THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHRISTINE BECKETT,
Grievant,

v. **Docket No. 2014-1753-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILD SUPPORT ENFORCEMENT,
Respondent.

DECISION

Grievant, Christine Beckett, was employed by Respondent, Department of Health and Human Resources with the Bureau for Child Support Enforcement ("BCSE"). On June 25, 2014, Grievant filed a grievance against Respondent. Grievant did not complete the statement of grievance section, but instead attached a five-page handwritten statement accusing her supervisor of abuse of power and creating a hostile work environment[1]. Grievant protested her performance evaluations and the refusal of her rescission of resignation. This grievance was assigned docket number 2014-1739-DHHR. On June 30, 2014, Grievant's representative then filed two additional grievance forms. The first stated, "Improper refusal of timely rescission" and was also assigned docket number 2014-1739-DHHR. The second stated, "Improper employee performance appraisals" and was assigned docket number 2014-1741-DHHR. The grievances were consolidated into the above-styled action at level one. Grievant requests to be made whole, reinstatement, back pay, interest, restoration of benefits, and corrected employee performance appraisals.

On October 14, 2014, a level one hearing was held by telephone. Grievant

[1] No evidence or argument was presented regarding hostile work environment, so that claim is deemed waived.

appeared by her representative, but did not appear in person. A level one decision was rendered on October 31, 2014, denying the grievance. Grievant appealed to level two on November 6, 2014. Following unsuccessful mediation, Grievant appeal to level three of the grievance process on July 30, 2015. The level three hearing in this matter was scheduled for October 26, 2015. On October 23, 2015, the parties submitted an agreed request to submit the grievance for decision on the level one record, as is permitted by W. VA. CODE ST. R. § 156-1-6.1.1, and the parties were directed to submit written Proposed Findings of Fact and Conclusions of Law by November 30, 2015. The parties both submitted their written Proposed Findings of Fact and Conclusions of Law on November 30, 2015, however, upon review of the case for decision, the undersigned discovered that the level one record was incomplete. By email dated January 11, 2016, Grievance Board staff requested the missing portion of the lower level record. Grievance Board staff sent a follow-up email on February 29, 2016, requesting the same, and received the missing document on that date. The matter became mature for decision upon receipt of the complete lower level record on February 29, 2016. Grievant is represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent is represented by counsel, Harry C. Bruner, Jr., Assistant Attorney General.

Synopsis

Grievant was employed by Respondent as a Child Support Specialist I with the Bureau of Child Support Enforcement. Grievant was upset upon receiving an unfavorable employee performance appraisal and resigned. Respondent accepted Grievant's resignation. Grievant then attempted to rescind her resignation. Respondent refused to allow Grievant to rescind her resignation. Grievant failed to prove that her resignation

was involuntary or that she was constructively discharged. Grievant failed to prove Respondent acted improperly in refusing to allow Grievant to rescind her resignation when Respondent had already communicated to Grievant that it accepted her resignation. Grievant's claim of improper employee performance appraisal with a request for a corrected appraisal is moot as Grievant is no longer employed by Respondent. 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 was employed as a probationary employee by Respondent as a Child Support Specialist I at the Boone County office of the BCSE.

2. On June 23, 2014, Grievant's supervisor, Teresa Darnell, and the Boone County BCSE attorney, Laura Straley, met with Grievant and gave her an Employee Performance Appraisal 2 ("EPA-2"), an evaluation used for interim or mid-point review, probationary employees, or special situations. Grievant was a probationary employee, who had been in her position for nine months. Grievant was rated "Fair, But Needs Improvement." The evaluation is lengthy, pointing out both positive and negative aspects of Grievant's job performance. It identified specific deficiencies in her performance and provided clear instruction on expectations. The evaluation noted that Grievant had taken 116.25 hours of unplanned leave on twenty-one different days. Grievant was instructed to request leave forty-eight hours in advance, and to provide a doctor's statement if sick leave was used.

3. Grievant was upset by the evaluation and said she was going to resign.

Both Ms. Darnell and Ms. Straley told Grievant she should think about it overnight before she made a decision, since she was upset. Grievant did not wait, and left her written resignation on Ms. Darnell's desk before leaving work. Grievant's resignation was in writing, signed, and dated June 23, 2014. Grievant gave two weeks' notice, with her last day effective July 7, 2014.

4. The same day, at 4:25 p.m., Ms. Darnell sent Grievant an email accepting Grievant's resignation.

5. The next day, June 24, 2014, at 6:55 a.m., Grievant emailed Ms. Darnell stating, "After much thinking, I wish to recant my resignation terminating my employment with BCSE. I will be providing this to you in writing as quickly as is possible."

6. At 7:19 a.m., Regional Director Henrietta Webb responded to Grievant stating, "Christine, we have already accepted your resignation. I am in the process of getting in touch with Personnel. Will get back to you as soon as I do."

7. In the afternoon of the same day, June 24, 2014, BCSE Commissioner Garrett Jacobs sent a memorandum to Grievant denying her request to rescind her resignation.

8. Grievant worked June 25th, took sick leave June 26th and 27th, worked June 30th and July 1st, but then did not return to work to complete her two weeks' notice period.

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 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 the EPA-2's restriction on Grievant's use of sick leave was improper, which makes Grievant's distress understandable. Grievant asserts that her resignation was a constructive discharge. Grievant also asserts that she resigned "in the heat of the moment," and that she should have been allowed to rescind her resignation, especially in light of her supervisor's offer to reconsider her resignation. Respondent argues that Grievant did not timely withdraw her resignation because her resignation had already been accepted by her supervisor, who had the authority to accept Grievant's resignation.

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. Dep't of Corrections*, Docket No. 94-CORR-1092 (Sept. 11, 1995). *See Welch v. W. Va. Dep't 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, however, that a [grievant] prove that the employer's actions were taken with a specific intent to cause the [grievant] 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). 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).

Grievant did not prove that she was constructively discharged. While Grievant alleged in her statement of grievance that she had been subjected to a hostile work environment, Grievant provided no evidence of that allegation. Instead, Grievant argues that the EPA-2 itself was an "adverse job consequence without appropriate reasons" serious enough that it forced Grievant's resignation. Grievant's resignation was voluntary. When Grievant became upset over the EPA-2 and threatened to resign, Ms. Darnell and Ms. Straley both suggested that Grievant wait before she made a hasty decision while she was upset. So, rather than any coercion to force Grievant to resign, Grievant was actually counselled by her employer not to resign while she was upset.

It was not reasonable for Grievant to resign based on the EPA-2. The EPA-2 simply was not that intolerable. In fact, the EPA-2 only stated that Grievant needed improvement, not that she did not meet expectations. The language in the EPA-2 was neutral, and also praised Grievant's positive qualities and performance. Grievant argues the EPA-2 was improper in the requirement that she maintain forty hours of sick leave and in requiring her to provide a doctor's statement for any sick leave used. Even if the EPA-2 was improper on those grounds, a reasonable person would not feel compelled to resign. The remedy in that situation would be for the employee to protest the EPA-2 and file a grievance, which is what a reasonable employee would do. An employee who simply decides to resign because they are unsatisfied with the conditions of their employment is not the same as an employee who has been subjected to conditions that are so intolerable that they are forced to resign.

Grievant also asserts that she should have been permitted to rescind her resignation. "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." Syl. Pt. 3, *W. Va. Dep't of Envtl. Prot. v. Falquero*, 228 W. Va. 773, 724 S.E.2d 744 (2012). "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." *Id.* at Syl. Pt. 4. Respondent clearly accepted Grievant's resignation when her supervisor responded by email accepting Grievant's resignation. *Falquero* does not require Respondent to both indicate acceptance *and* act in good faith reliance; it must only do one or the other.

Grievant asserts there should be a “cooling-off period” to allow an employee to reconsider a resignation made “in the heat of the moment.” Grievant cites no statute, caselaw, rule, or policy to support this contention. The current law is clear under *Falquero* and provides for no such time period. Grievant also asserts that Ms. Darnell and Ms. Straley extended an offer to Grievant to reconsider her resignation, and so Respondent should be estopped from refusing to allow Grievant to rescind her resignation. Ms. Straley and Ms. Darnell counselled Grievant to wait and not resign while she was upset. Grievant ignored that counsel and resigned anyway. There was no representation to Grievant that she would be allowed to rescind her resignation if she did choose to resign. Again, the law is clear: Grievant had a right to rescind her resignation until Respondent either accepted it or acted in good faith on it. Grievant failed to prove she had a right to rescind her resignation after Respondent had already accepted it or that Respondent acted improperly in refusing to allow her to rescind her resignation.

"Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dep’t of Health & Human Res*., Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res*., Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res*., Docket No. 95-HHR-561 (Sept. 30, 1996). Grievant’s protest of her EPA-2 and request for a corrected EPA-2 is now moot. The EPA-2 only affects Grievant’s conditions of employment with Respondent and Grievant is no longer employed by Respondent.

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. "[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). *See Welch v. W. Va. Dep't 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).

3. "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, however, that a

[grievant] prove that the employer's actions were taken with a specific intent to cause the [grievant] 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). 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).

4. Grievant failed to prove that her resignation was involuntary or that she was constructively discharged.

5. "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." Syl. Pt. 3, *W. Va. Dep't of Envtl. Prot. v. Falquero*, 228 W. Va. 773, 724 S.E.2d 744 (2012). "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." *Id.* at Syl. Pt. 4.

6. Grievant failed to prove Respondent acted improperly in refusing to allow Grievant to rescind her resignation when Respondent had already communicated to Grievant that it accepted her resignation.

7. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dep't of Health & Human Res*., Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res*., Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res*., Docket No. 95-HHR-561 (Sept. 30, 1996).

8. Grievant's protest of her employee performance appraisal and request for a corrected employee performance appraisal is now moot as Grievant is no longer employed by Respondent.

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: March 25, 2016

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Billie Thacker Catlett
Chief Administrative Law Judge