

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**PAMELA BURNS,
Grievant,**

v.

Docket No. 2020-1061-KanCH

**KANAWHA CHARLESTON
HEALTH DEPARTMENT,
Respondent.**

DECISION

Pamela Burns, Grievant, was employed in the Nurse 3 classification by Respondent, Kanawha Charleston Health Department. Ms. Burns filed a level three¹ expedited grievance dated March 16, 2020, alleging that she had been forced to resign and had been constructively discharged. As relief, Ms. Burns seeks reinstatement to full-time status with backpay and interest, as well full benefits restored, including annual and sick leave.

A level three hearing was conducted on August 5, 2020, at the Charleston office of the West Virginia Public Employees Grievance Board. Grievant personally appeared and was represented by Steve Thompson and Gordon Simmons. Respondent was represented by Christopher D. Negley, Esquire, Shuman, McCuskey, Slicer, PLLC. This matter became mature for decision on September 8, 2020, upon receipt of the last Proposed Findings of Fact and Conclusions of Law submitted by the parties.

¹ See W. VA. CODE § 6C-2-4(a)(4) which allows certain grievances to be filed directly to level three.

Synopsis

Grievant was employed in the position of a Nurse 3 and was serving a probationary period. She was given the difficult choice of resigning or being dismissed. Grievant chose the “resign under protest.” She alleges that her resignation was given under duress, involuntary, and resulted in a constructive discharge. Grievant was unable to perform essential recording keeping functions of the job after receiving more than the regular amount of training. She was given time to consider her choice and consult with an advisor. She did not prove that her resignation was involuntary. Even if Grievant’s resignation was involuntary, she did not prove that her job performance during the probationary period was satisfactory. Therefore, her dismissal was justified.

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

Findings of Fact

1. Pamela Burns, Grievant, was employed in the Nurse 3 classification by Respondent, Kanawha Charleston Health Department (“KCHD”).

2. For more than twenty-five years, Grievant has held various nurse positions for public and private employers including the following:

- Clinical Nurse Specialist at Charleston Area Medical Center (CAMC);
- Staff Nurse at CAMC;
- Infusion Therapy Specialist with CAMC;
- Nurse III/Nurse Case Manager with the West Virginia Workers Compensation Commission;
- Medical Review Specialist for the healthcare business known successively as Unisys, Molina Health Care, and DXC Corporation.

3. In the fall of 2019, Grievant was employed as a temporary nurse employee in the Respondent's seasonal flu clinic program. The program provided flu immunizations at workplaces in the Kanawha Valley.²

4. The KCHD's flu clinic program does not require the nurses to collect Electronic Health Records ("EHR") for entry into the KCHD's patient portal for clients receiving the immunizations. Only paper records are generated as the only injection involves seasonal influenza.

5. Respondent posted a job vacancy dated November 25, 2019, for a classified Nurse 3 position which listed the employment duties as:

Under limited supervision, at the advanced level, this position provides public health nursing duties. Duties will include assessment of health care needs for patients and communities, the development of plans of care when appropriate, and implementation and evaluation of community health interventions including immunization and other health clinics. The employee will participate in community educational activities that promote awareness and support for improved healthy habits/behaviors in the population. Employee will also perform public health emergency response duties as assigned & consistent with job classification and training provided in response to threats to the public's health. Performs related work as required.³

6. Grievant Burns applied for the Nurse 3 position and was selected. She was given the starting date of February 14, 2020 for a six-month probationary period.

7. Grievant's position was in KCHD Clinical Services which provides among other things, immunizations, blood pressure checks, school flu clinics, work flu clinics, STD prevention and treatment, and Tuberculosis testing.

² As a temporary employee Grievant was exempt from the classification system because she did not work more than 1,000 hours within a twelve-month period.

³ Grievant Exhibit 5.

8. KCHD utilizes an Electronic Health Record (“EHR”) system to maintain records for all its patients and clients. The specific software used by Respondent is titled “Advanced MD.” Unlike the temporary nurses in the influenza program, all full-time KCHD staff members are required to enter all medical data in the EHR system at the time of service, eliminating the need for paper records.

9. The EHR system contains a patient’s medical history, diagnoses, medications, treatment plans, immunization dates, allergies, radiology images as well as laboratory and test results. EHRs also allows health information to be created and managed by authorized providers in a digital format capable of being shared with other providers across different clinical settings.

10. To make the Advanced MD program effective, the staff member must place real-time patient information into the system so that proper care can be provided. For example, if the patient suffers from allergies, the Advanced MD program would contain a summary record of the allergy recorded by staff. Such record then stays with the patient’s medical history for all future health care activities. This not only facilitates treatment but helps eliminate accidents such as administering medication that a patient is allergic to. It is imperative that the staff be able to effectively utilize the Advanced MD program as a part of their duties.

11. Though not specifically listed in the job posting, utilization of the EHR system was an essential duty of the Nurse 3 position Grievant applied for and received.

12. The period of Grievant’s full-time employment with KCHD was during the busy flu season and at the time the Covid-19 pandemic was reaching America. It was a

very busy time for the Health Department and a nurse who could work quickly and effectively within their EHR system was needed.

13 Grievant reported to her first day of full-time employment with Respondent on February 14, 2020. In addition to general orientation, Grievant received her initial training on the Advanced MD program by Candace Nunley, LPN, Clinic Office Manager. Office Manager Nunley trained Grievant on Advance MD for one hour and provided her with multiple instructional videos which give step-by-step instructions for performing various tasks in the record keeping program. This is the standard orientation training Ms. Nunley provides to all KCHD new hires. She stated, without evidence to the contrary, that no one else had needed additional training to operate Advanced MD.

14. Greg Rinehart, Respondent's IT technician, instructed Grievant regarding resetting her password for her computer access. He is not responsible for training KCHD employees on the operation of Advanced MD. His role is to maintain the computers and the computer network.

15. LPN Nunley is the training officer for the Advanced MD program utilized by the KCHD. She provides instruction in proper utilization of Advanced MD to all new hires.

16. After the training with Ms. Nunley, Grievant joined and observed Nurse Director Snaman while she was seeing clients and providing services. While performing these tasks, Ms. Snaman provided Grievant with a practical review of the step-by-step procedure to document patient visits on Advanced MD. Grievant was also given time to complete two on-line training modules for the data entry program.⁴

⁴ Respondent Exhibit 15, a day-by-day account of Nurse Director Snaman's interactions with Grievant. Ms. Snaman personally testified to the content of this diary.

17. After the forgoing activities, Grievant received further training on Advanced MD from Nurse Director Snaman, her supervisor. Director Snaman also completed Grievant's initial Employment Performance Appraisal ("EPA-1"), which sets out goals and expectations for the employee. Grievant's Standards and Expectations for computer entry in some date entry systems were listed in the EPA-1 as follows:

5. Will complete enrollment process on the West Virginia Statewide Immunization Information System (WVSIIIS), become proficient in reviewing immunization records from WVSIIIS for completeness, and become familiar with data entry process of immunization histories by 07/31/2020.

6. Will complete enrollment in West Virginia Electronic Disease Surveillance System (WVEDSS) and become proficient with program's use for the case management needs of the agency and State tuberculosis (TB) program by 08/31/2020.⁵

18. Grievant's next day of work was Tuesday, February 18, 2020.⁶ In the morning, Grievant was assigned to shadow Nurse Sherry Graves for additional orientation by following her through patient meetings in the clinic. Nurse Graves demonstrated the step-by-step process for the patient visits including entering all documentation on Advanced MD. In the afternoon, Nurse Graves worked with Grievant on entering into Advanced MD, the paper documentation gathered during the Flu Vaccine Campaign in which Grievant had participate as a part-time employee. By the end of the day, Grievant, working with Nurse Graves' guidance, was only able to enter information from one and a half charts.⁷

⁵ Grievant Exhibit 4.

⁶ Monday February 17th was a legal holiday.

⁷ Graves did note that while going out to Clinics with Grievant, she observed that Grievant was "very proficient at injecting." No computer data entry was required at the Flu clinics.

19. On Wednesday, February 19, 2020, Grievant again worked with Nurse Director Snaman in the clinic. They went through patient visits step-by-step. When Ms. Snaman would ask Grievant the next step during the process data entry process, Grievant could not answer. Grievant was not progressing with Advanced MD which seriously concerned Ms. Snaman since other new employees had not suffered similar problems utilizing the program.⁸

20. Grievant took notes during her training and rewrote them when she got home. She told her supervisor that the best way for her to learn was to use her notes until she could work without them. She had her notes with her during her orientation sessions in the clinic, but they did not improve her performance.

21. Grievant told her supervisors that she had used an EHR data entry system at a previous employer. The trainer worked with Grievant daily until she was able to master the program. Her previous employer gave employees seven weeks to master the EHR program. She felt she was not being taught in a way that worked best for her and was not given sufficient time to learn how to input the data.

22. The next day, Thursday, February 20th, Grievant worked at entering data from the flu clinic she had worked on the previous Tuesday, and again, worked in the clinic with Ms. Snaman. Grievant was unable to successfully enter the flu data into Advanced MD. Additionally, Grievant was showing a continuing inability to document the health care needs of the KCHD's clinical practice to clients. Consequently, Snaman provided additional training to Grievant.

⁸ Nurse Deanna Bonham also gave Grievant some instruction on use of the Advanced MD system during the first week. Grievant found Ms. Bonham's instruction helpful but Nurse Bonham had to concentrate on her own assignments.

23. On Friday, February 21st, Grievant had a meeting with Administrator McCormick, and Nurse Director Snaman. Administrator McCormick again emphasized to Grievant the importance of making significant progress with the Advanced MD program by February 26, 2020, or they would have to dismiss her unless she chose to resign. Grievant was upset and stated that maybe she should just resign. Administrator McCormick told her to not do anything hasty and they should just see how things went in the coming days.

24. Grievant gave a letter to Ms. Snaman dated February 20, 2020, stating that she was not aware of time limits for each patient visit, and that she had not received training on a computer system which was new to her. She reiterated that she had successfully used EHR systems with other employers after being properly trained. (Grievant Exhibit 7)

25. Grievant was absent from work due to an excused absence for medical reasons from Monday, February 24, 2020 through Friday, February 28, 2020. Grievant suffered a significant flair up of an ongoing medical condition and provided the appropriate medical documentation from her doctor.

26. Grievant sent a hand-delivered letter to Administrator McCormick dated February 25, 2020.⁹ Grievant asked for written confirmation of “my understanding of the discussion” which took place on Friday, February 21, 2020. She noted she was told that her computer skills were not up to par. She stated that it was “her understanding that the expectation for [her] computer skills to be proficient after 4 days is unreasonable,

⁹ This letter was drafted while Grievant was unable to report to work and was delivered to the Health Department on her behalf by her sister.

especially with a West Virginia Division of Personnel probationary period of 6 months.” She stated that she was given an ultimatum to resign on February 26, 2020 or be dismissed. After further discussion, she asked “for written clarification of the reason for the apparently, impending termination of [her] job duties.” She indicated that the actual reasons might be budgetary. (Emphasis in original; Grievant Exhibit 8).

27. Administrator McCormick responded by email later that evening. She stated that she was “unable to confirm what [Grievant’s] understanding of the meeting is or isn’t.” In response to Grievant’s request for written clarification of the reasons for her impending dismissal Ms. McCormick wrote “A written probationary dismissal letter will be provided to you which will outline the specific reasons for your dismissal at the time of your dismissal.” She went on to note that at the meeting she believed Grievant would be returning to work the following Monday. She and Ms. Snaman would follow up with her after two days of additional training. In recognition that Grievant had been off work due to illness Ms. McCormick wrote:

Ms. Snaman and I will meet with you upon your return and still provide you with two additional training days as noted at the February 21, 2020 meeting and follow up the third day. Additional time will be provided if significant improvement is demonstrated.¹⁰

28. On Monday, March 2, 2020, Grievant returned to work. Administrator McCormick, Nurse Director Snaman and Grievant held a meeting whereupon it was decided to provide Grievant with additional training with Candace Nunley on the Advanced MD program and with Debra Snaman on both the Advanced MD and the clinical side. McCormick gave Grievant until Thursday, March 5, 2020, to be able to work

¹⁰ Grievant Exhibit 9.

independently as a Nurse 3 including patient visits and EHR documentation. By that date, Grievant was to be able to access a patient's Advanced MD chart, complete the document, assess the patient's needs, obtain Ms. Snaman's approval that the steps were done correctly, then sign the Advanced MD record and save the result into the system.

29. On March 2nd Grievant also received two additional hours of Advanced MD program training from Ms. Nunley and Grievant continued to shadow Snaman with clinical duties. Grievant remained unable to access a patient's records regarding his allergies and became confused when trying to determine which vaccine a different patient needed.

30. The next day, Grievant called in at 11:30 a.m. to say that she had overslept. When she arrived at work, she again worked in the clinic with assistance from Ms. Snaman. Grievant was unable to access the Advanced MD system during Tuberculosis testing.

31. On Wednesday, March 4, 2020, Grievant was assigned to work with patients. She was asked to provide patient care utilizing Advanced MD while Ms. Snaman observed and made corrections if necessary. While working with the first patient Grievant became frustrated and upset. She got up from the station stating she did not think she could do the work with the Advanced MD program. Similar incidents occurred throughout the remainder of the day with the Grievant unable to provide initial care and Snaman completing the patient care with Grievant only assisting. Grievant had difficulty assisting Ms. Snaman because she was upset.

32. Ms. Snaman reported to Ms. McCormick that Grievant was still struggling with completing patient records. Thereafter, Administrator McCormick asked Grievant and Nurse Director Snaman to report to her office. They discussed the difficulties Grievant

was continuing to have. Grievant told Ms. McCormick that she believed she would resign that day. Ms. McCormick told Grievant:

I want you to understand that is your decision. We are not forcing you to resign. You will still have the rest of the week to show that you can perform the job.¹¹

33. Later that afternoon, Grievant hand-delivered a letter to Administrator McCormick stating the following:

I am writing this letter in response to your verbal ultimatum that you directed me to make a decision whether or not to resign my position as a Nurse III or be terminated at the close of business March 6, 2020. I have decided to RESIGN UNDER PROTEST at the close of business March 6, 2020. (Emphasis in original).

Grievant stated that she was being treated unfairly since she had only started on February 14, 2020, and was told she would receive training. She believed the training would continue until the end of her six-month probationary period. Grievant concluded by stating:

I wish there was another alternative for me to stay employed as I need the job and the benefits. Also, I wonder if this is being done in retaliation to my absence of last week due to a medical disability (of which I provided doctor's excuses) or my age?¹²

34. On Thursday March 5, 2020, Grievant continued to work with Ms. Snaman in the clinical setting. There was no indication of any improvement in the record keeping functions or Grievant's ability to manipulate the Advanced MD program.

¹¹ Respondent Exhibit 5. Contemporaneous notes taken by Director McCormick following the March 4, 2020 meeting and recorded in a memorandum dated March 6, 2020, which was provided to the Division of Personnel.

¹² Grievant Exhibit 11.

35. On March 6, 2020, a predetermination conference was held regarding the issues Grievant was having performing her job. Present at the meeting were Nurse Director Snaman, Administrator McCormick, Grievant and Grievant's sister, Robin Graley. Ms. McCormick told Grievant that she was recommending that her probationary employment be terminated based upon Grievant's inability to perform assigned nursing tasks, retain training information and perform tasks based on that training, and inability to document patient information in the electronic medical records system. Ms. McCormick cited examples of these problems. Ms. Graley asked why they were having a predetermination conference when Grievant had given Respondent a letter dated March 4, 2020 stating that she was resigning under protest. At that time, Administrator McCormick verbally accepted the resignation and the meeting ended.

36. Following the meeting, Administrator McCormick sent a memorandum dated March 6, 2020, to the Division of Personnel memorializing the predetermination conference and Grievant's resignation.¹³

Discussion

Grievant argues that her resignation obtained through coercion and deception. She alleges that her resignation was forced by Respondent rather than voluntary and constitutes a constructive discharge.¹⁴ Since this grievance does not challenge a disciplinary action, Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of*

¹³ Grievant Exhibit 12.

¹⁴ Notwithstanding some of Grievant's communications, she did not argue that her dismissal was based upon her age, her utilization of sick leave, or for reasons not stated by Respondent. Accordingly, the issues are not addressed herein.

Proof. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

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. *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); *Falquero v. Dep't of Envir. Protection*, Docket No. 2008-1596-DEP (Dec. 16, 2008).

If management's actions were unreasonable, on the whole, and Grievant had no other alternative than to resign, then constructive discharge is a viable claim. "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." *Falquero v. Dep't of Enviro. Protection*, Docket No. 2008-1596-DEP (Dec. 16, 2008); *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).

Factors to be considered in the analysis are 1) whether the employee was given time to consider his or her course of action or to consult with anyone; 2) whether the resignation was abruptly obtained and/or inconsistent with the employee's work history; and 3) whether the employer had reason to believe that the employee is not of a state of mind to exercise intelligent judgment. Duress has been found in situations 1) where the employee involuntarily accepted the employer's terms; 2) the circumstances surrounding the resignation permitted no other alternative; and 3) 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).

The case of *McClung v. W. Va. Dep't of Public Safety*, Docket No. 89-DPS-240 (Aug. 14, 1989) appears to be the first case where the issue of constructive discharge was addressed by the Grievance Board. That case also dealt with a grievant who was

faced with the choice of resigning or being dismissed. Upon arriving at work, a nineteen-year old employee was directed to report to a Lieutenant's office, who advised him, in the presence of other DPS officials, of misconduct he was alleged to have committed. The grievant was presented with a termination letter and a letter of resignation which had been prepared prior to his arrival and was told that he would immediately be terminated unless he resigned. The grievant was given a brief opportunity to talk with his father before deciding.

The Administrative Law Judge ("ALJ") concluded that under the circumstances of that case, the grievant's resignation was involuntary. Grievant was only nineteen years old and was given only a very brief time to decide whether to resign in order to avoid an immediate termination based upon alleged acts of misconduct. The resignation, which was made effective immediately, was imposed by DPS as a condition to avoid an immediate termination. The ALJ noted that "where an employee is faced merely with the unpleasant alternative of resigning or being subject to removal for cause, such limited choices do not necessarily make a resulting resignation an involuntary act. *See, Schultz v. United States Navy*, 810 F.2d 1133 (Fed. Cir. 1987)." *Id.* But the ALJ concluded that the grievant's age and inexperience, the fact that he was given the choice of resigning or being discharged immediately and given very little time opportunity to consult with someone before making the decision, lead to the conclusion that grievant's resignation was not voluntary.¹⁵ Without specifically enumerating them, the ALJ seemed to utilize

¹⁵ After the ALJ found that the resignation was involuntary, he found that the employer proved sufficient misconduct to warrant the grievant's dismissal. *McClung v. W. Va. Dep't of Public Safety*, *supra*.

factors later set out in *Smith v. W. Va. Dep't of Corrections*, *supra* in reaching his conclusion that the resignation was involuntary.

In the present case, Grievant was also faced with the unpleasant alternative of resigning or being subject to removal for cause. However, unlike in *McClung*, Grievant was first warned on February 21, 2020, that if she did not make significant progress on the electronic reporting system by February 26, 2020, she would be dismissed unless she chose to resign. Grievant discussed resigning that day but was encouraged to think about it and see how further training went. That deadline was extended to March 6, 2020, after Grievant returned to work from an illness on March 2nd. Grievant met with Administrator McCormick on March 4, 2020 to discuss difficulties she was continuing to have with electronic patient records. Grievant indicated again that she might resign that day. Ms. McCormick told her it was her decision; they were not forcing her to resign, and she had the rest of the week to show significant improvement. Later that evening, Grievant gave Ms. McCormick a letter stating that she was “resigning under protest.”

Unlike *McClung*, Grievant is not new to the workforce. Prior to working for Respondent, she had more than twenty-five years of successful work experience. She was also given time to consult with others before making a final choice between resigning and dismissal. When these circumstances are applied to the factors set out in *Smith v. W. Va. Dep't of Corrections*, *supra*, it is clear that Grievant was given time to consider her course of and consult with an adviser. The resignation was not abruptly obtained, and Respondent had no reason to believe Grievant was unable to exercise intelligent choice. Thus, even though Grievant wrote that her resignation was under protest, it was a voluntary choice of resignation versus dismissal, and there was no evidence that Grievant

was coerced by Respondent. Consequently, Grievant's resignation was voluntary, and she did not prove that she was subjected to constructive discharge.

As was pointed out in *McClung, supra*, even if Grievant's resignation was involuntary, the question of whether Grievant's dismissal as a probationary employee was justified remains. When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res.*, Docket No. 2008-0958-DHHR (Mar. 13, 2009). Grievant "is required to prove that it is more likely than not that his services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 2008).

The Division of Personnel ("DOP") Administrative Rule describes the probationary period as follows:

10.1.a. The probationary period is a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency. It is an integral part of the examination process and the appointing authority shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work.

W. VA. CODE ST. R. § 143-1-10.1.a. The same rules state that an employee may be dismissed at any time during the probationary period if the employer finds his or her services are unsatisfactory.

“[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep’t of Transp.*, Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep’t of Health and Human Res.*, Docket No. 99-HHR-299 (Aug. 31, 1999).” *Lott v. W. Va. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

The time period and training given to Grievant to learn the Advanced MD software was short. However, the undisputed evidence demonstrated she was given the same initial training which was given to other new hires for the KCHD, which was sufficient for them to work within the system. Grievant was given additional time, training and practice, and did not make significant progress in the case history software. The use of this software was an essential duty of the position.

Grievant is undoubtedly a skilled nurse with many years of experience. However, in this case, for whatever reason, she was unable to perform an essential function of the job regarding accessing and recording data in the Advance MD system. As a result, Grievant did not prove by a preponderance of the record that her performance during her probationary period was satisfactory.

Conclusions of Law

1. Since this grievance does not challenge a disciplinary action, Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of

the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. 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).

3. 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).

4. 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. *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); *Falquero v. Dep't of Envir. Protection*, Docket No. 2008-1596-DEP (Dec. 16, 2008).

5. If management's actions were unreasonable, on the whole, and Grievant had no other alternative than to resign, then constructive discharge is a viable claim. "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." *Falquero v. Dep't of Enviro. Protection*, Docket No. 2008-1596-DEP (Dec. 16, 2008); *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).

6. Factors to be considered in the analysis are 1) whether the employee was given time to consider his or her course of action or to consult with anyone; 2) whether the resignation was abruptly obtained and/or inconsistent with the employee's work history; and 3) whether the employer had reason to believe that the employee is not of a state of mind to exercise intelligent judgment. Duress has been found in situations 1) where the employee involuntarily accepted the employer's terms; 2) the circumstances surrounding the resignation permitted no other alternative; and 3) 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).

7. Grievant did not prove by a preponderance of the evidence that her resignation was involuntary or that she was constructively discharged.

8. When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res.*, Docket No. 2008-0958-DHHR (Mar. 13, 2009). Grievant "is required to prove that it is more likely than not that his services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.*, Docket No. 2008-1489-DOT (Nov. 12, 2008).

9. The Division of Personnel ("DOP") Administrative Rule describes the probationary period as follows:

10.1.a. The probationary period is a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency. It is an integral part of the examination process and the appointing authority shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work.

W. VA. CODE ST. R. § 143-1-10.1.a. The same rules state that an employee may be dismissed at any time during the probationary period if the employer finds his or her services are unsatisfactory.

10. "[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-299 (Aug. 31, 1999)." *Lott v. W. Va. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which

presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

11. Grievant did not prove by a preponderance of the evidence that her probationary job performance was satisfactory.

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* 156 C.S.R. 1 § 6.20 (2018).

DATE: October 15, 2020

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE