DARRELL W. PREECE,

Grievant,

v.

PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA, **DOCKET NO. 94-PSC-246**

Respondent,

and

BASHAR N. KHOURY,

Intervenor.

D E C I S I O N

On June 14, 1994, Darrell W. Preece (Grievant) filed this grievance directly at Level IV, pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that Respondent Public Service Commission (PSC or Commission) had engaged in conduct which resulted in his constructive demotion on June 1, 1994. Respondent submitted a Motion to Dismiss the grievance based upon Grievant's failure to state a claim and untimely filing. This Motion was denied on August 17, 1994. On September 1, 1994, Bashar N. Khoury (Intervenor) submitted a Petition to Intervene in this matter. Subsequently, on October 18, 1994, Intervenor status was denied. Thereafter, the Level IV hearing was stayed by Order of the Circuit Court of Kanawha County dated November 1, 1994, in order to consider the issue of Intervenor's status. On March 27, 1995, the Circuit Court of Kanawha County issued an

Order granting Mr. Khoury leave to intervene in these proceedings. Level IV hearings were subsequently scheduled, and after certain hearing dates were continued for good cause shown, an extensive evidentiary hearing was conducted in this matter on July 5, August 7, and August 8, 1995, and May 8, 1996. Following the conclusion of the final day of hearing, the parties were permitted to file briefs and reply briefs, and this matter became mature for decision upon receipt of the final round of briefs on July 22, 1996.

DISCUSSION AND ANALYSIS

Grievant alleges that he was constructively demoted. Respondent asserts that Grievant voluntarily resigned his supervisory position. A constructive demotion is essentially the same as a constructive discharge, except that a lesser penalty is involved. Thus, the legal standard applied to resolve this matter is the same. In order to prove constructive discharge in West Virginia, the employee must "establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit." Slack v. Kanawha County Housing & Redevelopment Auth., 188 W. Va. 144, 423 S.E.2d 547 (1992).

It is not necessary for the employee to show that the employer's actions were taken with a specific intent to cause the employee to quit. Slack, supra. However, to "determine whether an employee's act of resignation was the result of coercion, rather than a voluntary act, 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. Dept. of PublicSafety, Docket No. 89-DPS-240 (Aug. 14, 1989). See Adkins v. Civil Service Comm'n, 171 W. Va. 132, 298 S.E.2d 105 (1982). See also Schultz v. Dept. of the Navy, 810 F.2d 1133 (Fed. Cir. 1987); Dumas v. Merit Systems Protection Bd., 789 F.2d 892 (Fed. Cir. 1986). Moreover, whether working conditions are intolerable must be assessed by the objective standard of whether a "reasonable person" in the employee's position would have felt compelled to resign. Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985). See J.P. Stevens & Co. v. NLRB, 461 F.2d 490 (4th Cir. 1972); McKinney v. K-Mart Corp., 649 F. Supp. 1217 (S.D. W. Va. 1986). A grievant alleging a constructive discharge or demotion has the burden of proving his or her allegations by a preponderance of the evidence. McClung, supra. See Coster v. W. Va. Div. of Corrections, Docket No. 94-CORR-600 (Aug. 12, 1996).

Grievant began working for the Commission in 1976. By February of 1990, he was employed as a Chief Utilities Analyst in the Energy Section. At that time, he was appointed Acting Manager of the

Energy Section in PSC's Utilities Division. The Manager's position was posted in April or May of 1990 and Grievant formally applied for the position. He was officially promoted to Manager of the Energy Section in December 1990. In that capacity, Grievant supervised roughly eight employees in various classifications. These employees gather data based upon petitions filed by either utilities or customers relating to requested rate changes, analyze the data, and provide reports and testimony to the Commission on such matters.

David Ellis, Director of PSC's Utilities Division, was Grievant's immediate supervisor. Mr. Ellis reports directly to the PSC Chairman. Intervenor was employed in the Energy Section as a Utilities Analyst Supervisor. At the time Grievant was named Acting Managerof the Energy Section, Grievant discussed the matter of Intervenor's being habitually late to work with Mr. Ellis, asking him to accept responsibility if this situation started causing problems with the other employees. Indeed, Grievant testified:

> I told Mr. Ellis on February the fifth of 1990 that, if Mr. Khoury's tardiness caused a problem with some of the other employees in the section, then he [Mr. Ellis] would be the one who would have to correct Mr. Khoury and get him on line, within the rules.

Grievant noted that Intervenor would be late up to one hour or more on a regular basis and, to his knowledge, nothing was done about it. According to Grievant, Intervenor's erratic work schedule had been tolerated for at least eleven years prior to his assignment as Acting Manager. (See footnote 1) Mr. Ellis made no specific commitment to Grievant regarding dealing with Intervenor at that time. Grievant testified that Intervenor's tardiness continued after he became Manager, but it did not cause a significant "problem" until early in 1992, after PSC instituted a requirement for supervisors to sign monthly time sheets for employees working under their supervision.

Sometime after becoming Manager, Grievant went to Mr. Ellis, complaining that other employees in the Energy Section were emulating Intervenor, and coming in late morefrequently. Mr. Ellis suggested to Grievant that the Energy Section should keep daily records of the employee's time, and asked Grievant to design a sheet to record that information. After leaving Mr. Ellis' office, Grievant found that his secretary, Linda Ferguson, already had "daily time sheets" for recording this information. Ms. Ferguson testified that she developed the daily time sheets after Mr. Ellis directed her to prepare a form to record the whereabouts of the employees in the Energy Section.

Ms. Ferguson was instructed to go to each employee's office or work area at the beginning of the

day and verify if they were present. If an employee was not at work, she would check with an employee in an adjacent or nearby office, with Mr. Ellis' secretary, and with Grievant, to see if anyone knew the employee's status. If the employee was not accounted for, when Grievant or the secretary subsequently observed the missing employee at work later that day, that initial observation time was recorded on the daily time sheet as the time the employee reported to work. See G Exs C & D. Ms. Ferguson noted that employees in the Energy Section coming in late and leaving early was a practice which preceded Grievant's tenure as Manager. She did not feel comfortable in her "watchdog" role.

Despite Grievant's concerns about Intervenor's attendance, on March 6, 1992, Grievant sent the following hand-written memorandum, regarding "Merit Pay Raises/Salary Adjustments," to Mr. Ellis:

> As we have discussed on previous occasions and as you well know, Bob [Bashar] Khoury is an extremely valuable employee to this Commission, in general, and to the Energy Section in particular.
>
> In the past two years Bob has completed rate cases on Shenandoah Gas, Equitable Gas, Wheeling Electric, Mon Power and Apco. He is currently assigned responsibility for the Mountaineer rate case andAppalachian's depreciation case. As you know this is a great amount of work.
>
> I believe Bob should be recognized for this work and I also believe the best way to recognize his performance is through pay. If there is any money available for pay raises or if and when money does become available to the Commission for pay raises I think Bob should be at the top of [the] list and for a minimum of two steps.
>
> In addition to the work mentioned above, Bob has also become expert at making efficient use of computers which allows him to do more in less time and becomes (sic) even more valuable as an employee.

I Ex 6. On the same date as the foregoing memo, Grievant signed Intervenor's annual rating form, rating Intervenor an overall 9.3 (on a scale from 0 to 10), including an 8 in the category "use of time." I Ex 1. Grievant explained that, although Intervenor was consistently tardy, he was doing better than he had in the past, thus warranting a "very good" rating in the use of time category. (See footnote 2) See I Ex 1.

Shortly thereafter, on May 5, 1992, Grievant submitted a request for reassignment as follows:

> I respectfully request immediate reassignment, preferably within the Utilities Division. If possible, I would like to continue working on energy related cases, however I can not remain as Energy Section Manager since I find it to be an intolerable situation.
>
> As you know: (1) There is much work to be done in the electric and gas areas. (2) The present staff is not as qualified as ones in the past. (3) We have recently added another layer of work, which is very time consuming, to our responsibilities - - - informal complaints.
>
> With the addition of this informal complaint responsibility, the majority of my time is consumed before I can give my attention to the other matters. In addition I find it impossible to communicate with the person in charge of mothering (sic) the flow of the informal complaint system.
>
> I am also disappointed in the compensation I am receiving for this job. The job of Energy Section Manager is very demanding and much more time consuming than that of Utilities Analyst but it is not so differently compensated. I have been working lunch hours, evenings and weekends in an attempt to keep up with the work but I am not being successful. The backlog is growing. Obviously one or both of two things are true, either there is too much work for the section or I am not successfully managing the section. Therefore I am requesting that I be assigned in a capacity other than as Manager of the Energy Section.
>
> I would appreciate a prompt response to this request.

I Ex 2. It does not appear that any action was ever taken in regard to this memo.

Grievant testified that he began observing discrepancies between monthly time sheet entries by various employees, and the working hours recorded on the secretary's daily time sheets. He warned all employees that he would not sign their time sheets if there were further discrepancies. Thereafter, Grievant confronted several employees regarding perceived discrepancies between individual timesheets and his records, and most agreed to change hours claimed as worked to annual leave. In July 1992, Mr. Ellis issued a two-page memo to all employees in the Energy Division reiterating established policies regarding working hours. See G Ex N. Mr. Ellis previously issued a similar memo in April 1991. See G Ex R.

In September 1992, Grievant sent a hand-written memo to Mr. Ellis, noting various inconsistencies between the monthly time sheet for August and "section records" (daily time sheets)

on four employees, including Intervenor. G Ex B. Two of the employees corrected their monthly time sheets by taking annual leave or compensatory time. One employee's daily time sheet was demonstrated to be in error, and Grievant admitted his mistake, resolving the alleged "discrepancy." Intervenor refused to make any changes to his monthly time sheet. Grievant did not request any specific assistance from Mr. Ellis inhis memo. See G Ex B. Mr. Ellis forwarded Grievant's memo to PSC Chairman Boyce Griffith, noting the discrepancy between Grievant's records and the time reported by Intervenor. Mr. Griffith issued a memorandum in early November 1992 which addressed the issue of work attendance and maintaining established office hours. See G Ex O. In addition, Mr. Ellis discussed the discrepancies with Intervenor.

Similar discrepancies involving Intervenor's time sheets arose in September and October 1992. In October 1992, Grievant noted a 15-hour discrepancy between the number of hours Intervenor reported taken as annual leave on his time sheet and the number of hours noted in Section records. In each instance, Grievant refused to sign the monthly time sheets based on inconsistencies between the daily time sheets and the information reported by individual employees at the end of the month. In December 1992, Mr. Ellis called Grievant to his office and asked him if he would sign three pending monthly time sheets for August, September, and October of 1992. Mr. Ellis noted that Intervenor had corrected the time sheets to agree with the section records on the daily time sheets, with the exception of 8 hours. He also determined that Intervenor would be given credit for working at home when the air conditioning was out in the PSC building, even though Intervenor had not obtained advance approval from Grievant or Mr. Ellis to work from home. Grievant refused to sign any of the time sheets.

The time accounting problem receded temporarily until June 1993. On July 20, 1993, Grievant, Mr. Ellis, and Intervenor met to discuss a one-hour discrepancy in Intervenor's time sheet for June 1993. See G Ex F. Grievant acknowledged that trying to watch people come and go was "not a very good system for keeping time." Nonetheless, Grievant refused to sign the time sheets even though Mr. Ellis encouraged him to do so bystating, "how about going ahead and signing this time sheet. We're only talking about one hour." Mr. Ellis testified that Intervenor subsequently agreed to change his time sheet, but Grievant nonetheless indicated he would not sign a corrected time sheet. Ultimately, the June 1993 time sheet was not changed by Intervenor nor was it signed by Grievant or Mr. Ellis.

More discrepancies arose between Intervenor's monthly time sheet for August 1993 and the entries Grievant and his secretary made on the daily time sheets. These discrepancies totaled over 46 hours and Grievant again refused to sign the monthly time sheet. Mr. Ellis later came to Grievant and asked him to sign the time sheet since Intervenor had changed his annual leave taken from 14 hours to 23 hours. Grievant told Mr. Ellis that he could not sign because the data was still not accurate. Ultimately, Mr. Ellis signed a separate monthly time sheet for Intervenor. See G Ex E.

Intervenor began working for PSC in 1959. Following some breaks in service, he resumed employment by PSC in 1981. During his tenure, Intervenor worked on some of PSC's significant public utility rate cases. He considers himself a "professional," noting that he works whatever hours are necessary to get the job done, not just 9:00 a.m. to 5:00 p.m. By Intervenor's count, he "earned" over 5000 hours of compensatory time over the years working long hours on various rate cases. However, none of these hours are recognizable under any PSC policy or rule.

Intervenor did not deny that he would be tardy on occasion. Indeed, he conceded that he sometimes arrived as much as twenty or thirty minutes late. However, he consistently maintained that he made up the time by working late or coming in during the weekend. Mr. Ellis testified that he was familiar with Intervenor's work product, and he hadencountered Intervenor working in his office after hours or on weekends on multiple occasions. Mr. Ellis was satisfied that Intervenor was performing PSC work for the number of hours claimed on his monthly time sheets. However, Mr. Ellis agreed that Intervenor had a problem with reporting his whereabouts to his superiors, and had not obtained proper approval to work other than the established office hours.

Because Intervenor did not regularly report when he arrived and departed, his attendance problem could easily be exaggerated under the attendance recording system maintained by Grievant's secretary, Ms. Ferguson. This is in no small part due to the fact that Intervenor's office was on the second floor of the building, while Grievant, Ms. Ferguson, and all other Energy Section employees were located on the third floor. (See footnote 3) Thus, after checking Intervenor's office shortly after 9:00 a.m. and noting his absence, Intervenor remained "absent" until he was physically observed by Ms. Ferguson or Grievant, except on those rare occasions when he reported his arrival.

Grievant stated that Mr. Ellis never directed or ordered him to sign a time sheet which he believed to be false. Likewise, there was no testimony that Mr. Ellis ever threatened Grievant with any adverse action for refusing to sign the time sheets, or that this refusal otherwise impacted on his working

conditions in any manner. Indeed, Grievant testified that, except for the disagreement over the time sheets, his working relationship with Mr. Ellis was "surprisingly quite good." Furthermore, Grievant stated that he continued to receive "good" evaluations. Grievant's last evaluation as Manager, dated August 16,1993, rated him an overall 9.0 (on a scale of 0 to 10), as high as any other Manager in the Utilities Division. See G Ex K.

At least one other Manager in the Utilities Division, Paul Stewart, similarly refused to sign the monthly time sheets for one or more of his employees. See G Ex A. Mr. Stewart testified as to his reasons for refusing to sign the time sheets on a particular employee, noting that Mr. Ellis was likewise unable to resolve the problem. There was no evidence that anything adverse happened to him or that he felt compelled to resign under the circumstances.

In August 1993, Mr. Ellis came to Grievant's office and initiated a discussion about what could be done to deal with Intervenor's tardiness. Mr. Ellis suggested disciplining Intervenor or docking his pay. Grievant testified he had already made up his mind to resign from his supervisory position before the meeting began. The next day, August 5, 1993, Grievant submitted the following "Request for Reassignment" to Mr. Ellis:

> I respectfully request immediate reassignment, preferably within the Utilities Division. If possible, I would like to continue working on energy related cases, however I can not remain as Energy Section Manager since I find it to be an intolerable situation.
>
> As you know: (1) there is much work to be done in the electric and gas areas; (2) the present staff is not as qualified as ones in the past; (3) the present staff is not as dedicated or as professional as ones in the past; (4) the added responsibility of the informal complaint process consumes much more of my time than it is worthy of; (5) employee time control has been and continues to be a major problem.
>
> I have discussed these items with you on several different occasions. Although I could live with the first four items listed above, I can not function as a manager without the authority or the support from you to demand a proper accounting of employee work hours. The suggestions which you have made to me as possible solutions to this problem have been ones which indicate to me that you do not believe the problem to be as serious as I believe it to be. I have great respect for your judgment and one of yoursolutions may be best but I have such strong feelings about this that I can not (sic) continue as Manager.
>
> As I have discussed with you previously, I am also disappointed in the

> compensation I am receiving for this job. The job of Energy Section Manager is very demanding and much more time consuming than that of utilities analyst but it is not so differently compensated. I have been working extra hours in an attempt to keep up with the work. Either there is too much work for the section or I am not successfully managing the section. Therefore I am requesting that I be assigned, within the Energy Section, in a capacity other than as Manager.
>
> Effective immediately, I can no longer function as Manager of the Energy Section. I will provide you with a listing showing the cases in need of assignment and each employee's current case assignments.

I Ex 2.

According to Grievant, he found his employment situation intolerable because other employees were questioning why they were not permitted to come and go without being charged leave in the same manner as Intervenor. Grievant determined that the situation would not improve as, for whatever reason, Mr. Ellis would not support his efforts to make Intervenor adhere to the rules regarding attendance. Grievant explained that his original understanding, that Mr. Ellis would take responsibility for correcting Intervenor, was modified when Grievant became responsible for signing Intervenor's time sheet to verify his work hours. Grievant further contended that when Mr. Ellis requested that he sign Intervenor's time sheet containing a one hour discrepancy, he was being asked to perform an "illegal act."

Consistent with the resignation letter, Mr. Ellis assumed Grievant's supervisory duties, such as assigning cases and signing time sheets. However, because PSC was then participating in a reclassification project with the Division of Personnel, Grievant's demotion did not become effective until June 1, 1994. Since his demotion, Grievant hasbeen employed as a Utilities Analyst Supervisor in the Energy Section. (See footnote 4) Grievant claims that a preponderance of the evidence shows his resignation was coerced by the employer's actions which made his working conditions as the Energy Section Manager "intolerable" as defined in Slack.

There was overwhelming evidence that Respondent had written policies in place at the time which required employees to be in their work area between 9:00 A.M. and 5:00 P.M. each day, with a lunch hour from 12:00 P.M. to 1:00 P.M., unless prior arrangements were made with their immediate supervisor. There was considerable evidence that several employees in the Energy Section violated this policy on numerous occasions. However, Grievant, as their immediate supervisor, elected to

address this problem at the end of each month when the employees reported their annual and sick leave taken. (See footnote 5) Under such a system, honest mistakes could easily be made, and Grievant admitted that on at least one occasion the daily time sheets were in error, as one employee was listed as absent when he had been assigned to work on a matter outside the office. Intervenor testified andacknowledged that punctuality was not his forte, contending that he spent many hours of uncompensated overtime after normal working hours and on weekends doing PSC work. From his viewpoint, Grievant was being overly meticulous about time accounting, and had blown the entire issue out of proportion.

Mr. Ellis' position was that Grievant, as Energy Section Manager, was responsible for enforcing the attendance rules in his section. He did not tell Grievant how to do this or how not to do it. When it came to the time sheets, he would not ask Grievant to sign, nor would he himself sign, a time sheet which either of them believed to be either inaccurate or falsified. Mr. Ellis agreed that Intervenor was not always punctual and was deficient in failing to report his whereabouts to his supervisors. However, he also believed that Intervenor was working the hours for which he was claiming compensation, if not more.

As indicated in both resignation letters, Grievant alleged that he was not being compensated appropriately for his position, noting that Intervenor was receiving $9,036 per year more than his annual salary. Grievant noted that the other Managers in the Utilities Division made substantially more (an average of $15,100) than the highest paid employee they supervised. (See footnote 6) Grievant acknowledged that he knew he was being paid less than Intervenor at the time he became Acting Manager of the Energy Section. However, Grievant did not request that his pay be increased over Intervenor's at that time. At somelater point, Grievant did mention to Mr. Ellis that he believed that the Manager should be paid more than the people he supervises. This was not a formal request, nor was it made a condition of accepting the Manager's position.

A change in compensation which adversely affects an employee may create a coercive circumstance which leads to a constructive discharge or demotion. See J.P. Stevens, supra. However, Grievant's compensation was not reduced after he was promoted to Manager. Further, Grievant has not shown that the compensation he was receiving as a Utilities Analyst Manager was contrary to any statute, policy, rule or regulation applicable to state employees in the classified service. See Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Nafe v. W. Va.

Dept. of Health & Human Resources, Docket No. 96-HHR-386 (Mar. 26, 1997); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995). Moreover, Grievant was aware of the compensation he would receive when he accepted the position, and there was no evidence that he was ever encouraged to believe his compensation would be increased, other than as across-the-board pay raises or merit raises became available. A preponderance of the credible evidence of record indicates that Grievant simply determined that the Manager's position involved more trouble than it was worth.

In addition to inadequate compensation, Grievant's complaint is focused upon the employer's failure to support his efforts to maintain effective time control over certain employees in the Energy Section. Grievant contends that his situation was made intolerable because he was expected to sign time sheets which he knew to be false. From his perspective, the employer was asking him to commit a criminal offense. Grievant established that the time sheets are used by PSC's Department of Administration to calculate payroll, including use of sick and annual leave. The forms are titled "Monthly Time Report for Cost Accounting/Time System." Grievant opined that state employees have a statutory duty to account for their time, but was unable to cite a specific statute containing that requirement. The time sheets contain a line for the supervisor's signature below the statement, "I certify that the above employees were absent from their duties as indicated." G Ex A.

It is not necessary to discuss all of Grievant's theories about how the monthly time sheets could result in criminal charges. It is sufficient to conclude that because Grievant was being asked to "certify" a public document, he had a right to refuse to sign the document if, in good conscience, he did not believe that the information contained in the document was accurate. Grievant believed Intervenor and others would be compensated for hours they did not work if the time sheets were not challenged. However, it was never satisfactorily explained why Grievant did not simply correct the time sheets to conform to his records, thereby forcing the employees to prove that they were entitled to credit for working when their supervisor recorded them as being absent without approval.

A preponderance of the evidence indicates that the underlying reason for the discrepancy between the daily time sheets maintained by Grievant's secretary, Ms. Ferguson, and the monthly time sheets turned in by Intervenor and other employees in the Energy Section, was the employees' failure to adhere to generally reasonable standards in regard to reporting their comings and goings.

In this regard, it is unreasonable to place the blame for this entire situation on Grievant's superiors since Grievant exercised minimal supervisory authority to correct the situation. Grievant never counselled Intervenor one-on-one in regard to any of the discrepancies. More importantly, even when Ms. Ferguson reported on her daily time sheet that Intervenor was several hours late, or left without requesting annual leave, Grievant did not approach Intervenor upon his return to work to determine if he had been on PSC business, or to determine why he had failed to report his whereabouts in accordance with established policies.

Further, Grievant was advised by Joe Smith from the West Virginia Division of Personnel that, as the immediate supervisor, he could give any offending employee a directive to comply with the established rules for reporting to work. If the employee then persisted in violating that directive, Grievant should pursue progressive discipline. Nonetheless, Grievant made no effort to initiate any form of discipline against Intervenor or any other employee under his supervision who did not adhere to the rules. To the contrary, Grievant rated Intervenor as "very good" in that section of his annual evaluation dealing with such work habits as punctuality. See I Ex 1.

This record simply will not support a finding that Grievant's resignation resulted from coercion. Grievant's credible testimony was that Mr. Ellis "encouraged" him to sign the time sheets. It is significant that Mr. Ellis never ordered Grievant to sign any of the disputed time sheets nor threatened him with any adverse action for his refusal. (See footnote 7) Indeed, Mr. Ellis' primary effort involved attempted mediation of the dispute between Grievant and Intervenor, in regard to the time sheets in particular, and maintaining established officehours in general. Although Grievant exercised his best judgment in resigning as Manager, the undersigned is not persuaded that Grievant's resignation was compelled in these circumstances. See Bristow, supra.

It is apparent that there was a disagreement between Grievant and Mr. Ellis regarding the best way to deal with Intervenor's frequent tardiness. It is likewise clear that Mr. Ellis perceives Intervenor as a valued employee of the Commission whose expertise and experience significantly contribute to the accomplishment of the Commission's work. Mr. Ellis accepted Intervenor's representations that he worked additional hours outside normal office hours to accomplish the work assigned, and elected to accord Intervenor some flexibility. Grievant, while recognizing Intervenor's positive contributions in his memo of March 3, 1992, and Intervenor's favorable annual evaluation, insists that Intervenor needed to report on time and leave on time, the same as all other employees.

The issue to be resolved in this grievance is not which of these approaches was legally correct or clearly more appropriate. The issue is whether Mr. Ellis' failure or refusal to act made Grievant's working conditions intolerable. Slack, supra. At best, Grievant demonstrated that he was in a difficult position because Mr. Ellis did not share his concerns for punctuality and accurate time keeping. However, such a disagreement does not make Grievant's working conditions intolerable. See Bristow, supra. A preponderance of the evidence indicates that Grievant did not make a reasonable effort to exercise his supervisory authority over Intervenor before calling on Mr. Ellis to deal with "the problem." As for being coerced to sign a fraudulent time sheet, Grievant's own testimony makes it clear that he was never ordered to commit an "illegal act" by signing time sheets containing discrepancies with the records maintained by his secretary. Thus, Grievant has notdemonstrated that his working conditions were so intolerable that a reasonable person in his situation would have felt compelled to resign. See Slack, supra.

Intervenor requested an award of attorney's fees and costs in regard to both the proceedings before this Grievance Board, and the hearings in Kanawha County Circuit Court in relation to Intervenor's Motion to Intervene. W. Va. Code § 29-6A-10 provides:

> If an employee shall appeal to circuit court an adverse decision of a hearing examiner rendered in a grievance proceeding pursuant to provisions of this article or is required to defend an appeal and such person shall substantially prevail, the adverse party or parties shall be liable to such employee, upon final judgment or order, for court costs, and for reasonable attorney's fees, to be set by the court, for representing such employee in all administrative hearings and before the circuit court and the supreme court of appeals, and shall be further liable to such employee for any court reporter's costs incurred during any such administrative hearings or court proceedings: Provided, That in no event shall such attorney's fees be awarded in excess of a total of one thousand dollars for supreme court proceedings: Provided, however, That the requirements of this section shall not be construed to limit the employee's right to recover reasonable attorney's fees in a mandamus proceeding brought under section nine [§ 29- 6A-9] of this article.

This Grievance Board has previously determined that the foregoing statute does not provide authority for award of attorney's fees at Level IV. Chafin v. Boone County Health Dept., Docket No. 95-BCHD-362 (June 21, 1996). See Cremeans v. Bd. of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996); Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1996). Accordingly, Intervenor's request for attorney's fees is denied.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant has been employed by Respondent Public Service Commission (PSC) since 1976. In February 1990 Grievant was designated as Acting Manager of the Energy Section in PSC's Utilities Division.

2. In December 1990 Grievant was competitively promoted to Manager of the Energy Section. At all times pertinent to this Grievance, David Ellis, Director of PSC's Utilities Division, was Grievant's immediate supervisor. Mr. Ellis, in turn, reported directly to PSC Chairman Boyce Griffith.

3. At all times pertinent herein the regular working hours for PSC employees were 9:00 a.m. to 5:00 p.m., with an hour for lunch between 12:00 p.m. and 1:00 p.m. See G Exs G, N, O, & R.

4. Beginning sometime in 1991, Section Managers were required to sign a monthly time sheet certifying the leave and attendance data reported by employees under their immediate supervision. See G Ex A.

5. After the monthly time reports were implemented, Grievant noted that some of the time reported by employees under his supervision was inconsistent with his personal recollection of their attendance. He discussed this situation with Mr. Ellis.

6. In accordance with a recommendation from Mr. Ellis, Grievant's secretary, Linda Ferguson, began keeping daily time sheets recording the attendance of each employee in the Energy Section. Ms. Ferguson was instructed to check each employee's office shortly after 9:00 a.m. each day to verify who was present for duty. If an employee was not present and had not called in, Ms. Ferguson checked with Grievant and Mr. Ellis' secretary or Mr. Ellis, to determine if the employee had called in or been authorized to work out of the office. She would then record the time the employee arrived for work on thedaily time sheet based upon the time when the employee was first observed in the office by herself or Grievant. See G Exs C & D.

7. On March 6, 1992, Grievant signed Intervenor's annual rating form, rating Intervenor an overall 9.3, including an 8 or "very good" in the category "use of time." I Ex 1. In addition, Grievant sent a hand-written memo to Mr. Ellis that same day recommending Intervenor for a merit raise. I Ex 6.

8. The leave and attendance data reported by Intervenor and other employees for the months of August, September and October 1992, and June and July 1993 was inconsistent with the data contained in the daily time sheets maintained by Grievant's secretary. Cf. G Exs C & F.

9. On each occasion when the leave and attendance information reported by an employee was inconsistent with the daily time sheets, Grievant refused to sign the monthly time sheets for the

Energy Section.

10. Grievant reminded all employees under his supervision about the leave and attendance reporting requirements. See G Ex G & H. However, he never confronted any individual employee regarding his or her tardiness, or failure to request leave in accordance with established procedures, nor did he either propose or initiate any form of progressive discipline against any such employee or employees.

11. On several occasions, Grievant and Mr. Ellis discussed various issues regarding the monthly time sheets. Mr. Ellis encouraged Grievant to compromise by signing one or more of the time sheets as Mr. Ellis was satisfied that the employees had actually worked the hours claimed, although the employees had not reported their whereabouts or obtained advance approval to work after normal office hours in accordancewith established PSC procedures. At no time did Mr. Ellis order or direct Grievant to sign a false or inaccurate time sheet. Likewise, Mr. Ellis never took or threatened any adverse action against Grievant because of Grievant's refusal to sign the time sheets.

12. In May 1992, Grievant requested reassignment to a non-supervisory position, expressing concerns about the workload and the amount of compensation he was receiving as a Manager. See I Ex 2. No action was taken on this request.

13. In August 1993, Mr. Ellis came to Grievant's office to initiate a discussion regarding Intervenor's tardiness. Mr. Ellis suggested that Intervenor could be disciplined or his pay could be docked. Prior to that meeting, Grievant had decided to resign from his supervisory position as Energy Section Manager.

14. On August 5, 1993, Grievant submitted a written request for reassignment, indicating that Mr. Ellis had not provided him with proper authority or support to deal with employee attendance problems, and again noting disappointment over his compensation. See I Ex 2.

15. Following receipt of Grievant's resignation letter of August 5, 1994, Mr. Ellis substantially assumed Grievant's duties as Energy Section Manager.

16. At no time prior to August 5, 1993, did Grievant take his concerns regarding the matters stated in his resignation letter to Chairman Griffith.

17. On June 1, 1994, Grievant was officially demoted from Utilities Analyst Manager in Pay Grade 17 to Utilities Analyst Supervisor in Pay Grade 15, without any reduction in annual salary.

CONCLUSIONS OF LAW

1. In order to prove a constructive demotion, Grievant must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to resign. See Slack v. Kanawha County Housing & Redevelopment Auth., 188 W. Va. 144, 423 S.E.2d 547 (1992); Coster v. W. Va. Div. of Corrections, Docket No. 94-CORR-600 (Aug. 12, 1996); McClung v. W. Va. Dept. of Public Safety, Docket No. 89-DPS-240 (Aug. 14, 1989). See also Bristow v. Daily Press, Inc. 770 F.2d 1251 (4th Cir. 1985).

2. "To determine whether an employee's act of resignation was the result of coercion, rather than a voluntary act, the circumstances surrounding the resignation must be examined in order to measure the ability of the employee to exercise free choice." McClung, supra.

3. Grievant failed to prove that his working conditions as Manager of the Energy Section in the Utilities Division of the West Virginia Public Service Commission were so intolerable that a reasonable person would be compelled to resign. See Slack, supra; Coster, supra. See also Bristow, supra. Thus, Grievant's demotion resulted from his voluntary resignation.

4. This Grievance Board has no authority to award attorney's fees at Level IV. Chafin v. Boone County Health Dept., Docket No. 95-BCHD-362 (June 21, 1996). See Cremeans v. Bd. of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996); Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1996).

Accordingly, the grievance is **DENIED**. Intervenor's request for attorney's fees is likewise **DENIED**. Any party 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 Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: April 25, 1997

Footnote: 1

During the course of the hearing Grievant presented evidence regarding various events that occurred before he assumed the duties of Acting Manager or Manager of the Energy Section. For example, there was testimony that Intervenor had been conducting personal business on state time in his office in 1988. However, there was no credible evidence that Intervenor did other than PSC work in his office during the time Grievant was his supervisor. Further, while Grievant theorized that these events were relevant to prove a pattern of "favoritism" prohibited by W. Va. Code § 29-6A-2(h), Grievant was apparently aware of these circumstances when he accepted the position, and he cannot rely on them to demonstrate that his working conditions were made intolerable after he became Manager. Unless otherwise indicated, this evidence will be considered for the limited purpose of determining whether Mr. Ellis displayed undue favoritism toward Intervenor or others during Grievant's tenure as Manager, in circumstances which made Grievant unable to effectively function in his position as Energy Section Manager.

Footnote: 2

Grievant testified, on cross-examination by Intervenor's counsel, "for this particular period that I was his supervisor, he was doing extremely well for Mr. Khoury."

Footnote: 3

Grievant maintained that this arrangement was yet another example of Mr. Ellis' undue "favoritism" toward Intervenor. However, Mr. Ellis satisfactorily explained that the second floor offices were larger than those on the third floor, and Intervenor was assigned one of those larger offices based upon his superior seniority.

Footnote: 4

Although Utilities Analyst Supervisor is in a lower pay grade than Utilities Analyst Manager, Grievant's salary was not reduced. The West Virginia Division of Personnel has defined "demotion" as follows:

> *A change in the status of an employee from a position in one class to a position in another class of lower rank as measured by salary range, minimum qualifications, or duties, or a reduction in an employee's pay to a lower rate in the pay range assigned to the classification.*

W. Va. Div. of Personnel Administrative Rule, 143 C.S.R. 1 § 3.27 (1995). Thus, Grievant suffered a demotion as defined by Personnel.

Footnote: 5

At no time did Grievant approach Mr. Ellis with a specific proposal that any disciplinary or corrective action be taken in regard to Intervenor or any other employee in the Energy Section, beyond making their time sheets conform to the records maintained by Grievant and his secretary.

Footnote: 6

Grievant further reported that Intervenor was the second-highest paid employee in the Utilities Division, including other Managers. Thus, it can be surmised that Intervenor would also have been paid more than some of the other Managers, had he been assigned to their section. Intervenor's salary was not shown to be improper in any regard, and resulted

largely from seniority and merit raises received before Grievant became his supervisor.

Footnote: 7

Mr. Ellis' statement asking Grievant why he would not sign the time sheets was not coercive. It simply reflected Mr. Ellis' inability to comprehend why Grievant was being so adamant in his refusal to approve Intervenor's time sheet. Certainly, Mr. Ellis did not perceive the time sheets to be fraudulent, and Grievant did a poor job of convincing him otherwise.