THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WOLF ROGGENBACH,
Grievant,

v. **Docket No. 2019-1514-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
HOPEMONT HOSPITAL,
Respondent.

DECISION

Grievant, Wolf Roggenbach, was employed by Respondent, the Department of Health and Human Resources, at Hopemont Hospital. On April 19, 2019, Grievant filed this grievance against Respondent, stating, "Suspension without good cause." As relief, he seeks, "To be made whole in every way including back pay with interest and all benefits restored". This grievance was filed directly to level three of the grievance process, as authorized by W. Va. Code § 6C-2-4(a)(4). On June 21, 2019, Grievant requested his grievance be amended to include "dismissal without good cause and denial of due process." On July 2, 2019, Grievant again requested it be amended to include "improper discharge/constructive discharge[,] discrimination in violation of Title 9[,] violation of Patient Safety Act".

At a level three hearing on July 31, 2019, Respondent moved to dismiss and Grievant submitted 12 exhibits supporting his requests to amend. The parties were given until September 9, 2019, to submit any stipulated exhibits and memorandum. They never submitted stipulated exhibits. Instead, on August 26, 2019, Grievant sent the Grievance Board 19 exhibits, the first 12 of which had been made part of the record during the hearing on July 31, 2019. On August 30, 2019, Respondent filed a Memorandum in

Support of Respondent's Motion to Dismiss. On September 5, 2019,[1] Grievant filed a Response to Respondent's Motion to Dismiss and attached the 19 exhibits it had sent to the Board on August 26, 2019. On October 2, 2019, the undersigned issued an order deeming the resignation related claims as timely and the remainder of the amended claims as untimely.

The Covid-19 pandemic delayed scheduling. The level three hearings scheduled for June 1, 2020, and February 11, 2021, were continued. On September 2, 2021, a level three hearing took place online. Grievant appeared and was represented by Gordon Simmons. Respondent appeared by Jenny Fitzwater and was represented by counsel Steven Compton, Deputy Attorney General. The undersigned extended the parties the unsolicited curtesy of informing them that the level three record reflected 5 exhibits for Respondent and 12 exhibits for Grievant (all submitted at the July 31, 2019 hearing). Neither party moved for submission of any more exhibits before the hearing concluded.

On September 7, 2021, Grievant filed a Motion to Correct Evidentiary Record and attached thereto the 19 exhibits he had sent the Board on August 26, 2019, and September 5, 2019. Grievant asserted that he had without objection and at the undersigned's invitation submitted the additional exhibits on August 26, 2019, that he learned the record only included his first 12 exhibits after the Board sent him a copy of his exhibits, and that he did not hear the undersigned announce each party's exhibit count due to a bad zoom connection. Respondent submitted by email an objection to Grievant's exhibits 13 through 18. Grievant's exhibits 13 through 18 are excluded. This matter became mature for decision on November 23, 2021, after the parties agreed to extend

[1]This document was dated September 9, 2019.

the original mature date. Each party submitted written proposed findings of fact and conclusions of law.

Synopsis

Grievant emailed all employees and management on Wednesday, stating, "I am turning in my resignation effective immediately on Monday." While not then apparent, Grievant only intended to threaten resignation. Before Grievant could clarify, management accepted via text, reasonably interpreting the immediacy of his tender. Within minutes, Grievant texted back that he had not resigned but had simply proposed the possibility of resigning based on work conditions. The next day, management barred Grievant from work, telling him he was suspended without pay pending investigation into alleged misconduct. Grievant timely grieved this suspension. Two months later, Grievant finally learned he was processed as resigned and made two amended filings. The amended claims related to resignation were filed timely, but the remainder were untimely. Grievant did not prove that Respondent was unreasonable in interpretating his email as a tender of resignation rather than a threat of future tender. Grievant did not prove that the resignation was coerced or that he rescinded his resignation before it was accepted. As such, this 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, Wolf Roggenbach, was employed as a Clinical Applications Specialist (CAS) at Hopemont Hospital (Hopemont), a long-term care facility operated by Respondent, the Department of Health and Human Resources (DHHR).

2. Grievant reported directly to Hopemont Administrator Mark Nesland.

3. On Wednesday, April 17, 2019, Administrator Nesland told Grievant to relocate his office by Friday, April 19, 2019. (Grievant's testimony & Grievant's Exhibit 2)

4. On Wednesday, April 17, 2019, at 4:09 p.m., Grievant sent all employees at Hopemont, including management, a lengthy email that began, "I am turning in my resignation effective immediately on Monday." (Grievant's Exhibit 12)

5. Monday was April 22, 2019.

6. The email went on to state, in relevant part:

> I am done with the lies and politics from John Pritt and Mark Nesland that are blessed by the powers that be in Charleston, aka Shevona Lusk, Ginny Fitzwater. I cannot abide by their demands and their wishes. Our residents suffer and die needlessly. No one cares. The state is not on the side of us staff or our residents. They just don't care. Well, I, for Myself, care. I, as well as you all, care, and it does not matter. We and the residents are nothing but dollar signs and numbers. We tried, didn't we, to make a change? To love and care for our residents as we knew was demanded? Fight for the residents, because we are all they have, and know that you are the last ditch effort for them to live and thrive. God bless you all, and I have tears in my eyes to realize once and for all that administration and Charleston could not give less care about the value we all enjoy and bring to our residents. We are done. I love all of you. Politics be damned, we are Americans. Our forefathers fought for us to have a voice. Let it be proclaimed that we will not work under these conditions that deprive you of our choice! Let me alert all of you to all dark corners of the government that oppresses us to say enough:
> 1. Enough to huge salaries for Charleston …
> 2. Enough to the removal of Resident rights …
> 5. Covering for the administrative mistakes that led to the deaths of Residents, the silent majority will no longer be silent. See something, theory it to OHFLAC. John and Mark picking and choosing the reportables is done. Do not be afraid. You are all mandated reporters. USE YOUR VOICE AS AMERICANS, WEST VIRGINIANS AND HUMANS! Don't ever forget that West Virginia has never lost a fight …
> Do not let anyone anywhere or at anytime take away your constitutionally mandated voice as a Citizen of West Virginia and of the United States of America. This is what our forefathers did for us. Protect us. We could all be here at Hopemont. Accident, disease or age could make us be a resident here. Treat each other as we have would want to be treated. …

As Q ANON SAYS, ALL WILL COME TO LIGHT
Tearfully,
Wolf

7. Grievant did not intend to write "I am" resigning "immediately," but rather that he would possibly resign first thing Monday, April 22, 2019, if Respondent did not address his concerns. (Grievant's testimony)

8. However, before Grievant could clarify that he only intended to threaten the possibility of resignation, Respondent accepted his resignation.

9. On April 17, 2019, at 7:19 p.m., then Hopemont Assistant Administrator[2] John Pritt texted Grievant, "Wolfe Roggenbach I have your email and read text messages where you have indicated you have resigned your position as [H]opemont [CAS]. Your resignation is accepted. This is John Pritt." (Grievant's Exhibit 1)

10. Within minutes, Grievant texted back, "I have not. Reread the messages. My statement reflects my proposition to resign based in work Environment." (Grievant's Exhibit 1)

11. Grievant showed up for work the next day, April 18, 2019, at 7:30 a.m. and was barred from entry by a deputy sheriff and Assistant Administrator Pritt. Assistant Administrator Pritt informed Grievant that he was under suspension without pay pending investigation of alleged physical threats to Administrator Nesland. Grievant handed over his work keys and laptop upon being instructed to do so. (Grievant's Exhibit 2 and Grievant's testimony)

12. On April 18, 2019, at 9:39 a.m., Administrator Nesland sent an email to the management team stating, in part:

[2]John Pritt has been the Administrator since Mark Nesland retired last year.

> I am just feeling sick today. I am changing my time of arrival. I have been threatened before. [Grievant's] email is a vailed threat to me as well as anyone else that is in his way. I have been afraid of him for a while. His behaviors have been intolerable. … I am taking precautions for my welfare. I don't want him in the facility or on this property.
>
> (Grievant's Exhibit 12)

13. On April 18, 2019, at 11:55 a.m., Grievant emailed WVDHHR Director of the Office of Human Resources Management, Mischelle Williams, and facility HR Director, Brenda Thomas, in part:

> …Staff morale is the lowest it has ever been, ubiquitously, and residents are dying, three in one week. I have many, many emails that describe how I have sent alarm bells off to Shevona Lusk, Ginny Fitzwater, Matt Keefer, Etc. since October 22nd, pleading for help…. I was approved for wv nursing home administrator in training on March 1st 2019 and since then, the animosity and hostile work environment that had already been reported by me and documented became exponentially worse. Yesterday I was told I must move my office to the old housekeeping supervisors office on the guest floor, a small closet-like room that would not even hold my current desk, let alone all of the other items that are crucial to my job. This office is 90 degrees in the winter from uncontrolled heat and 85 degrees in summer with a barely working air conditioner. I cannot do this move for health reasons with the heat and expressed myself to Mark. This is a pattern used by Mark and John for months against employees they want to quit.
>
> I love my job, the residents, my [c]o workers, but the people for whom I work, John and Mark, are destroying everyone who questions their follies and mismanagement … I just want to get back to work. … I would like to get back to work as soon as possible in a less hostile environment. … I do not understand why I simply cannot be left to do my work …
>
> (Grievant's Exhibit 2)

14. On April 19, 2019, at 9:40 am, Grievant emailed members of management a clarification that he had not resigned, stating, in part:

> I just want to be clear as day. I have not resigned, not (sic) do I wish to resign. Perhaps my language was not clear in my email on Wednesday the 17th, but the consideration was that I would hypothetically turn in my resignation on Monday April 22nd, that would have been effective immediately. I have decided not to pursue this and want it be known that I

> am not and have not resigned from my position and place with the state. I am aware of the suspension pending investigation, and I look forward to the conclusion of the investigation so that I can return to work in good standing. …
>
> (Grievant's Exhibit 3)

15. On April 19, 2019, Grievant filed the instant grievance stating, "Suspension without good cause" and relief of "back pay with interest and all benefits restored."

16. On April 19, 2019, at 5:31 p.m., Grievant again emailed members of management, "I have not and will not resign." (Grievant's Exhibit 6)

17. On April 22, 2019, Assistant Administrator Pritt sent Grievant a letter on letterhead for the "Bureau for Behavioral Health" confirming his previous assertion that he had accepted Grievant's resignation on April 17, 2019, at 7:19 p.m. (Respondent's Exhibit 1)

18. On April 22, 2019, Assistant Administrator Pritt sent Grievant a letter on letterhead for the "Office of Health Facilities Hopemont" informing him that he was being suspended without pay pending investigation of alleged threats on April 17, 2019, via Facebook to the Administrator and threats to provide the press with documents concerning Respondent's mishandling of patients, which Respondent interpreted as evidence that Grievant had inappropriately accessed patient files. It advised him of his right to grieve his suspension. (Respondent's Exhibit 4)

19. The suspension letter also stated:

> You are directed to limit discussion of this matter to those who are conducting the investigation. Any deviation from this directive without authorization from me may be construed as an effort to impede or interfere with our investigation and may be grounds for dismissal. …
>
> Upon conclusion of this investigation, you will be advised of any action that may be contemplated regarding the outcome. If the allegations are

> determined to be unfounded, you will be compensated for the period of suspension not otherwise covered by annual leave, any annual leave used will be credited back to your leave balance, and your personnel file will be purged of any documentation thereof. If, however, it is determined that the allegations are true, disciplinary action may be taken.

20. On May 9, 2019, at 11:40 a.m., Grievant sent an email to members of management and union representatives titled, "Clarification again for no resignation." It stated, in part:

> All of you have ample communication from me showing I have not and will not resign. I have written twice before to indicate I am not and have not resigned from my position. I have a pending grievance and a continued suspension pending investigation. These bullying tactics are precisely why Hopemont is failing its staff and residents. I have attached the text message that I sent immediately to John on April 17th stating that I did not resign, and this, in addition to my other two emails, clarify my position and John Pritts misunderstanding of reality.
>
> (Grievant's Exhibit 7)

21. On May 9, 2019, at 12:05 p.m., Grievant sent an email to members of management and union representatives titled, "Clarification again for no resignation." It questioned the legitimacy of Assistant Administrator Pritt's April 22, 2019 letter accepting Grievant's apparent resignation because Grievant usually reported to Administrator Nesland and the letter was written on obsolete letterhead. (Grievant's Exhibit 8)

22. On May 23, 2019, at 11:27 a.m., Grievant texted HR Director Thomas as follows:

> Morning. I called peia and they have me as an active employee. She stated that I need to follow [H]opemont policy on me writing the check for 83.40 for my portion of insurance while off payroll for the suspension. Do I make it out to [H]opemont and mail it there? There is no record on their end for resignation at all. I need continuity of benefits, otherwise I need to be informed to apply for Medicaid. I cannot have resigned and also be suspended pending investigation. It has been 4 weeks.
>
> (Grievant's Exhibit 10-11)

23. On May 23, 2019, Grievant further texted HR Director Thomas as follows:

> Talking to Crystal Hilton, she has no idea what's going on. She has me active. And also that benefits were not taken out for either May check. So I am to pay them for my benefits for May. She gave me the info to send in my money and checks. She has no notation on my account of anything other than I am active.

(Grievant's Exhibit 11)

24. Respondent failed to ever notify Grievant that the suspension and investigation were concluded or to issue Grievant notification of the outcome of the investigation. (Grievant's testimony)

25. Grievant was last paid on April 17, 2019, for the period ending with his clocking out at 1:30 p.m. and was also paid for his unused accumulated annual leave. (Grievant's testimony)

26. On June 21, 2019, Grievant requested that his grievance be amended to include "dismissal without good cause and denial of due process."

27. At the end of June 2019, Grievant learned that his PEIA benefits had been terminated after his insurance denied him prescription coverage. (Grievant's testimony)

28. On July 2, 2019, Grievant requested that his grievance be amended to include discrimination under Title IX, constructive discharge (relating to Respondent's assertion that it had accepted Grievant's resignation) and violation of the Patient Safety Act.

Discussion

There is no dispute that Grievant timely grieved his suspension. However, Respondent asserts that Grievant's requests to amend his grievance were untimely filed

two months after the grievable events. "[When an] employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991)." *Higginbotham v. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997).

An employee is required to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-3(A)(1). The time limits for filing a grievance are as follows:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing.

W. VA. CODE § 6C-2-4(a)(1).

Respondent accepted Grievant's apparent resignation on April 17, 2019. Grievant was suspended on April 18, 2019. Grievant grieved his suspension on April 19, 2019. On June 21, 2019, Grievant requested that the grievance be amended to include "dismissal without good cause and denial of due process." On July 2, 2019, Grievant

requested that the grievance be amended to include "improper discharge/constructive discharge[,] discrimination in violation of Title 9[,] violation of Patient Safety Act."

Grievant contends that Respondent waited two months before processing him as resigned. Grievant asserts that the suspension letter promised to inform Grievant of the status of his suspension and investigation. Respondent counters that its acceptance of Grievant's apparent resignation automatically ended the suspension and investigation.

However, Respondent suspended Grievant pending investigation after it accepted his apparent resignation and did not process him as resigned for two months. Grievant grieved his suspension because he wanted to return to work. He immediately amended his grievance to include resignation, when he was eventually processed as resigned, to ensure he would not be barred from working based on a technicality. Respondent both accepted Grievant's apparent resignation and subsequently suspended him to ensure he could not return to work. Thus, the suspension and acceptance of resignation are part of the same grievable event. To mandate that a grievance be filed every time an employer changes its rationale for the ongoing exclusion of an employee from work would transform the grievance process into a depraved game of Whac-A-Mole.

In the spirit of a simple and expeditious process, the Grievance Board has previously allowed grievants to litigate their subsequent dismissal in grievances challenging a suspension when "the facts giving rise" to the suspension were the same as the dismissal, with the dismissal only being "the final discipline imposed." *Lough v. Dep't of Health & Human Res*., Docket No. 99-HHR-323 (Aug. 29, 2000); *Messer v. Mingo County Bd. of Educ*., Docket No. 00-29-332 (May 16, 2001), aff'd, Kanawha Cty. Cir. Ct. Civil Action No. 01-AA-80 (Oct. 22, 2001); *Keller v. Dept. of Transp./Div. of Highways*,

Docket No. 2009-1440-DOT (Sept. 8, 2010) (rev'd on other grounds, Kanawha Cty. Cir. Ct. Civil Action No. 10-AA-173 (June 15, 2012)). Similarly, Respondent suspended Grievant after accepting his apparent resignation to ensure he could not return to work. By grieving his suspension, Grievant was implicitly grieving Respondent's assertion that it had accepted his resignation. Thus, Grievant substantially complied with the grievance procedure by timely grieving his suspension and then amending it with claims related to his apparent resignation. Respondent did not prove by a preponderance of evidence that Grievant untimely grieved claims related to his resignation but did prove his other amended claims were untimely. Grievant did not demonstrate a proper basis to excuse these other amended filings.

As Grievant's resignation related claims are not disciplinary, 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 he did not resign. He argues that even if he did resign, Respondent did not properly accept it, he effectively rescinded, and it was constructive discharge. The starting point for examining a resignation grievance is that "a resignation is, by definition, a voluntary act on the part of an employee seeking to end the employer-employee relationship. . ." *Smith v. W. Va. Dep't of Corrections*, Docket No. 94-CORR-1092 (Sept. 11, 1995). *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). 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); *Perkins v. Dep't of Health & Human Ser*., Docket No. 2012-0885-DHHR (Oct. 1, 2013); *Seagraves v. Dep't of Health & Human Ser*., Docket No. 2013-1475-DHHR (Oct. 29, 2013).

Grievant's troubles escalated when he emailed coworkers and management to say, "I am turning in my resignation effective immediately on Monday." While not then apparent, Grievant only intended to threaten resignation due to what he perceived as refusal by management to heed the needs of patients and employees. Instead, he mistakenly conveyed the immediacy of his resignation in using the terms, "I am" and "effective immediately on Monday" instead of, "I am considering" or "I will be resigning." In so doing, he obviated what would have been the second step, actually tendering his resignation on Monday, which he considered necessary to consummate his resignation.

Despite the poor choice of words, Grievant's tender was voluntary. The apparent death of patients was not sufficient to cause any other employee to threaten resignation. The reasonable response for a seasoned employee like Grievant would have been to involve Adult Protective Services or law enforcement. Grievant's email even hints at this option in stating that all employees are mandatory reporters. Grievant only argued later that Respondent forced his hand by requiring him to move his office to a small room with poor temperature controls. However, Grievant did not make any reference to this in his resignation email but only raised it thereafter in an apparent attempt to boost his case for coercion and constructive discharge.

Even if Grievant's language had expressed less immediacy, such as "I will be resigning on Monday," it may not have mattered. The Grievance Board previously

addressed a fact pattern where an employee tendered his resignation using language similar to that intended by Grievant, which the employer accepted before the effective date. The Grievance Board found that the employee did tender his resignation when he wrote, “I will be resigning my position at Sharpes (sic) effective August 19, 2019,” and that a resignation was effectuated even though the acceptance was before the effective date. *Willis v. DHHR/Sharpe*, Docket No. 2013-1475-DHHR (Nov. 25, 2013). Of course, the circumstances surrounding the resignation must be considered. The similarities in this regard are that Respondent did not ask Grievant to resign or encourage his resignation in any way. Neither was Grievant under any time constraint that would have kept him from consulting with a representative or thinking through his options prior to his tender of resignation.

As for acceptance and rescission of Grievant’s tender, "[a]cceptance 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, *Dep't of Envtl. Prot. v. Falquero*, 228 W. Va. 773, 724 S.E.2d 744 (2012). "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*., at Syl. Pt. 3.

A few hours had passed without Grievant rescinding or clarifying his poor choice of words when Respondent accepted the resignation via text. In accepting, Respondent reasonably interpreted the immediacy of Grievant’s choice of words as a tender of resignation rather than a threat of future tender. In determining acceptance, *Falquero* only requires Respondent to either indicate acceptance or act in good faith reliance.

Grievant argues that Assistant Administrator Pritt did not have direct authority over him, and that Administrator Nesland was the only one who could have accepted his resignation. However, Assistant Administrator Pritt was in Grievant's chain of command and second only to Administrator Nesland in authority at Hopemont. Thus, Assistant Administrator Pritt effectively accepted Grievant's tender of resignation. When, minutes later, Grievant texted back that he had not resigned but had simply proposed the possibility of resigning based on his work conditions, it was too late to rescind. The evidence shows that Respondent reasonably interpreted Grievant's choice of words as a tender of resignation and accepted the tender before Grievant rescinded. Grievant failed to prove that his tender of resignation was coerced or that he rescinded prior to its being accepted.

As for his suspension, Grievant failed to show that he had any unpaid wages or benefits for the period prior to April 22, 2019, the effective date of his 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). Thus, Grievant's resignation renders any remaining claims moot.

Accordingly, the grievance is DENIED. The following Conclusions of Law support the decision reached.

Conclusions of Law

1. "[When an] employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ*., Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv*., Docket No. 90-DHS-524 (May 14, 1991)." *Higginbotham v. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997).

2. Respondent did not prove by a preponderance of evidence that Grievant untimely grieved claims related to his resignation but did prove that his other amended claims were untimely. Grievant did not demonstrate a proper basis to excuse these untimely amended filings.

3. 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*.

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. "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).

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); *Perkins v. Dep't of Health & Human Ser*., Docket No. 2012-0885-DHHR (Oct. 1, 2013); *Seagraves v. Dep't of Health & Human Ser*., Docket No. 2013-1475-DHHR (Oct. 29, 2013).

7. "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*., Syl. Pt. 4.

8. Grievant failed to prove by a preponderance of evidence that Respondent was unreasonable in interpreting his email as a tender of resignation rather than a threat of future tender, that his resignation was involuntary or coerced, or that he rescinded his resignation prior to Respondent’s acceptance.

9. "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).

10. The remainder of Grievant's claims are moot.

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 (2018).

DATE: January 6, 2022

Joshua S. Fraenkel
Administrative Law Judge