THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANGELA BENEDUM,

Grievant,

v. **Docket No. 2019-0040-DHHR**

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

Respondent.

DECISION

Grievant, Angela Benedum, was employed by Respondent, Department of Health and Human Resources (DHHR). On July 6, 2018, Grievant filed this grievance against Respondent stating, "Grievant was coerced into resignation and rescinded it the same day. Constructive discharge without good cause or due process". For relief, Grievant seeks "[t]o be made whole in every way including back pay with interest and all benefits restored".

Grievant filed directly to level three of the grievance process.[1] A level three hearing was held on November 13, 2018, before the undersigned at the Grievance Board's Westover office. Grievant appeared by phone and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Brandolyn Felton-Ernest, Assistant Attorney General. This matter became mature for decision on December 19, 2018, upon receipt of each party's written proposed findings of fact and conclusions of law.

[1]West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.

Synopsis

Grievant alleges that Respondent coerced her resignation by misrepresenting State policy in telling her she would not work for the State again if she was fired but that she could work for the State by resigning. She contends that her resignation is constructive discharge and that she should be reinstated. In the alternative, Grievant alleges that she never technically resigned, but that even if she did she rescinded her resignation prior its acceptance. Grievant failed to prove that she rescinded her resignation prior to acceptance. However, Grievant proved she was constructively discharged when Respondent's misrepresentation of State policy induced her to resign in lieu of termination. Respondent's misrepresentation created a false distinction between future employability of State employees who are terminated verses those who resign in lieu of termination. Accordingly, the grievance is GRANTED.

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 at the Lewis County Office of the Bureau for Child Support Enforcement (BCSE) as a Child Support Specialist II.

2. Larry LeFevre, BCSE Director of Field Operations, is stationed in the central office in Charleston.

3. On July 5, 2018, Grievant arrived at work to find that her access badge had been disabled. She proceeded to the front desk and was informed that Mr. LeFevre was in the office to meet with her. (Grievant's testimony)

4. Mr. LeFevre did not have permission on July 5, 2018, to fire Grievant. Even though Mr. LeFevre implements terminations, the Commissioner makes the decision to terminate. The Commissioner had not issued a decision to terminate Grievant. (Mr. LeFevre's testimony)

5. At their July 5, 2018, meeting, Mr. LeFevre gave Grievant the choice of being fired or resigning, but did not tell Grievant she would be fired that day. (Grievant's testimony)

6. At the same meeting, Mr. LeFevre told Grievant his understanding of State policy is that if she resigns, she "can work" for other state agencies but that if she is fired she "won't be able to work" for the State again. (Grievant's testimony)

7. Mr. LeFevre told Grievant he did not have permission to terminate her at that point, but "if I get permission to terminate you, you will not get a chance to resign." (Mr. LeFevre's testimony)

8. Mr. LeFevre called this meeting with Grievant because he had been told that staff were concerned for their safety because Grievant had been walking in circles while talking to herself and had been found on July 3, 2018, passed out after work hours, whereupon she was awakened and taken home. (LeFevre's testimony)

9. During the same meeting, Mr. LeFevre told Grievant he had received an email saying that Grievant was walking in circles and speaking to herself. (Grievant's testimony)

10. Around this period, Grievant had been on an attendance improvement plan. (Mr. LeFevre's testimony)

11. Mr. LeFevre led Grievant to believe that Respondent was contemplating firing her.

12. Mr. LeFevre knew that if Grievant resigned she would be doing so in lieu of termination.

13. During the same meeting, Mr. LeFevre told Grievant to pack her belongings and write a resignation letter by noon.

14. After Grievant returned to her office, Mr. LeFevre stopped by frequently to ask her if she was done, brought her boxes to use, told her to change her hours in Kronos (payroll system) to noon that day and to zero out the remainder of the pay period. (Grievant's testimony)

15. That same morning of July 5, 2018, Mr. LeFevre requested and received a separation packet from HR, whereupon Mr. LeFevre completed the separation packet himself and submitted it. (Mr. LeFevre and Grievant's testimony)

16. The separation packet contained three documents. Mr. LeFevre signed one of them with his signature in the space for "supervisor's signature". Grievant did not sign the space marked "employee signature" below Mr. LeFevre's signature. (Respondent's Exhibit 3)

17. Respondent did not provide Grievant with copies of the completed resignation packet. (Mr. LeFevre and Grievant's testimony)

18. That same morning of July 5, 2018, Grievant provided Mr. LeFevre with her resignation letter. The resignation letter states, "I, Angela Benedum, am putting in my resignation as a CSS II effective this day. It has been a pleasure working for the State of West Virginia, Thank you for the opportunity!". (Respondent's Exhibit 2)

19. Upon receiving her letter of resignation, Mr. LeFevre told Grievant he accepted her resignation. (Mr. LeFevre's testimony)

20. Grievant's resignation was motivated by a desire to work for the state again at some point and to preserve that option by not being fired. (Grievant's testimony)

21. Mr. LeFevre had authority to accept Grievant's resignation. (Mr. LeFevre's testimony)

22. By 10:00 a.m., Mr. LeFevre told Grievant to leave the premises and she did so. (Grievant's testimony)

23. That same day, after speaking to her union representative, Grievant returned to the office after 4:00 p.m., when Mr. LeFevre had already left, and submitted to the receptionist a letter rescinding her resignation. (Grievant's testimony)

24. The letter states, "I, Angela Benedum am needing to recind (sic) (remove) my resignation written earlier today. Please do so." It was stamped, "RECEIVED JUL 05 2018 LEWIS COUNTY DHHR". (Respondent's Exhibit 4)

25. Mr. LeFevre learned of Grievant's letter rescinding her resignation when the Lewis County DHHR office emailed it to him on July 6, 2018. (Respondent's Exhibit 4)

26. On July 6, 2018, Mr. LeFevre sent Grievant a letter informing her that DHHR was not rescinding her resignation. It states, "Please be advised that we are in receipt of your letter asking to withdrawal (sic) your resignation which I verbally accepted on July 5, 2018 during my meeting with you at the BCSE office in Weston, West Virginia. We have decided not to rescind your resignation. Your resignation from your position as a Child Support Specialist II with the Bureau for Child Support Enforcement remains effective as of close of business July 5, 2018." (Respondent's Exhibit 5)

27. Until Grievant received Mr. LeFevre's July 6, 2018, letter denying her request to withdraw her resignation, she had not received a written acceptance or written acknowledgement of her resignation. (Grievant's testimony)

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant contends her resignation should be viewed as constructive discharge[2] due to the coercive nature of Mr. LeFevre's misrepresentation of state policy when he told her that she could work for the state by resigning but would not be able to work for the state again if fired. Grievant asserts that Respondent further coerced her by leading her to believe that her dismissal was imminent through telling her she had two options, be fired or resign. Respondent counters that constructive discharge necessitates that Grievant be compelled to quit through intolerable working conditions. Respondent asserts that Mr. LeFevre's representation to Grievant was not so difficult or unpleasant that a reasonable person would feel compelled to resign and that Grievant freely resigned. Grievant counters that constructive discharge is broad enough to include resignation

[2]"The Grievance Board considers potential constructive discharge cases, as similar in nature to those cases in which a respondent has terminated a grievant's employment." *Quigley v. Kanawha County Board of Education*, Docket No. 01-20-105 (Aug. 30, 2001).

induced by coercion. Grievant asserts that she would not have resigned but for Mr. LeFevre's misrepresentation of policy incentivizing her to resign immediately and Respondent's statements and actions leading her to believe it was not only contemplating firing her but that dismissal was imminent. Respondent counters that it never told Grievant that she would be fired.

In the alternative, Grievant claims she never technically resigned, even though she wrote a letter of resignation, because she never verbally resigned, Respondent never accepted her resignation, Mr. LeFevre completed DHHR's "separation packet" on Grievant's behalf without her participation, and Grievant never signed the forms in the "separation packet". Grievant further contends that even if she did resign, she rescinded her resignation prior to Respondent's acceptance and that this should result in her reinstatement. Respondent counters that Grievant did resign and that Mr. LeFevre verbally accepted her resignation prior to Grievant rescinding the resignation.

As there are disputed facts, the undersigned must make credibility determinations. 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); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES

MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

The following disputed facts necessitate a credibility determination. They include whether Mr. LeFevre led Grievant to believe he was contemplating firing her; whether Mr. LeFevre told Grievant he did not have permission to terminate her at that point, but that, "if I get permission to terminate you, you will not get a chance to resign"; whether Mr. LeFevre knew that a resignation by Grievant would be in lieu of termination; whether Mr. LeFevre accepted Grievant's resignation; and whether an acceptance occurred prior to Grievant's attempt to rescind her resignation. Not every credibility factor listed by *Asher* is necessarily applicable to a credibility determination in every case. In the present case, the difficulty in determining Grievant's demeanor was exacerbated through her testifying by phone, although her delivery was calm. Mr. LeFevre's verbal and physical demeanor was calm and matter of fact, which enhanced his credibility. The undersigned could glean little about either's attitude. While neither admitted to untruthfulness, Mr. LeFevre acquiesced (in answering a leading question) to telling Grievant that "if you're fired you couldn't work for the State but if you resign you could". While the distinction between being fired and resigning in lieu of termination turned out to be inaccurate under the Administrative Rule, there was no hint of evidence that Mr. LeFevre knew this distinction was inaccurate when he made it. Each of these witnesses had an apparent bias as a result of their respective interest in the outcome of the case, but the undersigned did not

observe that this affected either's credibility. Neither Mr. LeFevre nor Grievant made an inconsistent statement during these events which the undersigned perceived as affecting the accuracy or inaccuracy of a specific factual position. The undersigned could not directly determine whether any fact testified to did not exist other than through the plausibility or non-plausibility of certain statements made by the witnesses under oath. Which brings us to the last credibility factor: the plausibility of information. Much of the remaining credibility analysis herein will be accomplished through a determination of factual plausibility when discussing the pivotal issues herein.

The following essential facts are undisputed: that Mr. LeFevre presented Grievant with no option other than resigning or being terminated; that Grievant offered her resignation by letter; that Grievant submitted a letter requesting that her resignation be rescinded; that Grievant's resignation was motivated by a desire to work for the state again and to preserve that option by not being fire; and that Mr. LeFevre told Grievant that she "can work" for other state agencies if she resigns versus "won't be able to" if she is fired. Grievant was unrefuted in testifying that she asked Mr. LeFevre whether she had any option other than being terminated or resigning. Grievant and Mr. LeFevre testified that Grievant submitted both a letter of resignation and a letter requesting that the resignation be rescinded. Grievant was unrefuted in testifying that her resignation was motivated by a desire to work for the state again and to preserve that option by not being fired. Grievant testified that Mr. LeFevre told her on July 5, 2018, that if she resigns she "can work" for other State agencies, but if she is fired she "won't be able to work" for the State again. Mr. LeFevre never directly testified about the choice he gave Grievant on July 5, 2018, but adopted through his answer the phrasing of a leading question asked of

him by Respondent's attorney. Respondent's attorney asked Mr. LeFevre to provide the authority for the following statement: "if you're fired you couldn't work for the State but if you resign you could." Mr. LeFevre answered that the Commissioner told him this. In posing this question, Respondent's attorney was apparently repeating Grievant's testimony since there was no other testimony on this point. Depending on usage, "could"[3] is either the past tense of "can"[4] or a less forceful alternative to "can". In asking this leading question, Respondent's attorney gave no indication she was referring to anything other than Grievant's testimony. Therefore, the context of "could" in the leading question simply meant the past tense of "can". There remains an apparent inconsistency between Grievant and Mr. LeFevre's testimony. Grievant testified that Mr. LeFevre told her she "won't be able" to work for the State if fired. Conversely, in answering Respondent's leading question, Mr. LeFevre arguably adopted the phrase "if you're fired you couldn't work for the State". "Will" is the converse of "won't". "Will" denotes "probability",[5] while "can" denotes possibility. There is however no evidence that Mr. LeFevre intended to adopt this leading question as his version of the precise wording of his statement to Grievant. Rather, the intent of the leading question and Mr. LeFevre's answer thereto was to address the basis of Mr. LeFevre's understanding of the policy as testified to by Grievant rather than to dispute the Grievant's testimony as to what Mr. LeFevre told her.

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[3]"Could" is the "past of CAN – used as an auxiliary in the past or as a polite or less forceful alternative to can in the present". MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS 176 (2007).
[4]While "can" has various meanings, a common one is "be able to". MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS 106 (2007). It is "sometimes used interchangeably with may". WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 200 (1983).
[5]MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS 923 (2007).

The issues to be decided in this grievance are whether Grievant technically resigned and whether her resignation was constructive discharge necessitating reinstatement. Grievant implies that she never resigned because, while she submitted a letter of resignation, she never verbally resigned as claimed by Respondent, her resignation was never accepted either verbally or in writing by Respondent, she did not sign the "separation packet" after Mr. LeFevre completed it on his own, and she rescinded the resignation before it was accepted.

Whether Grievant verbally resigned and whether she participated in completing the separation packet are irrelevant. Grievant never presented any authority for her implied argument that resignations must be given verbally. Grievant did not contest the legitimacy of her written resignation. As such, any determination of whether she also verbally resigned is irrelevant to resolving this matter. While Grievant avers that she did not sign her "separation packet" and did not complete it herself, she did not present any evidence showing that completion of the "separation packet" was a necessary element in consummating her resignation. While tantalizing, any evidence concerning Mr. LeFevre's unilateral completion of DHHR's separation packet on behalf of Grievant is irrelevant to a factual determination of Grievant's resignation and Respondent's acceptance thereof based not only on the strength of Grievant's admitted action but also on Grievant's inability to show that the completion and signing of this packet by Grievant was necessary to effectuate her resignation.

Grievant contends that Respondent never consummated her resignation through acceptance. Grievant testified that Mr. LeFevre told her she could either be fired or resign and that she chose to resign based on his representation that she could work for the State

again if she resigned and would not work for the State again if fired. Grievant testified that she submitted a letter of resignation to Mr. LeFevre before leaving the office by 10:00 a.m. on July 5, 2018. Grievant also testified that Mr. LeFevre first told her to have her stuff packed and her letter of resignation submitted to him by noon, then told her around 10:00 a.m. to leave immediately because she had already tied up loose ends and submitted her letter of resignation. Mr. LeFevre was credible in testifying that he verbally accepted Grievant's resignation when Grievant handed him her letter of resignation. Both parties seem to agree that Mr. LeFevre wanted Grievant to resign. Mr. LeFevre testified that he told Grievant he did not have permission to terminate her at that point, but that "if I get permission to terminate you, you will not get a chance to resign." This statement embodies Mr. LeFevre's motive and posture at his meeting with Grievant. He did not shy away from broadcasting that he wanted her gone and that he would get rid of her as soon as he had permission to do so. Thus, it is highly plausible that Mr. LeFevre verbally accepted Grievant's resignation when she tendered her letter of resignation to him. It is apparent to the undersigned that even though Mr. LeFevre did not yet have permission to terminate Grievant, he would not forgo the same opportunity she presented to him when she submitted her letter of resignation. The only evidence presented as to Grievant's motive in leaving at 10:00 a.m. was that Mr. LeFevre told Grievant to leave in conjunction with the tendering and acceptance of her resignation. In leaving the facility around 10:00 a.m., Grievant broadcasted her understanding that she had resigned and that her resignation had been accepted.

Mr. LeFevre told Grievant upon receiving her written resignation that it was accepted. However, Grievant implies that acceptance entails more than just verbally

agreeing to it, yet presented no authority for this proposition. Conversely, the West Virginia Supreme Court has stated, "[w]e find no reason to follow the course taken by some states of imposing a rigid requirement on governmental agencies to formally, in writing or other prescriptive means, indicate acceptance whenever a classified public employee tenders a resignation." *W. Va. Dep't of Envtl. Prot. V. Falquero*, 228 W. Va. 773, 780, 724 S.E.2d 744, 751 (2012). The only requirement for the method of tendering and accepting a resignation is that the tender be made to the right person and that it be accepted or acted upon in any manner. This Board has previously held that an employee is bound by a representation of resignation when the representation is made to a person with the authority to address such personnel matters. *See Welch v. W. Va. Dept. of Corrections*, Docket No. 95-CORR-261 (Jan. 31, 1996). Mr. LeFevre possessed authority to accept Grievant's tender of resignation to him. "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. Pt. 4*, W. Va. Dep't of Envtl. Prot. V. Falquero*, 228 W. Va. 773, 724 S.E.2d 744 (2012).

Grievant contends that she rescinded her resignation before it was accepted. "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." *Id.*, Syl. Pt 3. The undersigned has already determined that Mr. LeFevre accepted the resignation before Grievant left the facility on the morning of July 5, 2018. Grievant admits that she submitted her letter to rescind her resignation later that afternoon upon returning to the facility. The undersigned

therefore concludes that the acceptance occurred before Grievant attempted to rescind her resignation.

Grievant alleges constructive discharge by Respondent, effectuated when Mr. LeFevre coerced her into resigning through misrepresenting to Grievant that if she resigns she “can work” for other State agencies but if fired she “won’t be able to work” for the State again. The Fourth Circuit has held that constructive discharge includes depriving an employee of a “free and informed choice”. “A public employer obviously cannot avoid its constitutional obligation to provide due process by the simple expedient of forcing involuntary resignations. Accordingly, where an employee's purported resignation was so involuntary that it amounted to a constructive discharge, it must be considered a deprivation by state action triggering the protections of the due process clause. Generally, courts have found resignations involuntary where forced by duress or coercion. Thus, courts must examine whether the conduct deprived the employee of ‘a free and informed choice’ regarding her retirement.” Syl. Pt. 4, *Miller v. Balt. City Bd. of Sch. Comm'rs*, 565 Fed. Appx. 262 (2014).

Respondent argues that constructive discharge necessitates intolerable working conditions. In support thereof, Respondent relies on the following: “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).

Grievant counters 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). Grievant contends that her resignation was not voluntary. Voluntary means acting "intentionally and without coercion". BLACK'S LAW DICTIONARY 1575 (6th ed. 1990). "The presumption of voluntariness may be rebutted if the employee can establish that the resignation was the product of duress or coercion brought on by the employer, was based on misleading or deceptive information, or if the employee was mentally incompetent. *Scharf v. Dep't of Air Force*, 710 F.2d 1572, 1574_75 (Fed. Cir. 1983). Resignations that are obtained through coercion or deception are contrary to public policy. *Welch* , supra." *Quigley v. Kanawha County Board of Education*, Docket No. 01-20-105 (Aug. 30, 2001). If *Slack* and *Quigley* are read in conjunction with each other, an employee may convert a resignation into

constructive discharge by either proving that intolerable working conditions led to the resignation or that the resignation was involuntary.

In support of her contention that constructive discharge is not limited to resignation in lieu of intolerable working conditions, Grievant notes that this Board has treated as constructive discharge resignations induced by misrepresentation or coercion. "Resignations which are obtained through coercion or deception are contrary to public policy. *Adkins, supra; McClung, supra; Falquero, supra, Perkins, supra*." *Richardson v. West Virginia Department of Health and Human Resources*, Docket No. 2013—0144-DHHR (May 13, 2015). This Board has taken a nuanced approach to constructive discharge. "Factors to be considered in the analysis are whether the employee was given time to consider his or her course of action or to consult with anyone; whether the resignation was abruptly obtained and/or inconsistent with the employee's work history; and whether the employer had reason to believe that the employee is not of a state of mind to exercise intelligent judgment. 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 of the employer. Whether a resignation was voluntary is a question of fact which must be resolved on a case-by-case basis. *Smith v. W. Va. Dep't of Corrections,* Docket No. 94-CORR-1092 (Sept. 11, 1995)." *Dawson v. Division of Natural Resources*, Docket No. 2015-1301-DOC (Dec. 14, 2016). In considering the voluntariness of Grievant's resignation, the undersigned must look at the fact that Grievant was not given time to consult her representative or spend the evening considering her options. Her resignation was obtained abruptly. Mr. LeFevre gave Grievant no alternative when

Grievant asked whether she had options besides being fired or resigning. By giving her no other option and going as far as telling her that "if I get permission to terminate you, you will not get a chance to resign", Respondent led Grievant to believe that it was contemplating firing her. The options presented to Grievant were either being fired or resigning in lieu of termination.

In assessing whether Mr. LeFevre's conduct was coercive, the undersigned must determine whether Mr. LeFevre misrepresented State policy and created an unjustifiable distinction between the termination and resignation in lieu of termination. Grievant referenced Respondent's Administrative Rule as the basis for her contention that Mr. LeFevre misrepresented State policy. While Mr. LeFevre accurately stated that Grievant would not be able to work for the State again if she was fired, he misstated policy in telling Grievant that she could work for the State again if she resigned when he knew that her resignation would be in lieu of termination. In telling Grievant his understanding of the Rule, Mr. LeFevre was applying it to Grievant's situation, which meant, given that Respondent had led her to believe it was contemplating her termination, that Grievant would be resigning in lieu of termination. Grievant cites the 2012 version of the Rule, which provides that Respondent must inform an employee prior to accepting their resignation of the possibility that their resignation "in lieu of" termination may affect their future employability with the State. While the 2016 version of the Division of Personnel's Administrative Rule is devoid of this provision, it still limits the State from rehiring an employee if the employee resigns after being informed that the State is considering dismissal. The rule provides that "[e]mployees informed of contemplated dismissal who choose to resign prior to issuance of formal notice or employees permitted to resign

through settlement after being dismissed are considered to have not separated in good standing, and the employee is ineligible for reinstatement and may be disqualified from employment in the classified service as provided in subsection 6.4 of this rule." W. VA. CODE ST. R. § 143-1-12.1.b. (2016). Subsection 6.4 of this rule provides that the Director[6] may prohibit the reinstatement of a former employee if "he or she has previously been dismissed, or resigned in lieu of dismissal, from any public service for delinquency, misconduct, or other similar cause". W. VA. CODE ST. R. § 143-1-6.4.a.5. (2016).

The circumstances surrounding his misrepresentation make it apparent that Mr. LeFevre was in the Weston DHHR office on July 5, 2018, to elicit a resignation from Grievant. Through misrepresenting that Grievant could work for the State again if she resigned (when Mr. LeFevre knew the resignation would be in lieu of termination), but would not work for the State again if she was fired, Mr. LeFevre created a sense of uncertainty and urgency. Grievant testified that she resigned because she wanted to work for the State again in the future. Grievant felt compelled to ensure that she acted before Respondent fired her so she could work for the State again. Grievant's actions must be analyzed through the eyes of a reasonable person. 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). It was reasonable for

[6]"The Director of Personnel, as provided in W. Va. Code § 29-6-7 and § 29-6-9, who serves as the executive head of the Division of Personnel, or his or her designee." W. VA. CODE ST. R. § 143-1-3.30. (2016).

Grievant not only to believe Mr. LeFevre's misrepresentation, but to act on it. Mr. LeFevre is a high-ranking member of management at DHHR and thus it was reasonable for Grievant to assume that Mr. LeFevre knew State employment policy. She had no reason to question the accuracy of Mr. LeFevre's statement. As such, it was reasonable for her to ensure her future employability with the State by resigning immediately before Respondent could fire her. Mr. LeFevre told Grievant that "if I get permission to terminate you, you will not get a chance to resign." The circumstances surrounding this statement, including Mr. LeFevre testifying to making it even though it appears to be against Respondent's interest, make its pronouncement highly plausible. Mr. LeFevre added further urgency through the imposition of an artificial deadline. Grievant had little time to consider her options and to check with her union representative regarding the accuracy of Mr. LeFevre's representation of State policy before she resigned.

The fact that upon leaving the facility Grievant did talk to her representative and did determine that Mr. LeFevre had misrepresented State policy shows that, given time to review her options, Grievant would have obtained sound legal advice and would have decided against resigning. Employees frequently resign as a result of a well-reasoned cost-benefit analysis to avoid having a termination on their employment record. However, Grievant's only concern was whether she would be able to work for the State again. Mr. LeFevre's misleading restatement of policy coerced Grievant into immediately resigning by inducing her to believe that she could benefit from the false hope of future employability if she resigned before Respondent had the opportunity to fire her at a date uncertain and forever hinder her chances of future employment with the State. But for Mr. LeFevre's misrepresentation, Grievant would not have resigned. Grievant's resignation was

therefore an involuntary act induced by the coercion of Mr. LeFevre's misrepresentation of State policy.

Under the Rule, the possibility exists for Grievant to work for the State again subsequent to resigning in lieu of termination or being fired. However, the decision belongs to the Director of Personnel. The Rule provides that the Director "may" prohibit reinstatement. "May" indicates discretion and, contrasted against the certainty of "shall", denotes uncertainty and speculation. See BLACK'S LAW DICTIONARY 979, 1598 (6th ed. 1990) In telling Grievant she "can work" for the State again if she resigns in lieu of being terminated, Mr. LeFevre was informing Grievant that she was the one who could control her eligibility through resigning and thereby avoid becoming "ineligible for reinstatement". "Can" means "to have a right to" or "to have permission to". BLACK'S LAW DICTIONARY 206 (6th ed. 1990) Mr. LeFevre told Grievant she "can work" for the State again if she resigns (knowing it would be in lieu of termination). This inaccurately implied that Grievant could avoid the alternative of not being able work for the State again if fired, when the Director clearly was the only one with discretion to reinstate, whether Grievant was fired or resigned in lieu of termination.

"Could" and "can" are sometimes interchangeable with "may".[7] In the context of her testimony, Grievant was not using "can/could" interchangeably with "may" when she testified regarding Mr. LeFevre's representation of the Rule. Grievant's implied understanding was that she would be able to work for the state again if she resigned and would not be able to if she was fired. This understanding can be seen in her testifying

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[7]It is "sometimes used interchangeably with may". WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 200 (1983).

that Mr. LeFevre said she “won’t be able to work” for the State again if fired. “Won’t”, of course, is short for “will not”. “Will” means “shall or must” and “is a word of certainty”. See BLACK’S LAW DICTIONARY 1598 (6th ed. 1990) It denotes the high probability or certainty of action as opposed to the possibility of action inherent in “can” or “may”. Mr. LeFevre misrepresented to Grievant a stronger certainty for future unemployability for firing versus resigning when there is no difference in certainty under the rule, but also created a distinction between firing and resigning (knowing it would be in lieu of termination) when the rule treats the two identically. Therefore, not only did Mr. LeFevre misrepresent the Rule in leading Grievant to believe she would be able to work for the state again if she resigned in lieu of termination but also misrepresented a distinction between future employability with the State for those employees who resign in lieu of termination and those who are fired.

Respondent contends that Mr. LeFevre never told Grievant that Respondent was contemplating firing her. However, Mr. LeFevre testified that he told Grievant on July 5, 2018, that he did not have the authority that day to fire her and that she would never be able to work for the State again if she was fired. Mr. LeFevre also testified that he told Grievant he did not have permission to terminate her at that point, but that “if I get permission to terminate you, you will not get a chance to resign.” Grievant gave unrefuted testimony that Mr. LeFevre told her she could work for the State if she resigned but would not be able to if fired. It is highly plausible that through the consistency of these statements to Grievant, Respondent did reasonably cause Grievant to believe that Respondent was contemplating her dismissal. Grievant reasonably thought that her firing was imminent. While Mr. LeFevre credibly testified that he told Grievant he did not have

the authority to fire her that day, the plausibility of Grievant's belief made it credible that Mr. LeFevre did in fact have that authority and was either going to fire her that day or in the near future. Grievant's access badge was non-operational when she got to work that day and Mr. LeFevre in effect put a deadline on Grievant's resignation by telling Grievant to leave by noon, and then ordering her to leave at 10:00 a.m. There was no evidence that Grievant was told she would have been fired or at least suspended that day. Nevertheless, in giving Grievant a deadline by which to leave and submit her written resignation, Mr. LeFevre reasonably affirmed her belief that she would be fired. Grievant did not have the choice to ignore Mr. LeFevre and go about her normal day. The fact that he told her that "if I get permission to terminate you, you will not get a chance to resign" and that she would not be able to work for the State again if fired, reasonably led her to believe that she would be fired and the effect on her future employability with the State would be irreversible. Because Mr. LeFevre led Grievant to believe he was contemplating firing her, he knew that if Grievant resigned it would be in lieu of termination.

There is no distinction under the Rule between termination and resignation when resignation is in lieu of termination. "In lieu of" means "in the place of."[8] Section 12.1.b offers insight into the intended definition of "in lieu of" when it presumably uses the phrase "employees informed of contemplated dismissal" interchangeably with "in lieu of". Section 12.1.6 states that "employees informed of contemplated dismissal who choose to resign prior to issuance of a formal notice . . . are considered to have not separated in good standing." Section 6.4.a.5 and section 12.1.b both mention the possibility of future ineligibility to work for the State. Mr. LeFevre informed Grievant that Respondent was

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[8] THE NEW MERRIAM-WEBSTER DICTIONARY 425 (1989).

contemplating dismissing her. Mr. LeFevre's statements and behavior on July 5, 2018, led Grievant to reasonably believe that she would soon be fired. Grievant chose to resign prior to formal issuance of a dismissal. Therefore, if sections 12.1.b and 6.4.a.5 are to be read as consistent with each other, and in light of the evidence, it is apparent that Grievant resigned "in lieu of" termination.

Grievant testified that she resigned because she did not want to be fired (although her stated aversion to being fired was purely based on its adverse effect on her future employability with the State). While Respondent no longer had a duty under its rules to inform Grievant that her resignation in lieu of termination would inhibit her future employability with the State, it did not have leeway to misrepresent its policy in a manner to coerce Grievant into resigning. Respondent's misrepresentation was coercive and induced Grievant into resigning involuntarily. Grievant has proven constructive discharge.

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 his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. As a general rule, an employee may be bound by her verbal representations that he is resigning when they are made to a person or persons with the authority to

address such personnel matters. *See, Welch, supra; Copley v. Logan County Health Dept.*, Docket No. 90-LCHD-531 (May 22, 1991).

3. "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*.

4. "[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).

5. "Resignations which are obtained through coercion or deception are contrary to public policy. *Adkins, supra; McClung, supra; Falquero, supra, Perkins, supra*." *Richardson v. West Virginia Department of Health and Human Resources*, Docket No. 2013-0144-DHHR (May 13, 2015).

6. “Factors to be considered in the analysis are whether the employee was given time to consider his or her course of action or to consult with anyone; whether the resignation was abruptly obtained and/or inconsistent with the employee's work history; and whether the employer had reason to believe that the employee is not of a state of mind to exercise intelligent judgment. 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 of the employer. Whether a resignation was voluntary is a question of fact which must be resolved on a case-by-case basis. *Smith v. W. Va. Dep't of Corrections*, Docket No. 94-CORR-1092 (Sept. 11, 1995).” *Dawson v. Division of Natural Resources*, Docket No. 2015-1301-DOC (Dec. 14, 2016).

7. The Division of Personnel’s Administrative Rule limits reinstatement subsequent to resignation as follows: “Employees informed of contemplated dismissal who choose to resign prior to issuance of formal notice or employees permitted to resign through settlement after being dismissed are considered to have not separated in good standing, and the employee is ineligible for reinstatement and may be disqualified from employment in the classified service as provided in subsection 6.4 of this rule.” W. VA. CODE ST. R. § 143-1-12.1.b. (2016). Subsection 6.4 of this rule provides that “[t]he Director may temporarily or permanently prohibit” the reinstatement of an applicant, disqualify or remove his or her name from a register or certification, or refuse to certify an eligible person on a register if “he or she has previously been dismissed, or resigned in lieu of dismissal, from any public service for delinquency, misconduct, or other similar cause”. W. VA. CODE ST. R. § 143-1-6.4.a.5. (2016).

8. Grievant proved by a preponderance of the evidence that Respondent misrepresented State policy while knowing that Grievant's resignation would be in lieu of termination, when Mr. LeFevre told Grievant that if she resigns she "can work" for other State agencies but that if she is fired she "won't be able to work" for the State again.

9. Grievant proved by a preponderance of evidence that Respondent coerced her resignation through misrepresenting State policy and that she resigned involuntarily, resulting in constructive discharge.

Accordingly, the grievance is **GRANTED.**

Respondent is hereby ORDERED to reinstate Grievant to the Child Support Specialist II position, with applicable back pay and interest, seniority, and benefits.

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 (2018).

DATE: February 4, 2019

Joshua S. Fraenkel
Administrative Law Judge