CHRISTINE DINGESS,

Grievant,

v v.

Docket No. 00-23-094

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Christine Dingess, employed by the Logan County Board of Education ("LCBOE" or "Board"), filed the following grievance on or about October 27, 1999:

> STATEMENT OF GRIEVANCE: Grievant is a regularly employed teacher's aide. Grievant was initially charged with two felonies as a result of a shooting which occurred when Grievant's former boyfriend invaded Grievant's home through a window at night. Grievant subsequently entered a plea to a misdemeanor count of battery. Grievant and Respondent's Superintendent executed an agreement on or about August 19, 1999 in which the Grievant agreed to "bid out" of the Chapmanville area and, further, not to apply for vacancies in the Chapmanville area for a period of five years. Grievant contends that she executed the agreement under duress and that the county Superintendent of schools does not have the statutory authority to enter into such agreements and that this agreement is null and void. In addition, the Grievant contends that this agreement was rescinded by the parties and that she should no longer be bound by this agreement.
>
> RELIEF SOUGHT: Grievant seeks reinstatement to her former teacher's aide position at Chapmanville Grade School and the opportunity to apply for future vacancies in the Chapmanville area. Grievant also seeks compensation for mileage incurred traveling to Verdunville Grade School.

It appears there was no filing at Level I. A Level II hearing was held on January 7, 2000, and a Level II decision denying the grievance was issued on January 19, 2000. There is no transcript of the proceedings at Level II due to a malfunctioning of the recording equipment. Grievant appealed to Level III, and the Board, on March 8, 2000,voted four to one to deny the grievance and to uphold the Superintendent's Decision. (See footnote 1) Grievant appealed to Level IV on March 16, 2000, and a

Level IV hearing was held on May 22, 2000. The deadline for the parties' proposed findings of fact and conclusions of law was June 19, 2000, at which time this grievance became mature for decision. (See footnote 2)

Issues and Arguments

Respondent filed an oral Motion to Dismiss at hearing, based on the prior written agreement. Grievant argued the written agreement should be null and void because it was entered into under duress, the Superintendent did not have the authority to make such an agreement (See footnote 3), and the written agreement had been rescinded. Respondent asserted the written agreement was valid, within Superintendent Ray Woolsey's authority, and had not been rescinded.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed as an Aide by LCBOE for approximately 19 years.

2. Grievant had been personally involved with William Adkins for a number of years. This relationship had been a troubled one, and at one time Grievant had gotten a Domestic Violence Petition against Mr. Adkins, as he had harmed her in the past, especially when he was drinking.

3. At an unspecified time during 1999, Grievant had spent several days with Mr. Adkins at his house. After she returned home, he showed up one night at her house, intoxicated, and demanded to come inside. When Grievant would not let him in the trailer, he attempted to crawl in through the window, and she pushed him out. He then tried to enter the trailer through the front door, and Grievant shot at him to frighten him away. Mr. Adkins was wounded in the groin. (See footnote 4) Mr. Adkins was not armed.

4. Grievant was charged with one felony count of malicious wounding and one felony count of wanton endangerment.

5. Later Grievant and Mr. Adkins reconciled, and Mr. Adkins asked the Court to dismiss the pending charges saying he believed the shooting was accidental. Grievant then entered a guilty plea to one misdemeanor count of battery.

6. During this time, Superintendent Woolsey received several complaints from parents who did not want Grievant at the Chapmanville Grade School. These parents were fearful that further violence

could occur at the school and threatened to picket. 7. Superintendent Woolsey contacted Grievant and directed her to attend a meeting to discuss the complaints he had received about her actions.

8. Prior to this meeting, Superintendent Woolsey contacted Ken Legg from the West Virginia School Service Personnel Association, Grievant's representing Association, and asked his opinion about the possible written agreement he planned to discuss with Grievant.

9. Superintendent Woolsey explained to Mr. Legg that his first thought had been to terminate Grievant's employment. He then believed there was a possible alternative, and discussed with Mr. Legg an agreement where Grievant would agree to bid out of the Chapmanville area, where the events had occurred, and would also agree to not bid on a position in the Chapmanville area for five years.

10. Mr. Legg informed Superintendent Woolsey he thought this offer was fair and reasonable.

11. Grievant met with Superintendent Woolsey on the morning of August 19, 1999. Superintendent Woolsey informed Grievant of his initial plan to terminate her employment, but that he had an alternative to propose to this consideration.

12. Superintendent Woolsey discussed the proposal outlined in Finding of Fact 9 with Grievant. He explained he would need a response by the next board meeting scheduled for August 26, 1999. (See footnote 5) 13. Grievant agreed to this solution, and Superintendent Woolsey directed Assistant Superintendent Brenda Skibo to draw up this written agreement.

14. Grievant signed this written agreement at that time.

15. Grievant did not ask, and Superintendent Woolsey did not suggest that Grievant contact her Association.

16. Superintendent Woolsey informed the Board of the written agreement Grievant had signed.

17. Grievant bid on, and was accepted for, an Aide position at Verdunville, which is in the Logan area of LCBOE.

18. On September 4, 1999, after discussions with a teacher and her son, Grievant wrote Superintendent Woolsey stating, "Please be advised that I wish to rescind the agreement that I signed August 19, 1999 in which I agreed to no longer work or apply for vacanc[ies] in the Chapmanville area." This letter was received in Superintendent Woolsey's office on September 7,

1999.

19. On September 14, 1999, Superintendent Woolsey wrote Grievant stating he was now going to recommend her dismissal from employment. The letter stated the following reasons and information :

> 1. You committed an act involving a fire arm which constitutes a crime.
>
> 2. You misinformed me as to your involvement regarding the said incident.
>
> 3. On September 4, 1999, you wrote a letter rescinding the original agreement dated August 19, 1999, by which you were not to work or apply for any vacancies within the Chapmanville area for five years.
>
> Due to the nature of your involvement of said act, and the notoriety brought upon this school system, I am going to recommend the termination of your employment with the Logan County Board of Education.
>
> According to due process, you are entitled to a hearing before the Logan County Board of Education within a timely manner.

20. Although this letter was mailed, Superintendent Woolsey, after conversations with Mr. Legg and Mr. John Roush, decided the written agreement was binding and did not take the issue to the Board for the necessary approval to terminate Grievant's contract.

21. After Grievant received her plea agreement, she and Mr. Adkins again broke off their relationship. Mr. Adkins accused Grievant of tricking him in order to receive reduced charges, and he and his family frequently complained to Superintendent Woolsey because Grievant was still employed.

22. Sometime later, Mr. Adkins murdered Grievant's son, and Mr. Adkins is currently incarcerated.

23. Grievant applied for several vacancies in the Chapmanville area, and her application was not considered because of the prior agreement.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. KanawhaCounty Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6.

"The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy." Syl. Pt. 1, Sanders v. Roselawn Memorial Gardens, 152 W. Va. 91, 159 S.E.2d 784 (1968). This Grievance Board, of course, also recognizes this general rule of law. Dye v. W. Va. Dep't of Educ., Docket No. 99-DOE-217 (Sept. 16, 1999); Lowe v. W. Va. Div. of Corrections, Docket No. 99-CORR-095 (June 10, 1999); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996). See McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (1994). The burden of proof is upon the party seeking to invalidate a settlement agreement to establish proper grounds to support a determination that the agreement is invalid and should be set aside. Dye, supra. See Kyle v. W. Va. Div. of Corrections, Docket No. 99-CORR-077D (Aug. 3, 1999). In determining whether the agreement Grievant entered into with Superintendent Woolsey to resolve her proposed termination should be set aside, this Grievance Board will look to ordinary principles of law governing the formation of contracts in West Virginia. See, e.g., Nutter v. Harrison County Bd. of Educ., Docket No. 91-17-081 (Dec. 26, 1991); Nealis v. Berkeley County Bd. of Educ., Docket No. 02-87-231-2 (Dec. 22, 1987). See also Mahoob v. Dep't of Navy, 928 F.2d 1126 (Fed. Cir. 1991). In addition, this Grievance Board sometimes looks to the decisions of other agencies which adjudicate disputes involving public employees, such as the federal-level United States Merit SystemsProtection Board (MSPB). Dye, supra. See, e.g., R.H.S. v. RESA IV, Docket No. 96- RESA-348 (Mar. 31, 1997); Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

In regard to a settlement agreement which has been entered into to resolve a disciplinary action, the MSPB allows an employee to challenge such an agreement on the basis that the agreement was unlawful, involuntary, or the result of mutual fraud or mistake. Wade v. Dep't of Veterans Affairs, 61 M.S.P.R. 580 (1994). For example, an employee can demonstrate that a settlement agreement was

coerced, and therefore involuntary, by showing that the agency threatened to take a disciplinary action that it knew or should have known could not be substantiated. Schulz v. U.S. Navy, 810 F.2d 1133 (Fed. Cir. 1987). However, the mere fact that an employee must choose between one of two unpleasant alternatives does not make the employee's decision involuntary. Dye, supra; Schulz, supra.

In addition, a grievant may plead she was coerced into an agreement by duress or undue influence. In order to plead force or duress successfully, a grievant must show the employer constrained or forced her to accept the terms of the settlement. See Asberry v. USPS, 692 F.2d 1378 (Fed. Cir. 1982). Duress has been defined by the West Virginia Supreme Court of Appeals as "that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness . . .". Warner v. Warner, 183 W. Va. 90, 394 S.E.2d 74 (1990). The Warner Court stated, "[t]he requirements of common-law 'duress' have been enlarged to include any wrongful acts that compel aperson, such as a grantor of a deed, to manifest apparent assent to a transaction without volition or cause such fear as to preclude him from exercising free will and judgment in entering into a transaction." See Vandiver v. Gen. Accounting Office, 3 M.S.P.R. 158 (1980). 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 by the employer. Vandiver, supra (citing Freuhauf Southeast Garment Co. v. United States, 111 F.Supp. 945 (Ct. Cl. 1953)). See Warner, supra. "The modern approach to resolving the issue of duress focuses on the issue of whether an individual has been 'preclude[d] . . . from exercising free will and judgment in entering into a transaction.' " Warner, supra (citing Norfolk Div. of Social Serv. v. Unknown Father, 2 Va. Appointment. 420, 345 S.E.2d 533, 541 (1986) and 25 Am. Jurisdiction. 2d Duress and Undue Influence § 12 (1966)). "The individual claiming duress has the burden of demonstrating such allegations of duress by clear and convincing evidence." Warner, supra.

Grievant presented insufficient evidence of the kind and type of duress required to set aside the agreement. Grievant was informed there was a time limit in which to accept the agreement because Superintendent Woolsey must go to the Board with some form of recommendation. Grievant says she was told he must accept before the evening Board meeting, Superintendent Woolsey says Grievant

needed to accept before the Board meeting a week later. Either way Grievant was not forced to decide "on-the-spot." She testified she was a long-term member of her Association and knew it had attorneys and other individuals to give her guidance. Grievant's explanation that she did not think ofconsulting these people for assistance is insufficient to support a claim of duress. As previously stated, having to choose between two unpleasant alternatives does not constitute duress.

Although this case does not involve a resignation, the factors identified in Smith v. West Virginia Division of Corrections, Docket No. 94-CORR-1092 (Sept. 11, 1995), used in analyzing whether a resignation was involuntary may also be considered here by analogy. The Smith factors are whether: 1) an employee was given time to consider his course of action or to consult with anyone; 2) whether the resignation was abruptly obtained and/or inconsistent with the employee's work history; and 3) whether the employer had reason to believe the employee was not of a state of mind to exercise intelligent judgment. See Paroczay v. Hodges, 297 F.2d 439 (D.C. Cir. 1961).

Grievant did not prove any of the above-listed factors existed at the time she accepted Superintendent Woolsey's alternative to being terminated. Grievant had the rest of the week (or of the day, if Grievant's contention is accepted) to think about the issue, and although she was not told she could consult someone, she also was not prevented from doing so. Additionally, while Grievant may have been upset by the discussion with Superintendent Woolsey, there was no evidence to support that she was "not of a state of mind to exercise intelligent judgment." Smith, supra.

Grievant's claim of undue influence likewise fails on the facts of this case. "To invoke undue influence as a means of voiding an executed document, an individual must establish that he had no free will when he signed the document in question." See Sturm v. Stump, 239 F. 749, 754 (N.D. W. Va. 1917), rev'd on other grounds, 254 F. 535 (4th Cir.1918), cert. denied, 248 U.S. 578, 39 S. Ct. 19, 63 L. Ed. 430 (1918). See also Nuckols v. Nuckols, 228 Va. 25, 320 S.E.2d 734 (1984) (undue influence occurs when 'manifest irresistible coercion' deprives person of volition to dispose of property as he desired)." Warner, supra. The necessary "irresistible coercion" depriving Grievant of volition was not present here.

The issue of whether the written agreement was rescinded in a simple one. It was not. Although Superintendent Woolsey planned to rescind the agreement after receiving Grievant's letter unilaterally requesting rescission, he changed his mind after discussions with Mr. Legg and Mr. Roush, when they informed him the written agreement was still binding. After those discussions,

Superintendent Woolsey did not take his recommendation to the Board for approval. Since he did not take the required action to rescind the contract, it is still in place. The rescission of this written agreement would required the mutual consent of the parties, and this agreement or mutual consent did not occur here. See generally, Gaston v. Wolfe, 132 W. Va. 791, 53 S.E.2d 632 (1949); Babcock Coal and Coke Co. v. Brackens Creek Coal Land Co., 128 W. Va. 676, 37 S.E.2d 519 (1946).

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Toneyv. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6.

2. "The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy." Syl. Pt. 1, Sanders v. Roselawn Memorial Gardens, 152 W. Va. 91, 159 S.E.2d 784 (1968). See Dye v. W. Va. Dep't of Educ., Docket No. 99-DOE-217 (Sept. 16, 1999); Lowe v. W. Va. Div. of Corrections, Docket No. 99-CORR-095 (June 10, 1999); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996). See McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (1994).

3. The party seeking to invalidate a settlement agreement has the burden of establishing proper grounds to support a determination that the agreement is invalid and should be set aside by clear and convincing evidence. Warner v. Warner, 183 W. Va. 90, 394 S.E.2d 74 (1990). See Kyle v. W. Va. Div. of Corrections, Docket No. 99-CORR-077D (Aug. 3, 1999).

4. Where an employee and agency have entered into a settlement agreement to resolve a proposed or pending disciplinary action, the employee may have the agreement set aside by establishing that the agreement was unlawful, involuntary, or the result of mutual fraud or mistake.

Warner, supra. See Wade v. Dep't of Veterans Affairs, 61 M.S.P.R. 580 (1994). 5. In order to have a settlement agreement set aside on the basis that the agreement was coerced, and therefore involuntary, the employee may demonstrate that the agency threatened to take a disciplinary action that it knew or should have known could not be substantiated. Dye, supra; See Schulz v. U.S. Navy, 810 F.2d 1133 (Fed. Cir. 1987).

6. An agreement may also be set aside by duress and undue influence. Warner, supra.

7. Duress has been defined by the West Virginia Supreme Court of Appeals as "that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness . . .". Warner, supra.

8. To prove undue influence "as a means of voiding an executed document, an individual must establish that he had no free will when he signed the document in question." See Sturm v. Stump, 239 F. 749, 754 (N.D. W. Va. 1917), rev'd on other grounds, 254 F. 535 (4th Cir. 1918), cert. denied, 248 U.S. 578, 39 S. Ct. 19, 63 L. Ed. 430 (1918). See also Nuckols v. Nuckols, 228 Va. 25, 320 S.E.2d 734 (1984) (undue influence occurs when 'manifest irresistible coercion' deprives person of volition to dispose of property as he desired)." Warner, supra.

9. Grievant failed to demonstrate that the agreement she made with her employer was the result of unlawful duress, undue influence, coercion, or was otherwise involuntary, unlawful, or the result of fraud or mutual mistake. See Warner, supra; Dye, supra; Asberry v. USPS, 692 F.2d 1378 (Fed. Cir. 1982). 10. Grievant did not demonstrate Superintendent Woolsey threatened to take disciplinary action he knew or should have known could not be substantiated. Dye, supra; See Schulz v. U.S. Navy, 810 F.2d 1133 (Fed. Cir. 1987).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Logan County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit

court.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: July 6, 2000

Footnote: 1

There was a recording of the proceedings at Level III, but Grievant's attorney did not believe it was necessary to transcribe it, as the evidence could easily be presented at the Level IV hearing.

Footnote: 2

Grievant was represented by Attorney John E. Roush, of the West Virginia School Service Personnel Association, and Respondent was represented by Attorney Brian Abraham.

Footnote: 3

Grievant did not present any evidence to support this contention, and the undersigned Administrative Law Judge has not found any impediments to a superintendent entering into an agreement such as the one at issue here. Accordingly, this argument must fail.

Footnote: 4

Grievant states she did not really aim at Mr. Adkins, but only wanted to scare him.

Footnote: 5

Grievant testified Superintendent Woolsey told her he needed an answer before the Board meeting scheduled for that evening. Superintendent Woolsey testified Board meetings are scheduled for the second and fourth Thursdays of the month, so the next meeting would have been August 26, 1999. As the burden of proof in this grievance rests with the Grievant, and there was no evidence presented to demonstrate SuperintendentWoolsey was incorrect, or that a special meeting of the Board was scheduled for August 19, 1999, this issue must be resolved against Grievant.