THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CINDY M. WILLIAMS,
Grievant,

v. **Docket No. 2012-1148-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
MILDRED MITCHELL-BATEMAN HOSPITAL,
Respondent.

DECISION

Grievant, Cindy M. Williams, was previously employed by Respondent, Department of Health and Human Resources, at Mildred Mitchell-Bateman Hospital. This action is a consolidation of three grievances filed by Grievant. On March 15, 2012, in Docket Number 2012-0962-DHHR, Grievant filed the first grievance stating,

> I received my MSN/INF on Nov 7 2011 and submitted proof of degree and application for Nurse 3. I have several emails about the position being approved and made several attempts to be reallocated as a Nurse 3. I am one of two nurses in the entire nursing department at MMBH that hold a MSN and have been unsuccessful in obtaining a raise so I can pay my federal student loan.

As relief she sought "to be relieved from my education obligation and time owed to the State of West Virginia, because I am being forced to actively seek employment to meet my federal student loan obligation. I am currently being paid 65% less than the average salary for a nurse possessing a MSM/INF [sic]." On April 7, 2012, Grievant filed a second grievance in Docket Number 2012-1073-DHHR stating, "I recently received information of average salary of Nurse 3 at MMBH is [$]50,159.31 and my Nurse 3 pay is considerably less at [$]40,548 and became effective 3-23-12[.] [T]he original application was 11-22-2011 and would like to know why the old app was used." As relief Grievant requested back pay from November 22, 2011, to be "dismissed from

education leave contract due to unfair treatment compared to other Nurse 3, mental + financial stress," and to see the typed Nurse III application from November 22, 2011. On April 11, 2012, Grievant filed a third grievance in Docket Number 2012-1092-DHHR stating, "I was constructively discharged from MMBH as of 4-7-2012. I was forced to resign due to being treated unequally [and] retaliation from employer. Would like to go to level 3 due to forced resignation [and] loss of wages." Grievant again requested the educational leave contract be dismissed, and to further be reinstated with all back pay, benefits, and interest.

A level one hearing was held on the first grievance, Docket Number 2012-0962-DHHR, on April 4, 2012. No level one decision from this hearing appears in the Grievance Board file, but Grievant appealed to level two on April 20, 2012. The second and third grievances, Docket Number 2012-1073-DHHR and Docket Number 2012-1092-DHHR, were consolidated at level one into the instant number, and the parties agreed to waive the consolidated grievance to level three. By order entered September 4, 2012, Docket Number 2012-0962-DHHR was consolidated into the instant number by the Acting Chief Administrative Law Judge. A level three hearing was held on October 16, 2012, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, James "Jake" Wegman, Assistant Attorney General. This matter became mature for decision on November 21, 2012, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant filed three grievances consolidated in the instant action. In her grievances, Grievant asserts that Respondent failed to timely promote her, failed to pay her an appropriate salary once promoted, and then constructively discharged her when she was forced to resign. Grievant sought in part to be released from an education reimbursement contract she entered into with Respondent to provide her with monies to attend college and graduate school in return for Grievant's agreement to work for Respondent for a specified time period. The Grievance Board does not have the authority to sever the contract between Grievant and Respondent for educational reimbursement or to determine how the terms of the contract are to be fulfilled. Grievant did not prove she was entitled to greater pay upon her promotion or for her pay to commence earlier than it did. A reasonable person in Grievant's position would not have felt compelled to resign because of her conditions of employment. Grievant failed to meet her burden of proof that she was constructively discharged.

Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant began her employment at Mildred Mitchell-Bateman Hospital ("Bateman") in 2001 as a Health Service Worker.

2. The Division of Personnel ("DOP") has authorized through policy the establishment of educational expense reimbursement/leave programs by individual state agencies. Respondent has established such a program whereby it will reimburse

employees for certain educational expenses. In order to receive this benefit, an employee must sign a contract with Respondent agreeing to work for Respondent for a specified period of time. The contract requires that, if the employee should voluntarily leave employment or be dismissed, the employee must reimburse the agency on a pro-rata basis for the remaining balance of obligated months of employment.

3. Grievant chose to further her education to obtain a degree in nursing, and availed herself of the reimbursement program. From January 2007 through May 2009 Grievant received reimbursement from Respondent of between $750 and $900 per semester for a total of $4,050.

4. In 2009 Grievant graduated from Marshall University with a Regents Bachelor of Arts degree and an Associate of Science in Nursing degree.

5. Grievant's position was reallocated to Nurse I on August 12, 2009.

6. Grievant later requested reallocation of her position to Nurse II, which reallocation was delayed. Grievant filed a grievance, and was awarded reallocation, retroactive to August 24, 2010, through a settlement with Respondent.

7. Grievant again chose to participate in the reimbursement program to obtain a master's degree in nursing. From November 2009 to August 2011 Grievant received both a stipend and reimbursement of between $1,400 and $1,695 each time[1] for a total of $14,025.

8. On February 1, 2011 Grievant, along with thirty-six other staff members, signed a petition addressed to Bureau of Behavioral Health and Health Facilities officials calling for the removal of Director of Nursing ("DON") Patricia Ross (now

[1] The agreements appear to be for individual classes rather than per semester.

Hamilton) and Assistant Director of Nursing ("ADON") Belinda Ackerson. The petition alleges that DON Hamilton and ADON Ackerson should be removed for creating a hostile work environment, employee harassment, unsafe working conditions, jeopardizing professional licenses, discrimination, favoritism, conflicting schedules, and incompetence.

9. On August 24, 2011, Grievant applied for a Nurse III position, but was properly denied eligibility to apply because she did not hold a bachelor's degree in nursing or the alternative years of experience as an RN.[2]

10. On November 30, 2011, Grievant graduated from University of Phoenix with a Master of Science in Nursing degree ("MSN").

11. Around the same time, Grievant requested to be "reclassified[3]" to a Nurse III or Nurse IV based on her achievement of a master's degree. Grievant alleged that she submitted an application on November 22, 2011, but the only applications in the record are for Nurse IV dated August 10, 2011[4] and Nurse III/Nurse IV dated February 9, 2012[5].

12. On December 12, 2011, Grievant interviewed for a Nurse IV position as a Nurse Manager. This was a position that had been vacant for some time. Ray Brillantes, Nurse Manager of another unit officially covered the vacancy. Steve Ashby,

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[2] Grievant filed a grievance for this denial of eligibility in Docket Number 2010-1592-DHHR, which grievance has since been denied on December 10, 2012.

[3] As will be discussed further below there was significant confusion regarding the difference between the terms "reclassification," "reallocation," and "promotion."

[4] Grievant's Exhibit Number 6, Level One.

[5] Grievant's Exhibit Number 8, Level One.

who was a Nurse III Nursing Supervisor, performed many of the duties of the vacant position, but did not receive a temporary upgrade. DON Hamilton and Mr. Ashby were on the interview panel that interviewed Grievant for the position. Grievant was not awarded the position but no letter of rejection was ever issued to Grievant. Mr. Ashby was not eligible to apply for the position at the time Grievant was interviewed as he was just shy of the years of experience required. Mr. Ashby fulfilled the years of experience requirement and applied for the position sometime in May or June 2012 and was awarded the position in July 2012.

13. On February 23, 2012, Victoria Parlier Jones, Office of Health Facilities Commissioner and Bateman CEO, requested approval from Harold Clifton, Office of Human Resource Management Director, to promote Grievant to Nurse III. The requested salary offer was the Bateman hiring rate[6] of $40,458. The letter acknowledges that that Bateman average salary for a Nurse III is $50,159.31 and the DHHR average is $45,942.42.

14. Grievant's promotion into a vacant Nurse III position was made effective March 23, 2012.

15. Grievant resigned by letter dated March 24, 2012, with her resignation to be effective April 7, 2012. In it she states she has suffered financial hardship due to Respondent's refusal to provide her with a Nurse III or Nurse IV position, despite being only one of two nurses with a master's degree. She requested to be allowed to work one day a month to fulfill her educational reimbursement contract. She further states,

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[6] Because of recruitment and retention issues Bateman has been allowed a special higher hiring rate.

> If not granted I will consider my obligation paid in full due to my contract not being specific about my remaining time as a full time, part time or PRN employee. Also, due to the fact of not receiving promotions or advancement opportunities in a timely manner or without biased or persona[l] opinion by certain Mildred Mitchell Bateman management cliques.

16. By letter dated March 26, 2012, Kieth Anne Worden, Human Resources Director for Bateman, accepted Grievant's resignation. In the letter, Director Worden also responded to Grievant's request to fulfill her work requirement through temporary employment. Director Worden explained that it was not feasible to meet the obligation by working only one day per week[7]. Further, Director Worden explained that the policy specifically stated that if an employee leaves the agency voluntarily he/she must reimburse the agency for the remaining balance of the obligated months of employment.

17. Under her various contracts with Respondent for stipend and reimbursement, Grievant was obligated to work for Respondent through March 7, 2014.

18. Throughout her employment, Grievant either met or exceeded expectations on her employee performance appraisals and had no record of disciplinary action.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *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

[7] Grievant's offer of work was actually only one day per month.

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).

This consolidated grievance presents three issues: whether Grievant can be relieved of her contractual obligation to Respondent, whether Grievant was entitled to greater and earlier compensation for her promotion to Nurse III, and whether Grievant was constructively discharged.

The Grievance Board does not have the authority to sever the contract between Grievant and Respondent for educational reimbursement or to determine how the terms of the contract are to be fulfilled. "Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)). The Grievance Board's authorizing statute, W. VA. CODE 6C-2-1, *et seq.*, provides the Grievance Board with no authority to determine this type of contract dispute within the context of a grievance proceeding.

Grievant did not prove she was entitled to greater pay as a Nurse III than she received upon her promotion or for her pay to commence earlier than it did. Grievant appears to be confused about the difference between reclassification, reallocation, and promotion. Grievant uses the term "reclassification" throughout her attempts to obtain

greater pay by becoming a Nurse III or Nurse IV. However, it appears Respondent increased this confusion by also misusing this term. These three terms are specifically defined terms that have very different rules about pay associated with them. "Reallocation" is defined as "[r]eassignment by the Director of Personnel of a position from one class to a different class on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." W. VA. CODE ST. R. § 143-1-3.75. "Promotion" is defined as "[a] change in the status of an employee from a position in one class to a vacant position in another class of higher rank as measured by salary range and increased level of duties and/or responsibilities." W. VA. CODE ST. R. § 143-1-3.73. "Reclassification" is defined as "[t]he revision by the State Personnel Board of the specifications of a class or class series which results in a redefinition of the nature of the work performed and a reassignment of positions based on the new definition and may include a change in the title, pay grade, or minimum qualifications for the classes involved." W. VA. CODE ST. R. § 143-1-3.76.

Reclassification was never at issue in this case. According to the testimony, twice before positions in which Grievant was the incumbent were reallocated. Given the confusion of terms by both parties, it is unclear if reallocation was really what happened or whether reallocation was proper. Reallocation is supposed to be about the position itself and not the particular person who holds it at the time. It appears that the reallocations, if reallocations they actually were, were driven by Grievant's change in credentials rather that an actual change in the position itself. Accordingly, it is understandable why Grievant would be confused about her personal movement through the classification system. Nevertheless, the issue of Grievant's Nurse III pay must be

decided based upon whether Respondent properly followed the rules as they relate to the classification action actually taken. Grievant's movement to the Nurse III position was a promotion. The DOP's rule for pay on promotion applicable to Grievant's promotion is as follows:

> An employee whose salary is at the minimum rate for the pay grade of the current class shall receive an increase to the minimum rate of the pay grade for the job class to which the employee is being promoted. An employee whose salary is within the range of the pay grade for the current class shall receive an increase of one pay increment, as established by the State Personnel Board, per pay grade advanced to a maximum of three (3) pay grades, or an increase to the minimum rate of the pay grade for the job class to which the employee is being promoted, whichever is greater. In no case shall an employee receive an increase which causes the employee's pay to exceed the maximum for the pay grade to which he or she is being promoted. . . . The appointing authority may grant additional incremental increases, as established by the State Personnel Board, to an employee being promoted if the employee has sufficient qualifications in excess of the minimum required for the new class. The employee must possess at least six (6) months of pertinent experience or an equivalent amount of pertinent training for each additional incremental increase granted. In no case shall the additional incremental increase cause the employee's pay to exceed the maximum for the pay grade to which he or she is being promoted.

W. VA. CODE ST. R. § 143-1-5.5.

Grievant was promoted to Nurse III at the Bateman minimum salary of the Nurse III pay grade. Grievant argues that this pay amount was unfair because she is only one of two nurses at Bateman holding an MSN and the pay was less than the average pay for a Nurse III. Grievant did not prove Respondent failed to follow the above rule relating to promotion. Although Grievant asserts that it is unfair that she is paid less

than the average salary for Bateman Nurse IIIs, Grievant offers no evidence that this action was discriminatory or in violation of the rule or other policy or law.

Previous decisions of the West Virginia Supreme Court of Appeals and this Board have established that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. *Largent v. W. Va. Div. of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994); *Salmons v. W. Va. Dept. of Transp.,* Docket No. 94-DOH-555 (Mar. 20, 1995); *Hickman v. W. Va. Dept. of Transp*., Docket No. 94-DOH-435 (Feb. 28, 1995); *Tennant v. W. Va. Dept. of Health & Human Resources*, Docket No. 92-HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dept. of Health & Human Resources*, Docket No. 91-H-177 (May 29, 1992). It is not discriminatory for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dept. of Health and Human Resources/Pinecrest Hospital*, Docket No. 02-HHR-366 (Sept. 18, 2003). As noted by the West Virginia Supreme Court of Appeals in *Largent,* pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." *Jenkins v. Dept. of Environmental Protection/Office of Mining and Reclamation*, Docket No. 03-DEP-154 (Sept. 12, 2003)(citing *Largent* at 246). Grievant's MSN is simply one of the various ways to meet the minimum requirements for Nurse III and does not entitle Grievant to greater pay as a Nurse III. As noted by Respondent, the average salary Grievant cites includes all Nurse IIIs, and so would include nurses with many more years of

experience than Grievant and also nurses hired in from the private sector, for whom pay is not limited by the DOP rules of pay on promotion.

In addition, Grievant asserts that her promotion to Nurse III should have been effective immediately upon her application. Again, it is understandable that Grievant was confused about what was going on. In her second grievance, Grievant refers to Respondent's failures in her attempt to be "reallocated" to Nurse III. Respondent perpetuated this misunderstanding in email communication with Grievant referring to having additional Nurse III duties assigned to Grievant. Director Worden's testimony indicated that there were questions about how to advance Grievant after she completed her MSN and requested advancement. It appears Respondent had considered yet another reallocation at that time. In addition, Grievant also applied for an open Nurse IV position. Eventually, Respondent decided that Grievant should be advanced by promoting into a vacant Nurse III position. Commissioner Jones made the request to Human Resources for the promotion on February 23, 2012. Thirteen signatures were required in order to complete the promotion. All signatures could not be acquired prior to the March 1 deadline, so the promotion did not become effective until March 23, 2012.

Although Respondent contributed to Grievant's confusion and discontent by failure to clearly communicate with her, Respondent's "delay" in advancing Grievant was not improper. Respondent is not required to promote Grievant simply because she obtained an additional degree and, as previously discussed, reallocation is about the position and not the person filling it. Four months was not an unreasonable length of time to complete this promotion. Furthermore, as Grievant was not entitled to automatic

promotion, Respondent cannot be penalized for taking four months to do something it was not required to do at all.

Grievant did not prove she was constructively discharged when she resigned. 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). *See Welch v. W. Va. Dept. 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).

In order to prove a constructive discharge, a grievant must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary that a grievant prove that the employer's actions were taken with a specific intent to cause her to quit. Syl. Pt. 6, *Slack v. Kanawha County Housing*, 188 W. Va. 144, 423 S.E.2d 547 (1992); *Preece v. Public Serv. Comm'n*, Docket No. 94-PSC-246 (Apr. 25, 1997); *Coster v. W. Va. Div. of Corrections*, Docket No. 94-CORR-600 (Aug. 12, 1996); *Jenkins v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002). "The trier of fact must be satisfied that the…working conditions would have been

so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Slack,* 423 S.E.2d at 556 (citing *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977). A reasonable person is "neither an automaton nor an exceptional man, but an ordinary member of the community. Being an ordinary person, the law makes allowance for mere errors in his judgment and does not visualize him as exercising extraordinary care. Normality is the quintessence of this characterization." Syl. Pt. 6, *Patton v. City of Grafton*, 116 W.Va. 311, 180 S.E. 267 (1935); *Honaker v. Mahon,* 210 W.Va. 53, 552 S.E.2d 788 (2001).

As discussed above, Grievant has significant confusion regarding the way the classification system works and the rules regarding pay within the classification system. In addition, Grievant was under the mistaken belief that her participation in the educational reimbursement program somehow entitled her to be automatically promoted. These misunderstandings appear to be the heart of Grievant's dispute with Respondent. Grievant's testimony at levels one and two and her emails show clearly that she believes she was entitled to "reclassification" and immediate increase in her salary upon completion of her master's degree. Grievant is just as clearly mistaken in her beliefs. Respondent is not required to provide Grievant with an education, although Respondent did, through its voluntary reimbursement program, assist Grievant in furthering her education by providing her with over $18,000. Respondent is likewise not required to simply hand over additional salary or a promotion just because Grievant graduated. Grievant provided absolutely no law, rule, or policy that shows any duty on Respondent's part to automatically promote her. Rather than being grateful for the assistance of Respondent in furthering her education by providing a significant amount

of money with only the requirement for Grievant to work for it for a short while, Grievant was angry that Respondent did not automatically provide her with a better job.

Grievant asserts she suffered retaliation for filing and winning grievances and for a petition she started against management. Grievant had filed and prevailed in several other grievances against Respondent. She also testified about and introduced a petition to the Commissioner she started and signed in February 2011 to have DON Hamilton and ADON Ackerson removed, from which an EEOC investigation was launched. While these events certainly could act to negatively bias management against Grievant, Grievant must provide evidence that this was so. In addition to the delay in approving her promotion to Nurse III as discussed above, Grievant also cites Respondent's failure to select her for a Nurse IV position for which she applied as support of her charge of retaliation. In December 2011, Grievant interviewed for a Nurse IV, Nurse Manager, position. An MSN only minimally qualified Grievant to apply for the position as an MSN is only one of four alternate minimum training qualifications for Nurse IV. It is important to note that Grievant did not grieve her non-selection for the Nurse IV position. In this grievance she has simply offered it as evidence of her constructive discharge.

At the time of her application for the Nurse IV position, Grievant was only a Nurse II and had never had the supervisory duties that would accompany a Nurse III, Nursing Supervisor, position. Even though Grievant was minimally qualified for the Nurse IV position, she had just obtained her master's. Given those two factors, it was reasonable for Respondent to be hesitant to hire Grievant for the Nurse IV position and to choose to promote her to the vacant Nurse III position instead. While it is suspicious that Mr.

Ashby was eventually awarded the Nurse IV position after meeting the minimum qualifications, that happened months after Grievant resigned so could have no bearing on her decision to resign. Other than her assertion that her promotion was delayed and she was not selected for the Nurse IV position, Grievant provided no evidence that she was retaliated against.

Grievant also asserts that she was forced to resign due to a hostile work environment. Grievant testified that a doctor resigned and another nurse went on medical leave because of the atmosphere. She testified that her unit had to run itself for six months. Grievant provided no testimony about what specifically was wrong with the work atmosphere other than to simply state that it was "very intimidating and kinda scary." Grievant provided no testimony of particular incidents or actions by management that would explain her statement, nor did she provide any testimony from coworkers about the atmosphere.

A reasonable person in Grievant's position would not have felt compelled to resign because of her conditions of employment. It may have been reasonable for Grievant to resign as an RN with a master's degree, since she likely could make more money in the private sector. However, that is a choice, and not a compulsion. While Grievant made several allegations of mistreatment to support her charge of constructive discharge, she provided very little evidence to support those allegations. Grievant failed to meet her burden of proof that she was constructively discharged.

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 her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *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).

2. "Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)).

3. The Grievance Board's authorizing statute, W. VA. CODE 6C-2-1, *et seq.*, does not provide the authority to sever the contract between Grievant and Respondent for educational reimbursement or to determine how the terms of the contract are to be fulfilled.

4. Grievant's advancement to Nurse III was through promotion. The DOP's rule for pay on promotion applicable to Grievant's promotion is as follows:

> An employee whose salary is at the minimum rate for the pay grade of the current class shall receive an increase to the minimum rate of the pay grade for the job class to which the employee is being promoted. An employee whose salary is within the range of the pay grade for the current class shall receive an increase of one pay increment, as established by the State Personnel Board, per pay grade advanced to a maximum of three (3) pay grades, or an increase to the minimum rate of the pay grade for the job class to which the employee is being promoted, whichever is greater. In no case shall an employee receive an increase which causes the employee's pay to exceed the maximum for the pay grade to which he or she is being promoted. . . . The appointing authority may grant additional incremental increases, as established by the State Personnel Board, to an employee being promoted if the employee has sufficient qualifications in excess of the minimum required for the new class. The employee must possess at least six (6) months of pertinent experience or an equivalent amount of pertinent training for each additional incremental increase granted. In no case shall the additional incremental increase cause the employee's pay to exceed the maximum for the pay grade to which he or she is being promoted.

W. VA. CODE ST. R. § 143-1-5.5.

5. Previous decisions of the West Virginia Supreme Court of Appeals and this Board have established that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. *Largent v. W. Va. Div. of Health*, 192 W. Va. 239, 452 S.E.2d 42 (1994); *Salmons v. W. Va. Dept. of Transp.,* Docket No. 94-DOH-555 (Mar. 20, 1995); *Hickman v. W. Va. Dept. of Transp*., Docket No. 94-DOH-435 (Feb. 28, 1995); *Tennant v. W. Va. Dept. of Health & Human Resources*, Docket No. 92-HHR-453 (Apr. 13, 1993); *Acord v. W. Va. Dept. of Health & Human Resources*, Docket No. 91-H-177 (May 29, 1992). It is not discriminatory for employees in the same classification to be paid different salaries. *Thewes & Thompson v. Dept. of Health and Human*

Resources/Pinecrest Hospital, Docket No. 02-HHR-366 (Sept. 18, 2003). As noted by the West Virginia Supreme Court of Appeals in *Largent,* pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." *Jenkins v. Dept. of Environmental Protection/Office of Mining and Reclamation*, Docket No. 03-DEP-154 (Sept. 12, 2003)(citing *Largent* at 246).

6. Grievant failed to prove that Respondent acted improperly in offering her the Bateman minimum salary for a Nurse III or for making the promotion effective March 23, 2012.

7. "[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). *See Welch v. W. Va. Dept. 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).

8. In order to prove a constructive discharge, a grievant must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary that a grievant prove

that the employer's actions were taken with a specific intent to cause her to quit. Syl. Pt. 6, *Slack v. Kanawha County Housing*, 188 W. Va. 144, 423 S.E.2d 547 (1992); *Preece v. Public Serv. Comm'n*, Docket No. 94-PSC-246 (Apr. 25, 1997); *Coster v. W. Va. Div. of Corrections*, Docket No. 94-CORR-600 (Aug. 12, 1996); *Jenkins v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002). "The trier of fact must be satisfied that the…working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Slack,* 423 S.E.2d at 556 (citing *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977). A reasonable person is "neither an automaton nor an exceptional man, but an ordinary member of the community. Being an ordinary person, the law makes allowance for mere errors in his judgment and does not visualize him as exercising extraordinary care. Normality is the quintessence of this characterization." Syl. Pt. 6, *Patton v. City of Grafton*, 116 W.Va. 311, 180 S.E. 267 (1935); *Honaker v. Mahon,* 210 W.Va. 53, 552 S.E.2d 788 (2001).

9. A reasonable person in Grievant's position would not have felt compelled to resign because of her conditions of employment. Grievant failed to meet her burden of proof that she was constructively discharged.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: May 9, 2013

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Billie Thacker Catlett
Administrative Law Judge