, Abraham Evans, discussed this, and Mr. Evans told Mr. Berg that Grievant could remain on the substitute list to work when he could, if he would relinquish his seniority and go to the bottom of the seniority list. Sometime later, Grievant wrote and signed a letter, and submitted it to Mr. Berg, stating he would be unable to substitute on a regular basis, but asked to remain on the substitute list as the least senior substitute bus operator. Grievant now alleges that Mr. Berg coerced him into

[2] Grievant argued at the level one hearing and again at the level three hearing that Mr. Berg should not be allowed to intervene in this grievance. The motion was denied both at level one and at the level three hearing. Nonetheless, Grievant continued to pursue this argument in his post-hearing written argument. The undersigned already denied the motion at the level three hearing, and it will not be addressed again.

relinquishing his seniority, and wants his seniority back. Grievant failed to demonstrate any coercion by Mr. Berg, or that he otherwise acted under duress.

The following Findings of Fact are made based upon the evidence presented at levels one and three.

Findings of Fact

1. Grievant is employed by the Grant County Board of Education ("GBOE") as a substitute bus operator. He began his employment with GBOE on November 3, 2003, and in September 2005, he was second on the seniority list.

2. In September 2005, Grievant obtained full-time employment with another employer. Grievant told Delmer Berg, GBOE's Transportation Supervisor, that he would not be able to substitute on a regular basis, because he had obtained full-time employment with another employer, and Mr. Berg would have to remove his name from the substitute list.

3. GBOE has adopted a policy entitled, "Removal of Substitute Service Personnel for Unavailability." This policy states in section G,

> [t]his policy obligates substitute service employees to accept assignments in a reasonable manner. Unacceptable reasons to refuse work include, but are not limited to:
>
> 1. the refusal to answer the phone;
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> 2. having obtained other employment that conflicts with serving in the Grant County Board of Education position or to pursue other employment;
>
> 3. to report to work for another employer.

This policy also provides in section J, in pertinent part:

Continued employment of all service substitutes will be based on responses to calls to work as follows:

. . .

B. . . . should an employee refuse to work at all during any given semester and would have been given an opportunity on at least five (5) separate occasions, that employee shall be notified in writing of the Superintendent's intent to recommend, that his/her name be removed from the substitute list for willful neglect of duty, pending Board approval, and will be afforded the right to a hearing before the Board.

C. At the end of the first semester, should a substitute employee work on one (1) or more occasions but fail to work at least fifty percent (half) of the opportunities afforded through established call out procedures, a warning letter will be sent by certified/return receipt requested mail. The letter shall state that the employee, when given an opportunity to work on a least seven (7) separate occasions, must work at least seventy percent (70%) of the opportunities to work as afforded through established call out procedures over the course of the spring semester. Failure to work at least seventy percent (70%) of the opportunities as evidence[d] by copies of the school/county call out records shall result in said employee being notified in writing of the recommendation for his/her removal from the substitute list for willful neglect of duty, pending Board approval, and will be afforded the right to a hearing before the Board. If the employee does not have the opportunity to work on at leas[t] seven (7) separate occasions, s/he shall be required to have worked at least fifty percent (half) of the opportunities afforded.

4. GBOE had very few substitute bus operators, and Mr. Berg did not want to lose Grievant as a substitute bus operator. Mr. Berg suggested that Grievant might be able to remain on the substitute list if he moved to the bottom of the seniority list. Mr. Berg told Abraham Evans, GBOE's Director of Human Resources, that Grievant intended to resign, but he would like to retain him, and asked about how they could accomplish this. Mr. Evans called the West Virginia School Service Personnel Association and asked the attorney he spoke with whether Grievant could voluntarily relinquish his seniority so he

could remain on the substitute list. Mr. Evans then advised Mr. Berg that Grievant could remain on the substitute list, if he agreed that his name would go to the bottom of the substitute seniority list.

5. Mr. Berg told Grievant he could remain on the substitute list, and just work when he could, if he wanted to, if he relinquished his seniority.

6. After some time had passed, and Grievant had taken no action to relinquish his seniority, Mr. Berg reminded Grievant that he had not received a letter from him relinquishing his seniority, and that, without this letter, he could not remain on the substitute list if he was not available for work. Mr. Berg did not pressure Grievant to submit this letter.

7. Sometime thereafter, Grievant drafted and signed a letter, dated March 28, 2006, and gave it to Mr. Berg. The letter is addressed to the "Grant County Board of Education, To Whom It May Concern." The letter states, "I, John Rodriques, would like to remain active as a substitute bus driver, but request that I be placed at the bottom of the seniority list. Because of my circumstances, I am unable to substitute on a regular basis, but will call Delmer Berg to notify him when I am available." At the time Grievant submitted this letter, he was second on the substitute seniority list.

8. Mr. Berg gave Grievant's letter to Mr. Evans within a day of when Grievant gave it to Mr. Berg. Mr. Evans placed the letter in Grievant's personnel file.[3] The official

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[3] Grievant testified Mr. Evans told him in January 2007, when he was discussing with him the possibility of a temporary full-time assignment being available, that he was not aware of any letter relinquishing Grievant's seniority. Mr. Evans testified he put this letter in Grievant's personnel file within days of March 28, 2006. Mr. Evans further explained that Grievant's seniority was not an issue in filling this assignment, as none of the other substitutes wanted it because it was a short term need. (This assignment was not ever filled because circumstances changed.) As will be discussed in detail later, Grievant's testimony on this point is rejected as not credible.

substitute seniority list was not changed to reflect that Grievant had moved to the bottom of the list until October 2007[4].

Discussion

Grievant has the burden of proving his grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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 asserts that Mr. Berg lied to him, and it was this lie which caused him to submit his letter in March 2006. Grievant testified he wrote the letter because he thought Mr. Berg was telling him the truth when he told him he would lose his job if he did not write it. Grievant asserts Mr. Berg had as a motive moving his son-in-law up one position on the substitute seniority list.

The Grievance Board has previously discussed the factors to be considered in determining whether a Grievant was under duress when he took some action, in *Dingess v. Logan County Board of Education*, Docket No. 00-23-094 (July 6, 2000).

> In order to plead force or duress successfully, a grievant must show the employer constrained or forced him to accept the terms of the settlement. *See Asberry v. USPS*, 692 F.2d 1378 (Fed. Cir. 1982). Duress has been

[4] The record does not reflect whether Grievant's letter was ever presented to GBOE for official action. However, the parties did not address what effect the acceptance of this letter by GBOE, or the failure to present the letter to GBOE for action would have on this matter. The undersigned will therefore not address this issue.

> defined by the West Virginia Supreme Court of Appeals as "that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness . . .". *Warner v. Warner*, 183 W. Va. 90, 394 S.E.2d 74 (1990). The *Warner* Court stated, "[t]he requirements of common-law 'duress' have been enlarged to include any wrongful acts that compel a person, such as a grantor of a deed, to manifest apparent assent to a transaction without volition or cause such fear as to preclude him from exercising free will and judgment in entering into a transaction." *See Vandiver v. Gen. Accounting Office,* 3 M.S.P.R. 158 (1980). Duress has been found in situations where the employee involuntarily accepted the employer's terms; the circumstances surrounding the resignation permitted no other alternative; and the circumstances were the result of coercive acts by the employer. *Vandiver, supra* (citing *Freuhauf Southeast Garment Co. v. United States*, 111 F. Supp. 945 (Ct. Cl. 1953)). *See Warner, supra*. "The modern approach to resolving the issue of duress focuses on the issue of whether an individual has been 'preclude[d] . . . from exercising free will and judgment in entering into a transaction.' " *Warner, supra (citing Norfolk Div. of Social Serv. v. Unknown Father,* 2 Va. Appointment. 420, 345 S.E.2d 533, 541 (1986) and 25 Am. Jurisdiction. 2d Duress and Undue Influence § 12 (1966)). "The individual claiming duress has the burden of demonstrating such allegations of duress by clear and convincing evidence." *Warner, supra.*

Dingess, supra.

The Administrative Law Judge in *Dingess* also concluded that,

> the factors identified in *Smith v. West Virginia Division of Corrections,* Docket No. 94-CORR-1092 (Sept. 11, 1995), used in analyzing whether a resignation was involuntary may also be considered here by analogy. The *Smith* factors are whether: 1) an employee was given time to consider his course of action or to consult with anyone; 2) whether the resignation was abruptly obtained and/or inconsistent with the employee's work history; and 3) whether the employer had reason to believe the employee was not of a state of mind to exercise intelligent judgment. *See Paroczay v. Hodges*, 297 F.2d 439 (D.C. Cir. 1961).

Id.

Finally, “the mere fact that an employee must choose between one of two unpleasant alternatives does not make the employee’s decision involuntary. *Dye [v. W.*

Va. Dep't of Educ., Docket No. 99-DOE-217 (Sept. 16, 1999)]; *Schulz [v. U.S. Navy*, 810 F.2d 1133 (Fed. Cir. 1987)]." *Id.*

Grievant made accusations against Mr. Berg which must be considered, and Grievant's version of events on several points is different from that of the other witnesses. It is therefore necessary to assess Grievant's credibility. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

The undersigned concludes that Grievant was not a credible witness. First, Grievant signed the letter asking that he be moved to the bottom of the seniority list in March 2006.

Almost two years went by before Grievant decided he had been coerced by Mr. Berg, and filed this grievance.[5] The grievance was not filed until Grievant discovered that the official seniority list had finally been corrected to reflect this request. Grievant was asked at the level three hearing what had triggered the filing of the grievance, and gave varying answers, none of which made much sense. Grievant was asked several times to state the date he told Mr. Berg that he had obtained other full-time employment, and his response was different each time. He initially said he had first told Mr. Berg in March of 2006 (level one transcript, p. 15); then he stated Mr. Berg started pressuring him to submit the letter prior to March 2006, in January 2006 (level one transcript, pp. 19, 31); then he stated it was December of 2005 (level one transcript, p. 31); then he said it was August of 2005 (level one transcript, p. 35); and finally, at the level three hearing, he said it was September of 2005.[6] The question presented to Grievant was not difficult, and he should have been ready with the answer, because at the level three hearing he said he had started working full-time for the other employer in September 2005, an event that should have been fairly easy to remember.

Grievant's story that he only told Mr. Berg he would not be able to substitute "as much" differs from that of Mr. Berg, who testified that Grievant told him he would have to resign. Significantly, GBOE Superintendent Marsha Carr-Lambert also testified that Grievant had told her in the fall of 2007, that he told Mr. Berg he would have to resign.

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[5] A timeliness defense was not properly raised by any party.

[6] Apparently, the testimony confused Grievant's representative as well, as she submitted a proposed finding of fact which states that Grievant's full-time job started in March 2005, and some of her argument relies on this date as well.

Even the letter written by Grievant acknowledges that he would not be able to comply with the requirements of GBOE's policy regarding declining substitute assignments. Further, if Grievant only told Mr. Berg he would not be available as often as he had been, there would have been no reason for anyone to have been concerned. However, Mr. Berg took the problem to Mr. Evans, and Mr. Evans went to the trouble to contact the School Service Personnel Association to get their view on what they could do. Grievant acknowledged in his own testimony at the level three hearing that he was aware that his job would be in jeopardy when he told Mr. Berg about his full-time employment, stating he was asking that he not be removed from the substitute list.

Grievant suggested that Mr. Berg had wanted the letter from Grievant relinquishing his seniority in order to benefit Mr. Berg's son-in-law, who was also a substitute bus operator with less seniority than Grievant. The evidence does not support a finding that this is true. Mr. Berg was trying to find a way that would allow Grievant to remain on the substitute list, and Grievant knew this. Mr. Evans testified that, while it was certainly to the Board's benefit to find a way to retain Grievant as a substitute, they were concerned about being fair to other employees who were required to comply with the Board's policy, and accepted substitute employment on a regular basis. If Grievant relinquished his seniority, his failure to accept assignments on a regular basis should not have any affect on other employees. Grievant was being exempted from GBOE's policy, obtaining a benefit not offered to other substitutes.

The undersigned will note that, according to Grievant's level one testimony, Mr. Berg's son-in-law, Mark Mongold, did not even start working for GBOE until September 21, 2005. Grievant did not establish that Mr. Mongold was even an employee of GBOE at the

time Grievant told Mr. Berg he had obtained full-time employment elsewhere. In support of his assertion that Mr. Berg's goal was to benefit his son-in-law, Grievant stated Mr. Berg had not called him out to substitute as much after Grievant had told him of his full-time employment. Mr. Berg pointed out that Grievant's letter of March 28, 2006, states, "I am unable to substitute on a regular basis, *but will call Delmer Berg to notify him when I am available*." (Emphasis added.)

As Intervenor aptly points out, this grievance brings to mind the saying, "no good deed goes unpunished." Mr. Berg tried to help the board of education and Grievant, by trying to come up with some way to keep Grievant on the substitute list, and now Grievant has accused him of improper conduct. Had Mr. Berg just let matters take their course, it is more likely than not that Grievant would not have a job with GBOE at all, because he would not have been available for substitute assignments when called, and would not have had an acceptable excuse for declining assignments. Mr. Berg presented Grievant with an alternative which allowed him to continue to receive some work from GBOE and retain his bus operator certification, without having to comply with GBOE's policy on availability. As Intervenor notes, Grievant had two alternatives: "resign or violate the policy and ultimately be terminated. The agreement worked out by Intervenor provided an additional and much more palatable option to Grievant."

By Grievant's own account, he was aware in September 2005 that he would not be able to fulfill his duties as a substitute, and by at least January 2006, he had been presented with an option which would allow him to retain his employment with GBOE, regardless of how seldom he was able to accept substitute assignments, by moving to the bottom of the seniority list. Grievant did not submit his letter until the end of March 2006.

He had several months to carefully consider his options, review GBOE's substitute policy, and consult with others before making his choice. Grievant was not under duress when he submitted his letter on March 28, 2006, and he was in no way coerced by Mr. Berg.

Grievant further argued he could not "sign away" his seniority rights, and that GBOE did not follow its own policy. Grievant is incorrect in his assertion that he cannot waive his legal rights. A party may choose to waive his legal rights, and take such actions as are necessary to effectuate that decision. "'The concept of an actual waiver of one's established rights implies a voluntary act.' *Smith v. Bell*, 129 W. Va. 749, 760, 41 S.E.2d 695, 700 (1947)." *Sellers v. W. Va. Univ. - Parkersburg*, Docket No. 06-HE-276D (Feb. 27, 2007). "'A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights.' . . . Furthermore, 'the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.'" *Id., citing Rucker v. Dep't of Transp.*, Docket No. 05-DOH-123D (2005). Grievant voluntarily waived his right, in writing, to retain his substitute seniority in exchange for an exemption from GBOE's policy on refusal of substitute assignments. Grievant is correct that GBOE's policy on retention of substitutes was not applied to Grievant. If it had been, Grievant would no longer be employed by Respondent. "'Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences.' *Smith v. Bechtold*, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993). *Pullen v. Div. of Corrections*, Docket No. 04-CORR-323D (Dec. 15, 2004)." *Sellers, supra.*

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving his grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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).

> 2. In order to plead force or duress successfully, a grievant must show the employer constrained or forced him to accept the terms of the settlement. *See Asberry v. USPS*, 692 F.2d 1378 (Fed. Cir. 1982). Duress has been defined by the West Virginia Supreme Court of Appeals of as "that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness . . .". *Warner v. Warner*, 183 W. Va. 90, 394 S.E.2d 74 (1990).

Dingess v. Logan County Bd. of Educ., Docket No. 00-23-094 (July 6, 2000).

> 3. [T]he factors identified in *Smith v. West Virginia Division of Corrections,* Docket No. 94-CORR-1092 (Sept. 11, 1995), used in analyzing whether a resignation was involuntary may also be considered here by analogy. The *Smith* factors are whether: 1) an employee was given time to consider his course of action or to consult with anyone; 2) whether the resignation was abruptly obtained and/or inconsistent with the employee's work history; and 3) whether the employer had reason to believe the employee was not of a state of mind to exercise intelligent judgment. *See Paroczay v. Hodges*, 297 F.2d 439 (D.C. Cir. 1961).

Dingess, supra.

4. "[T]he mere fact that an employee must choose between one of two unpleasant alternatives does not make the employee's decision involuntary. *Dye [v. W. Va. Dep't of Educ.*, Docket No. 99-DOE-217 (Sept. 16, 1999)]; *Schulz [v. U.S. Navy*, 810 F.2d 1133 (Fed. Cir. 1987)]." *Dingess, supra.*

5. Grievant was not coerced by Mr. Berg into submitting a letter relinquishing his seniority, and he was not otherwise under duress when he submitted the letter. Grievant voluntarily relinquished his seniority rights in order to remain on the substitute list.

Accordingly, 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: March 10, 2009