WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KYLE WALTERS,
Grievant,

v. **Docket No. 2011-0965-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WELCH COMMUNITY HOSPITAL,

DISMISSAL ORDER

Kyle Walters, Grievant, was employed by the Respondent Department of Heath and Human Resources ("DHHR") at the Welch Community Hospital in McDowell County as a Licensed Practical Nurse. Mr. Walters filed a grievance at level three dated January 5, 2011, stating that he had been "Terminated without cause," and seeking "To be made whole, including back pay with interest & restoration of benefits."[1] A level three hearing was held in Beckley, West Virginia, on January 6, 2012. Grievant Kyle appeared at the hearing and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent DHHR was represented by James Wegman, Esquire, Assistant Attorney General. At the conclusion of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law, the last of which was received at the West Virginia Public Employees Grievance Board on February 7, 2012. This grievance became mature for decision on that date.

Synopsis

Grievant contests the alleged termination of his employment for misuse of internet

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[1] W. VA. CODE § 6C-2-4(a)(4) provides that a grievance contesting dismissal from employment may be filed directly at level three. The request for relief appears herein as it was written on the grievance form.

resources provided at the Hospital. Respondent argues that Grievant voluntarily resigned and his resignation was accepted by Respondent prior to filing a grievance, and therefore, the grievance must be dismissed. Respondent did not take any action to dismiss Grievant after accepting his resignation. Grievant voluntarily resigned his employment and Grievant's resignation was accepted by Respondent prior to the filing of the grievance.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Kyle Walters, was employed by the DHHR at the Welch Community Hospital ("Hosptial") for approximately six years as a Licensed Practical Nurse. He was so employed during the month of December 2010.

2. On December 29, 2010, Walter Garrett, Chief Executive Officer for the Hospital, received four Network Violation Reports ("NVR") from the Office of Technology indicating that four work computers at the Hospital had been used to access prohibited internet sites. Three of the NVRs were related to computers assigned to employees at the Hospital and one was related to a computer assigned to a person who provided contracted medical services to the Hospital.

3. One of the NVRs received by CEO Garrett indicated that the computer assigned to Grievant was used to access prohibited internet content on December 5, 2010.[2] The Office of technology technicians were able to determine that the person using

[2] The entire report was admitted as Respondent's Exhibit 1. The term "Network Violation Report" is defined in the Office of Technology's *Network Violation Management Procedure* as: "A summary of 24 hours of activity supporting the contention that a serious policy violation has occurred". Respondent's Exhibit 11.

this computer to access the prohibited material had logged on to the specific computer with Grievant's unique personal identification number and Grievant's password at the IP address for the computer assigned for Grievant's use at the Hospital.

4. CEO Garrett contacted his supervisor regarding the NVRs related to Grievant and other employees. CEO Garrett was instructed that the DHHR has a "zero tolerance" practice related to accessing the prohibited material with State computers and if Grievant could not demonstrate that he did not use the computer to access the prohibited web-sites, he had to be dismissed from employment.

5. CEO Garrett held a predetermination conference with Grievant on January 4, 2011, to inform Grievant that he was accused of violating information security policies by accessing prohibited internet sites from his computer. Present at the meeting were Grievant Walters, CEO Garrett and Hospital Human Resources Director, James Young. Director Young took contemporaneous notes of the conference that he reviewed with CEO Garrett, typed and placed them in Grievant's file.[3]

6. At the conference, CEO Garrett shared the results of the NVR with Grievant and indicated that he would terminate Grievant's employment if Grievant could not show that he was not the person who was accessing prohibited internet material utilizing the computer assigned to Grievant on December 5, 2010.

7. Grievant denied using his computer to access prohibited material at work. He

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[3] The typed copy of the contemporaneous notes taken by Director Young of the predetermination conference were identified as accurate by CEO Garrett and admitted into the record as Respondent's Exhibit 12.

then asked if he could resign rather than be dismissed. CEO Garrett indicated that Garrett would have to check with his supervisor. At that point, Grievant Walters "stated that he considers this a resignation" and "that he won't let the State get the best of him." Respondent's Exhibit 12.

8. After checking with his supervisor, CEO Garrett sent Grievant a letter dated January 5, 2011, stating the following:

> This is to inform you that I have accepted your verbal resignation as an LPN with the West Virginia Department of Health and Human Resources, Welch Community Hospital. The effective date of your resignation was January 4, 2011 (after one hour), per your request.

The letter also provided CEO Garrett's telephone number and invited Grievant to call if he had any questions. The letter was sent by certified mail and Grievant signed that he had received it. Respondent Exhibit 5.

9. Grievant Walters filed a level three grievance form dated January 5, 2011, and the form was received by the West Virginia Public Employees Grievance Board on January 7, 2011.

10. Grievant did not attempt to rescind his resignation.

Discussion

Respondent argues that Grievant resigned employment with the Hospital before Respondent took any action to terminate his employment. There was no evidence that Respondent took any action to dismiss Grievant. The only action taken was the letter from CEO Garrett, dated January 5, 2011, accepting Grievant's oral resignation. Accordingly, the controlling issue in this grievance is whether Grievant voluntarily resigned his employment with the Hospital. In *McGuire v. Mercer County Bd. of Educ.,* Docket No.

2010-1529-MerED (Apr. 12, 2011), the grievant argued that his resignation was not voluntary. The Administrative Law Judge held that the grievance was not disciplinary and the grievant had the burden to prove 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); *McGuire*, *supra.* The same is true in this matter. Even though the grievance states that Grievant was "terminated without good cause," there is no evidence that Grievant was terminated at all, so this is not a disciplinary case and Grievant bears the burden of proof. 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).

At the predetermination conference Grievant was confronted with the NVR prepared by the Office of Technology and told that Respondent intended to dismiss him from employment if he could not demonstrate that he was not the person who used his assigned computer to access prohibited internet content from his work computer. After some discussion, Grievant asked if he could resign and CEO Garrett said he was not sure and he would check with his supervisor and respond. At that point, Grievant told CEO Garrett that he should considered Grievant resigned and that "he won't let the State get the best of him." Thereafter, CEO Garrett checked with his supervisor and sent Grievant a letter accepting his resignation. Grievant signed for the letter demonstrating his receipt. Respondent's Exhibit 12.

Grievant admits that he asked CEO Garrett if he could resign and that he stated that he was not going to let the State get the best of him. However, he argues that he didn't

actually resign and points to the fact that he did not submit a resignation in writing. Grievant took no action to rescind the resignation. CEO Garrett testified that Grievant resigned and the only question was whether Respondent would accept it.

The starting point for examining a resignation grievance 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); *Jenkins v. Dep't of Health & Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002). The fact that Grievant did not submit his resignation in writing is of little consequence because, as a general rule, an employee may be bound by his verbal 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. Dep't of Corrections*, Docket No. 95-CORR-261 (Jan. 31, 1996); *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." *Hale-Smith v. Mingo County Bd. of Educ.*, Docket No. 98-29-075 (Sept. 30, 1998); *Lynn v. Monongalia County Health Dep't,* Docket No.04-MCHD-102 (June 14, 2004).

Grievant tendered his verbal resignation to CEO Garrett, the person ultimately responsible for all personnel actions at the Hospital. Therefore, the only question remaining is whether a reasonable person would believe that Grievant, through his statements, intended to sever his relationship with his employer. There is some disagreement in the testimony that must be resolved to reach that conclusion.

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' information. *See Gramlich v. Div. of Motor Vehicles*, Docket No. 2010-0929-DOT (June 14, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.*, Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Dir./W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

Grievant does not dispute that he asked if he could resign. His argument is that he did not actually follow through with a resignation. CEO Garrett states that Grievant was clear on his intent to resign and the only question was whether Respondent would accept it, which it did by letter the next day. We have available the notes of Director Young which he took at the January 4, 2011, predetermination conference. CEO Garrett saw the notes after the conference and confirmed that the typed copy introduced at the hearing were the same notes taken at the meeting. From these notes, it is clear that Grievant intended to resign. That conclusion is bolstered by Grievant's admitted statement that he was not going to let the State get the best of him. These contemporaneous notes are consistent with the testimony of CEO Garrett. A reasonable person would conclude from Grievant's statements that he intended to sever his employment relationship with the Hospital.

The West Virginia Supreme Court of Appeals has recently held that:

> Unless otherwise provided by law, a classified public employee may rescind or withdraw a tender of resignation at any time prior to its effective date as long as the withdrawal occurs before acceptance by the employing agency.
>
> Acceptance of a tender of resignation of public employment may occur when the employer (1) clearly indicates acceptance through communication with the employee, or (2) acts in good faith reliance on the tender.

Syl pts. 3 & 4, W. Va. Dep't of Envtl. Prot. v. Falquero, Appeal No. 11-0629 2012 W. Va. LEXIS 163 (March 22, 2012). Grievant made no effort to rescind his resignation and Respondent communicated acceptance of the resignation by letter the next day. Accordingly, the resignation was valid and binding on both parties. *Falquero, supra.*

The Public Employees Grievance Procedure was established to allow public employees and their employers to reach solutions to problems which arise within the scope of their respective employment relationships. W. VA. CODE § 6C-2-1(a); *See Wilson v. Dep't of Health and Human Res.*, Docket No. 2011-1769-DHHR (Oct. 31, 2011). WEST VIRGINIA CODE § 6C-2-2(e)(1) defines "employee" for the purposes of the grievance procedure, as follows:

> (1) "Employee" means any person hired for permanent employment by an employer for a probationary, full- or part-time position.

WEST VIRGINIA CODE § 6C-2-2(g) defines "employer" for the purposes of the grievance procedure, as follows:

> [A] state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, **using the services of an employee** as defined in this section.

(Emphasis added.)

A “Grievance” is “a claim by an employee.” W. VA. CODE § 6C-2-2(i). Only an employee may file a grievance. W. VA. CODE § 6C-2-2(a)(1).

The jurisdiction of the Public Employees Grievance Board is limited to the grant of authority provided in WEST VIRGINIA CODE §§ 6C-2-1 *et seq*. Since Grievant voluntarily severed his employment with the Respondent DHHR prior to initiating his claim, the West Virginia Public Employees Grievance Board has no jurisdiction to resolve any dispute Grievant may have with that agency. Accordingly, the grievance is DISMISSED. *See Clutter v. Dep’t of Agric.*, Docket No. 2009-1372-AGR (May 28, 2009); *Monroe v. Dep’t of Admin./Real Estate Div. & Legislative Serv./Employee Suggestion Award Bd.*, Docket No. 2012-0873-DOA (May 14, 2012).

Conclusions of Law

1. Even though the grievance states that Grievant was “terminated without good cause,” this is not a disciplinary case and Grievant bears the burden of proof by a preponderance of the evidence. *McGuire v. Mercer County Bd. of Educ.,* Docket No. 2010-1529-MerED (Apr. 12, 2011); 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. The starting point for examining a resignation grievance is that “a resignation is, by definition, a voluntary act on the part of an employee seeking to end the employer

1092 (Sept. 11, 1995); *Jenkins v. Dep't of Health & 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 verbal 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. Dep't of Corrections*, Docket No. 95-CORR-261 (Jan. 31, 1996); *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." *Hale-Smith v. Mingo County Bd. of Educ.*, Docket No. 98-29-075 (Sept. 30, 1998); *Lynn v. Monongalia County Health Dep't.,* Docket No.04-MCHD-102 (June 14, 2004).

4. A reasonable person would conclude from Grievant's statements to the Hospital CEO at the predetermination conference, that he intended to sever his employment relationship with the Hospital. Consequently, these statements constituted a voluntary resignation.

5. The West Virginia Supreme Court of Appeals has recently held that:

> Unless otherwise provided by law, a classified public employee may rescind or withdraw a tender of resignation at any time prior to its effective date as long as the withdrawal occurs before acceptance by the employing agency.
>
> Acceptance of a tender of resignation of public employment may occur when the employer (1) clearly indicates acceptance through communication with the employee, or (2) acts in good faith reliance on the tender.

Syl pts. 3 & 4, W. Va. Dep't of Envtl. Prot. v. Falquero, Appeal No. 11-0629 2012 W. Va. LEXIS 163 (March 22, 2012).

6. Grievant made no effort to rescind his resignation and Respondent communicated acceptance of the resignation by letter the next day. Accordingly, the resignation was valid and binding on both parties. *Falquero, supra.*

7. Grievant had voluntarily resigned his employment prior to filing this grievance. Since Grievant was no longer an employee of the Respondent DHHR, the West Virginia Public Employees Grievance Board has no jurisdiction to resolve any dispute Grievant may have with that agency. *See Clutter v. Dep't of Agric.*, Docket No. 2009-1372-AGR (May 28, 2009); *Monroe v. Dep't of Admin./Real Estate Div. & Legislative Serv./Employee Suggestion Award Bd.*, Docket No. 2012-0873-DOA (May 14, 2012).

Accordingly, the Grievance is **DISMISSED**.

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: May 24, 2012

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE