SHEREL DANIELS

v. Docket No. 94-HHR-1135

Docket No. 95-HHR-053

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES

D E C I S I O N

Until her resignation in November 1994, Grievant had been employed by Respondent W.Va. Department of Health and Human Resources (HHR) as an Administrative Assistant in HHR's Child Advocate Office (CAO) in Parkersburg. Grievant filed separate grievances alleging initially that HHR had unjustly demoted her, and later, that the resignation she tendered was prompted by the actions of HHR in the workplace and, therefore, amounted to a constructive discharge. HHR counters that Grievant lacks standing to pursue the demotion issue because she resigned her employment before the effective date of that personnel action and, further, raises the affirmative defense that the construc tive discharge grievance initiated by Grievant should be dis missed as untimely filed. The matter became mature for decision on May 12, 1995, the agreed-upon date for the completion of the parties' responsive briefing schedule.

Background and Procedural History

Grievant had worked several years for HHR prior to success fully bidding on the job of Administrative Assistant (AA) in CAO's Parkersburg office. Within a year or so after Grievant assumed the position, a reorganization took place within the Parkersburg CAO, and Darren Tallman became the Child Advocate Attorney stationed there. Among the duties Grievant performed as an AA were assisting Mr. Tallman and directly supervising the

seven Legal Assistants (LA) within the office. In early and/or mid 1994, Grievant filed two separate grievances relative to a reprimand and an unfavorable evaluation.

By letter dated November 18, 1994, Martha Hill, Director of the CAO, notified Grievant that she would be demoted from her AA position to a LA position for cause, effective December 16, 1994. Ms. Hill further advised Grievant as follows:

For any appeal rights you may have, please refer to WV Code 29-6A-4(e), Expedited Grievance Process. If you choose to exercise your rights, you must submit your appeal directly to the Education and State Employees Grievance Board at 808 Greenbrier Street, Charleston, WV 25311, within ten (10) working days of the effec tive date of this action. Copies of your appeal should be forwarded to the Director of your Agency and the Director of the Division of Personnel.

By letter dated November 21, 1994, and addressed to Sue Smith, at CAO's personnel office, Grievant resigned her employ ment as follows:

I hereby render my resignation effective at 4:30 p.m. today, November 21, 1994.

Please send my vacation money that is due to me in a lump sum to the address above. I am also requesting that I be able to review my personnel file in either [Mr.] Tallman's or John Dobson's presence the first week in December in the Parkersburg office.

My intentions are to proceed with the grievances that are in place.

Thank you for all of the help you have given me these last couple of years.

On a grievance form dated December 21, 1994, Grievant appealed the demotion action directly to level four. In the space entitled "Relief sought," she stated: "Reversal of the demotion action and that the grievant be made whole in every way concerning this matter." Grievant did not mention her November 21, 1994, resignation. This grievance was assigned Docket No. 94-HHR-1135.

Thereafter, on or about January 25, 1995, HHR filed a Motion to Dismiss Docket No. 94-HHR-1135, on grounds that Grievant lacked standing because she was no longer a State employee. The essential argument was that Grievant could not protest the demotion because at the time she filed the grievance she had already resigned her employment with HHR, and HHR had never processed the proposed demotion. By letter dated January 27, 1995, the undersigned tentatively indicated that if Grievant had resigned her employment prior to the time the demotion was to be effected on December 16, 1994, and prior to the time of filing her grievance in Docket No. 94-HHR-1135, Grievant would not have standing to file that grievance on December 21, 1994, in protest of the demotion because the demotion never occurred. By letter dated January 27, 1995, a letter which must have crossed the undersigned's January 27, 1995, letter in the mail, Grievant's representative, her husband, responded to HHR's Motion to Dismiss. Among other things, Grievant's representative stated, "Additionally, we will be claiming in the grievance that Mrs. Daniels did not voluntarily quit but was constructively discharged due to a hostile work environment . . . and as part of being made whole we will be seeking reinstate ment of my client to employment with the State of West Virgin ia."

In yet another letter to the parties, this one dated January 31, 1995, the undersigned responded to Grievant's response to HHR's Motion to Dismiss. Grievant was advised that a hearing would be scheduled because she had the right to pursue an action to remove unfavorable materials from her personnel files. Grievant was also advised that the "con structive discharge" issue was an entirely separate issue from the demotion issue before the undersigned in Docket No. 94-HHR-1135. It was noted that said constructive discharge issue could not be considered in Docket No. 94-HHR-1135 (12/16/94), but could form the basis of another grievance.

By grievance form dated February 1, 1995, Grievant filed a grievance directly to level four and raised the issue of con structive discharge. This grievance was assigned Docket No. 95-HHR-053. Both grievances were consolidated for hearing purposes, said hearing scheduled for March 14, 1995.

At the scheduled hearing on March 14, 1995, relative to Docket Nos. 94-HHR-1135 (12/16/94) and 95-HHR-053 (2/1/95), HHR orally moved to dismiss Docket No. 95-HHR-053 (2/1/95) on the basis that the grievance was untimely filed. HHR further protested that, because Grievant had never served HHR a copy of the grievance pleadings in Docket No. 95-HHR-053 (2/1/95), it was unprepared to litigate the constructive discharge issue.1 Grievant protested and essentially maintained that she had never been given the opportunity to present "her side of the story." Eventually, the parties agreed that the affirmative defense raised by HHR and/or the outcome of Docket No. 95-HHR-053 (2/1/95) would have bearing on, or be dispositive of, Docket No. 94-HHR-1135 (12/16/94). Therefore, Grievant was permitted to present her case relative to the constructive

discharge issue, and only limited evidence was adduced relative to the demotion issue. The parties agreed that HHR could respond with its case in chief on Docket No. 95-HHR-053 (2/1/95) on April 11, 1995.

On March 16, 1995, HHR filed a formal written Motion to Dismiss Docket No. 95-HHR-053 (2/1/95), based on the untimeli ness of the filing. Later, at the April 11, 1995, level four hearing scheduled for HHR's response to Grievant's presentation on Docket No. 95-HHR-053, HHR rested on the record already adduced.

The Timeliness and Standing Issues

At this point there are two questions presented by HHR relative to Docket Nos. 94-HHR-1135 and 95-HHR-053: Whether Grievant had standing to file the "demotion" grievance in Docket

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1Actually, a third grievance was then before the undersigned and docketed for hearing, this being a matter initiated by Grievant earlier in 1994. She withdrew that grievance, Docket No. 95-HHR-036, at the March 14, 1995, level four hearing.

No. 94-HHR-1135 (12/16/94) and whether the grievance protesting an alleged "constructive discharge," Docket No. 95-HHR-053 (2/1/95), was timely filed within the time period(s) established in W.Va. Code 29-6A-1, et seq. HHR argues that Grievant is not entitled to pursue either grievance. Therefore, HHR bears the burden of proof and must establish its claims regarding these issues by a preponderance of the evidence. After due delibera tion of the relevant facts, the parties' arguments and the applicable law, the undersigned has determined that HHR has met

its burden of proof, and that, accordingly, both grievances must fail.

Without question, the grievance in Docket No. 95-HHR-053 was not timely filed. W.Va. Code 29-6A-4(a) requires that a grievance must be initiated at level one

> [w]ithin ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, . . . the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant . . . .

Furthermore, W.Va. Code 29-6A-4(e) provides an expedited grievance process by which

> [a]n employee may grieve a final action of the employ er involving a dismissal, demotion, or suspension exceeding twenty days directly to the hearing examin er. The expedited grievance shall be in writing and must be filed within ten days of the date of the final action with the chief administrator and the director of personnel of the State Civil Service Commission.

Grievant failed to follow the dictates of Code 29-6A-4(e) because she did not file the expedited process for the alleged constructive discharge within ten days of her resignation, or even within ten days of the effective date on December 16, 1994, of the proposed demotion. Moreover, even if it could be said that the provisions for filing a level one grievance under Code 29-6A-4(a) should apply, Grievant knew of the facts which constituted the alleged constructive discharge on November 21, 1994, when she tendered her resignation.

While Grievant's representative is not an attorney, he stated in his letter of January 27, 1995, that he intended to claim constructive discharge as a defense to the demotion issue in Docket No. 94-HHR-1135 (12/16/94). It must be inferred that Grievant, through her representative, had some knowledge of the doctrine or theory of constructive discharge when she filed the initial grievance protesting the proposed demotion, but chose not to pose the issue, thus depriving HHR of any notice as to the true nature of her complaint. Moreover, Grievant utterly neglected to indicate in her grievance pleadings in Docket No. 94-HHR-1135 that she had resigned her employment and had not even worked for a number of weeks before she filed the griev ance.

Although W.Va. Code 29-6A-3(f) authorizes a non-lawyer to represent a grievant in grievance proceedings, Grievant's use of a non-lawyer does not and cannot excuse her failure or her representative's failure to know the applicable law, in this case, that the existence of the fact of "constructive discharge" is a grievable event, and that a grievance protesting such an alleged constructive discharge must be filed within ten (10) days after the occurrence of the event which constitutes the constructive discharge.

As part of the pleadings in Docket No. 95-HHR-053 (2/1/95), Grievant asserts, through her representative, that she did not become aware that the issue of constructive discharge should have been raised separately from the matters at issue in Docket No. 94-HHR-1135 until her receipt of the undersigned's letter of January 31, 1995. In her response to HHR's written Motion to Dismiss of March 17, 1995, Grievant asserts that she timely filed the constructive discharge grievance in Docket No.

95-HHR-053. She argues, in essence, that the undersigned's January 31, 1995, "ruling" that a new grievance must be filed triggered the provisions of Code 29-6A-3(j) and permitted her a new filing date. This argument must be rejected. The statute does not apply because it addresses the status of a grievance at the lower grievance levels, and a ruling made by a "grievance evaluator" at levels one through three. See Syl. Pt. 5, W.Va. Dept. of Health and Human Resources v. Hess, 432 S.E.2d 27 (W.Va. 1993).

In short, Grievant was aware of the facts which allegedly constituted the constructive discharge when she resigned her position in November, 1994. The provision of W.Va. Code 29-6A-4(a) which establishes the time within which a grievance must be filed creates an extension of time to file past the time of the grievable event to a period of ten (10) days after the grievant becomes "aware" of the grievable event. In that context, the occurrence of the grievable "event" is a matter of fact, not a matter of law. In this case, Grievant knew the facts which constituted the event of the alleged constructive discharge when it happened, even though she may have been ignorant of the procedural law which applied to the filing of the grievance.

The holding in Gaskins v. Dept. of Health and Human Re sources, Docket No. 90-H-032 (Apr. 12, 1990), is applicable. Gaskins, at 7, states that "ignorance of one's right to invoke the grievance procedure will not excuse the failure to file within the prescribed time limits. Otherwise the time limits would be rendered meaningless. This principle has been recog nized in numerous cases, e.g., Harris v. Lincoln County Board of Education, Docket No. 89-22-49 (March 23, 1989); Archibald v.

Randolph County Board of Education, Docket No. 42-88-171 (Decem
ber 9, 1988)." Likewise, even if the provisions of 29-6A-4(e)
are considered the applicable law in this case, this expedited
process does not contain a similar proviso related to an exten
sion of time until Grievant learned or became aware of the
grievable event. Therefore, it is determined that Docket No.
95-HHR-053 should be dismissed or denied as untimely filed.
As was noted by the undersigned and agreed upon by the
parties at the level four hearing, the outcome of Docket No.
95-HHR-053 could impact upon Docket No. 94-HHR-1135. HHR argues
and the undersigned agrees, that in the absence of a finding in
a properly filed grievance that Grievant was constructively
discharged on November 21, 1994, when she submitted her resigna
tion letter, Grievant was not an employee of the State on
December 16, 1994, when the demotion would have occurred.
Grievant did not raise the issue of constructive discharge in
the grievance filed in Docket No. 94-HHR-1135. The substance of
a grievance cannot be altered or amended at level four of the
grievance process. See W.Va. Dept. of Health and Human Resourc
es v. Hess, supra.
Because Grievant's claim in Docket No. 95-HHR-053 is
dismissed, there can be no finding in Docket No. 94-HHR-1135
that a constructive discharge occurred because the issue was not
raised in that grievance. Therefore, because Grievant resigned
on November 21, 1994, she was not an employee of HHR when she
was scheduled for demotion on December 16, 1994, nor was she an
employee on December 21, 1994, when she filed the grievance
protesting the demotion. Grievant had no standing to file a
grievance protesting a proposed demotion on either November 21,
1994 or December 21, 1994, because she was not an employee

covered by the state employees grievance procedure due to her voluntary resignation.

Some relief is offered to Grievant, relief that will make her "whole," but only in terms of her status as a former employ ee of the State when she filed her grievance in Docket No. 94-HHR-1135 relative to events which transpired prior to the resignation. In the undersigned's letter of January 31, 1995, the parties were essentially advised that Grievant had standing to pursue an action to remove unfavorable documents from her personnel file. The rationale was that Grievant had a right to seek the removal of documents from her personnel files which may have an adverse impact on future employment with either the private or public sectors, including the State of West Virginia. Subsequent to that, by letter dated February 10, 1995, HHR stated that it would remove all adverse materials from Grievant's files. Therefore, HHR will be held to that represen tation.

On a final note, a ruling on HHR's motion to dismiss both grievances at the level four hearing was taken under advisement, and Grievant was granted an opportunity to present her case with respect to the constructive discharge issue. Notwithstanding the rulings herein that the constructive discharge grievance was untimely filed and the demotion issue was moot, Grievant would not have prevailed on the merits of her case in any event. Although a recital of all of the pertinent facts is not neces sary here, the evidence does not support Grievant's claim of a constructive discharge. See Slack v. Kanawha County Housing Authority, 423 S.E.2d 547 (W.Va. 1992); Ball v. W.Va. Alcohol Bev. Control Comm., Docket No. 90-ABCC-027 (June 15, 1990). Notably, Grievant's resignation letter, in content and

tone, was compelling evidence of a voluntary resignation. Indeed, Grievant even indicated in the letter of resignation that she intended to pursue pending grievance actions. She made no mention of any future grievances. It was simply inexplicable for Grievant to resign from her position when she had recourse to the grievance procedure. If Grievant tendered a resignation in haste after she received the demotion notice, she thereafter made no attempt to ask HHR administrators whether she could rescind the resignation or to ask for reinstatement. In fact, nearly four weeks went by before Grievant filed any grievance at all, and even then, she never mentioned her resignation. Nonetheless, it is true that, for a period of time prior to her resignation, Grievant found herself in the midst of some reorganization on CAO's part and other occurrences in the CAO office which may have adversely affected her working situation during the time in question. Grievant was perhaps understand ably upset over the turn of events, including declining evalua tions and a proposed demotion. However, Grievant failed to establish by a preponderance of the evidence that working conditions created or known by HHR were so intolerable that a reasonable person would be compelled to quit. See Id. Thus, based on findings that Grievant's resignation was voluntary and, moreover, not the result of a constructive discharge, Grievant's claim of constructive discharge in Docket No. 95-HHR-053 would necessarily be denied and her claim of unwarranted demotion in Docket No. 94-HHR-1135 rendered moot.

In summary, it is proper, given the totality of the circum stances in this case, to give effect to HHR's motion to dismiss and to deny both grievances. Accordingly, these grievances are DENIED, except that HHR is Ordered to remove any and all adverse

materials from Grievant's personnel files if it has not already done so.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code 29-6A-7. Neither the West Virginia Education and State Employ ees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appeal ing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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NEDRA KOVAL

Administrative Law Judge

Date: May 31, 1995