HOWARD HARVEY,

Grievant,

v v.

DOCKET NO. 01-45-360

SUMMERS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Howard Harvey, Grievant, filed this grievance against his employer, the Summers County Board of Education ("Board") directly to level four on May 18, 2001, alleging as follows:

> Grievant, a regular bus operator, received a visit by the county superintendent and his supervisor at his home on or about May 3, 2001. (Grievant was off work that day). These individuals accused Grievant of abuse of alcohol and demanded that he resign under threat of dismissal and exposure in the local news media as a abuser of alcohol. Grievant does not recall resigning on that day, but was not at that time in a state of mind to necessarily recall or to be held responsible for his actions. As a result of these events, Respondent no longer recognizes Grievant an employee. Grievant contends that he has been terminated, either constructively or in actuality, without due process and in violation of West Virginia Board of Education Policy No. 5300, Respondent's policies on drug and alcohol abuse, West Virginia Code §§ 18A-2-7 and 18A-2-8.
>
> Relief sought: Grievant seeks reinstatement with compensation for all wages and benefits lost as a result of termination.

A level four hearing was held in the Grievance Board's Beckley, West Virginia, office on July 31, 2001, and this matter became mature for decision on August 30, 2001, thedeadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by John E. Roush, Esq., West Virginia School Service Personnel Association, and the Board was represented by

Kathryn R. Bayless, Esq., Bayless & McFadden, L.L.P.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

May 20,1997 and May 23, 2000 Evaluation Forms for Howard Harvey.

Board Exhibits

Ex. 1 -

Letter of resignation signed by Howard and Kathy Harvey.

Ex. 2 -

May 3, 2001 Board minutes.

Ex. 3 -

May 4, 2001 letter from Charles R. Rodes to Howard Harvey.

Ex. 4 -

Howard Harvey Absences/2000-2001 School Year.

Ex. 5 -

May 2, 2000 Probationary Contract of Employment for Service Personnel.

Ex. 6 -

August 15, 1996 signed acknowledgment of receipt of Drug-Free Workplace Policy, with attached Policy.

Ex. 7 -

Personal Leave Policy.

Testimony

Grievant testified on his own behalf, and presented the testimony of Kathy Sue Harvey. The

Board presented the testimony of Charles Rodes.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant was formerly employed by the Board as a regular bus operator under a probationary contract of employment. Board Ex. 5.

2. The Board was required to determine which probationary employees it would re-hire by the first Monday in May. The meeting at which the superintendent made the recommendation concerning probationary re-hires was conducted by the Board on May 3,2001. It had been the intention of Superintendent Charles Rodes to recommend the re- hiring of Grievant at this meeting.

3. Grievant was absent from work on April 30, 2001, and May 1 and 2, 2001. During the 2000-01 school year, Grievant's immediate supervisor, James Gore, the Board's business manager, Billy Joe Kessler, and the Superintendent began to have suspicions that Grievant was abusing alcohol which was contributing to his absence record. Grievant was confronted by these individuals about their suspicions, and a meeting was held between Grievant and his wife, Gore, Kessler, and Rodes on April 4, 2001. During that meeting, Grievant's suspected alcohol abuse and his absence record were discussed. Both Mr. and Mrs. Harvey denied Grievant had a drinking problem. Grievant has consistently denied abusing alcohol, and as a result, has never requested assistance from the Board for any suspected abuse problem.

4. On May 2, 2001, Grievant, while absent from work, telephoned Mr. Gore and informed him that he understood he “was looking for me.” Grievant advised Gore he was at home. Gore related the conversation to Superintendent Rodes, and they decided to visit Grievant at his home.

5. Grievant took sick leave on May 2, 2001. Grievant drank 5 or 6 cans of beer, in what he said was an attempt to spur his appetite. Mrs. Harvey was in the process of preparing food when Superintendent Rodes and Mr. Gore arrived at the Harvey residence.

6. During the ensuing conversation, Grievant admitted he had been drinking that day, and he requested a couple of days to “get himself together.” Superintendent Rodestold Grievant the Board was meeting the next day, and that he would not recommend that the Board re-hire Grievant for the coming school year.

7. Grievant inquired as to whether there were other options, and Rodes advised him he could resign, and if he chose to do so, the resignation letter had to be in his hands the next morning prior to the Board meeting.

8. After the meeting with Rodes and Gore, Grievant retired to his bed where he remained through the morning of the next day when he signed the letter of resignation that his wife had typed up by a relative. (See footnote 1)

9. Mrs. Harvey delivered the letter to Superintendent Rodes the morning of May 3, 2001, and during the meeting conducted that morning, the Board acted to accept the resignation. By letter of May 4, 2001, Superintendent Rodes advised Grievant the Board had accepted his resignation.

10. A few days later, Grievant contacted Mr. Gore and told him he did not want to resign and wished to rescind his resignation. Grievant was told this was not possible.

11. Grievant contacted his representative and this grievance was filed on May 18, 2001.

DISCUSSION

Grievant contends his employment was terminated, either in fact or constructively, without due process of law and in violation of State Board of Education Policy 5300, Summers County policy regarding drug and alcohol abuse, and W. Va. Code §§ 18A-2-7and 18A-2-8. The Board argues the grievance should be dismissed as untimely filed. The Board further argues Grievant voluntarily resigned his employment, and no laws, statutes, or policies were violated when the Board acted to accept that resignation pursuant to W. Va. Code § 18A-2-8a.

Where the 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. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29- 122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Once the employer has demonstrated that 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. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County

Health Dept., 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).

In a non-disciplinary education grievance, a grievance must be filed within fifteen days following the occurrence of the event upon which the grievance is based. W. Va.Code §18-29-4(a)(1). The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). Thus, taking May 3, 2001, the day the Board accepted Grievant's resignation as the event upon which the grievance is based, the grievance would have had to be filed no later than May 18, 2001.

However, in this case, Grievant filed his grievance directly to level four, without objection from the Board, and characterizes his resignation as involuntary or a “constructive discharge.” The Board argues that, if indeed, Grievant's resignation is to be analyzed as a constructive discharge, then the time frame set forth in Code § 18A-2-8 is controlling, which requires a grievance be filed within five (5) days of the event upon which the grievance is based. In that case, the grievance would have had to be filed no later than May 8, 2001, and the grievance is clearly untimely filed.

Grievant contends that he was confused with regard to the circumstances surrounding his resignation, and did not know how to proceed with his grievance until he contacted his representative, at which point the grievance was filed on May 18, 2001, which would be the last day for filing under W. Va. Code §§ 18-29-1, et seq.

Despite the Board's creative timeliness argument, there is no doubt that the Board was proceeding under W. Va. Code § 18A-2-8a when it notified Grievant he would not b rehired under a probationary contract for the next school year. It makes no difference how the Grievant characterizes his grievance; one must look at the Board's action whendetermining which statute to follow for the purpose of timely filing a grievance. It is not disciplinary to simply fail to renew a probationary employee's contract under Code § 18A-2- 8a, and the Board cannot now attempt to rely on the disciplinary statute, W. Va. Code § 18A-2-8, in order to succeed in its attempt to dismiss the grievance on the basis of timeliness. Consequently, the provisions of W. Va. Code §§ 18-29-1, et

seq. apply to this grievance, and the grievance was timely filed on May 18, 2001.

The burden of proving by a preponderance of the evidence that resignation was involuntary rests with the grievant. Bailey v. Eberle Technical Center, Docket No. 98-49- 189 (Sept. 30, 1998), citing Glasscock v. W. Va. Dept. of Corrections, Docket No. 95- CORR-093 (May 31,1995) and McClung v. W. Va. Dept. of Public Safety, Docket No. 89- DPS-240 (Aug. 14, 1989). Whether a resignation was voluntary is a question of fact which must be resolved on a case-by-case basis. Paroczay v. Hodges, 297 F.2d 439 (D.C. Cir. 1961).

A resignation is presumed to be voluntary. See Latham v. United States Postal Serv., 909 F.2d 500, 502 (Fed. Cir. 1990); Christie v. United States, 518 F.2d 584, 587 (Ct. Cl. 1975). The presumption of voluntariness may be rebutted if the employee can establish that the resignation was the product of duress or coercion brought on by the employer, was based on misleading or deceptive information, or if the employee was mentally incompetent. Scharf v. Dept. of Air Force, 710 F.2d 1572, 1574-75 (Fed. Cir. 1983). Resignations that are obtained through coercion or deception are contrary to public policy. Welch v. W. Va. Dept. of Corrections, Docket No. 95-CORR-261 (Jan. 31, 1996). The common element in all cases of involuntary resignation is that factors have operated onthe employee's decision-making process that deprived him of freedom of choice. Scharf, supra; Perlman v. U. S., 490 F.2d 928 (Ct. Cl. 1974); Heining v. GSA, 68 M.S.P.R. 513, 519 (1995).

The voluntariness of a resignation is determined based on whether the totality of the circumstances supports the conclusion that the employee was effectively deprived of free choice in the matter. See Braun v. Dept. of Veterans Affairs, 50 F.3d 1005, 1007 (Fed. Cir. 1995); Scharf, 710 F.2d at 1574; Christie, 518 F.2d at 587; Perlman, 490 F.2d at 933; Heining, 68 M.S.P.R. at 519-20. See also Smith v. W. Va. Dept. of Corrections, supra. Factors to be considered in the analysis are whether the employee was given time to consider his 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 was not in a state of mind to exercise intelligent judgment. Vandiver v. GAO, 3 M.S.R.P. 158 (1980). Duress has been found where the employee involuntarily accepted the employer's terms; circumstances surrounding the resignation permitted no other alternative; and the circumstances were the result of coercive acts of the employer. Vandiver, citing Freuhauf Southeast Garment Co. v. United States, 111 F. Supp. 945 (Ct. Cl 1953). Where an employee is faced with merely the unpleasant choice of resigning or being

subject to possible removal for cause, such limited alternatives do not make a resulting resignation an involuntary act. Glasscock, supra.

Analyzing the facts in the instant case, the undersigned concludes Grievant's resignation was a voluntary act. Superintendent Rodes and Grievant's supervisor cameto Grievant's home on May 2, 2001, to discuss his absence from work; Grievant admitted he had been drinking that day. He did ask Superintendent Rodes to give him a few days to get himself together before making a decision regarding his employment, and the Superintendent explained to Grievant and Mrs. Harvey that if Grievant was going to resign, the Superintendent needed to have the letter in his hand the next morning before the Board met, as the Board had a statutory deadline facing it with respect to the employment of probationary employees. Grievant and his wife had that evening to ponder the situation, and on the next morning of May 3, 2001, Mrs. Harvey delivered the letter to Superintendent Rodes.

Grievant contends he was coerced into resigning on threat of dismissal, and the “threat” of the newspaper reporting he was dismissed by the Board. As stated above, merely giving an employee the unpleasant choice of resigning or being dismissed does not render a resignation involuntary, and in this case, Grievant was not being “dismissed”; he was simply not being rehired. Merely having one's name in the newspaper for failure to be re-hired as a probationary employee may cause embarrassment to Grievant, but it is hardly of a nature to rise to the level of coercion or undue duress. Grievant had the freedom of choice as to his decision to resign. Had the resignation not been received, Superintendent Rodes simply would not have recommended Grievant for re-employment.

CONCLUSIONS OF LAW

1. Where the 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. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

2. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

3. Once the employer has demonstrated that 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. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., 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).

4. It is a Board's actions which determine which statute to follow in deciding whether a grievance was timely filed or not. In this case, the Board acted under W. Va. Code § 18A-2-8a in not renewing Grievant's probationary contract, which is not a disciplinary action. Therefore, the timelines set forth in W. Va. Code §§ 18-29-1, et seq. are controlling. The Board has failed to prove by a preponderance of the evidence that the grievance was untimely filed. 5. The burden of proving by a preponderance of the evidence that resignation was involuntary rests with the grievant. Bailey v. Eberle Technical Center, Docket No. 98- 49-189 (Sept. 30, 1998), citing Glasscock v. W. Va. Dept. of Corrections, Docket No. 95- CORR-093 (May 31,1995) and McClung v. W. Va. Dept. of Public Safety, Docket No. 89- DPS-240 (Aug. 14, 1989). Whether a resignation was voluntary is a question of fact which must be resolved on a case-by-case basis. Paroczay v. Hodges, 297 F.2d 439 (D.C. Cir. 1961).

6. A resignation is presumed to be voluntary. See Latham v. United States Postal Serv., 909 F.2d 500, 502 (Fed. Cir. 1990); Christie v. United States, 518 F.2d 584, 587 (Ct. Cl. 1975). The presumption of voluntariness may be rebutted if the employee can establish that the resignation was the product of duress or coercion brought on by the employer, was based on misleading or deceptive information, or if the employee was mentally incompetent. Scharf v. Dept. of Air Force, 710 F.2d 1572, 1574-75 (Fed. Cir. 1983). Resignations that are obtained through coercion or deception are contrary to public policy. Welch v. W. Va. Dept. of Corrections, Docket No. 95-CORR-261 (Jan. 31, 1996). The common element in all cases of involuntary resignation is that factors have operated on the employee's decision-making process that deprived him of freedom of choice. Scharf, supra; Perlman v. U. S., 490 F.2d 928 (Ct. Cl. 1974); Heining v. GSA, 68 M.S.P.R. 513, 519 (1995).

7. The voluntariness of a resignation is determined based on whether the totality of the circumstances supports the conclusion that the employee was effectively deprived of free choice in

the matter. See Braun v. Dept. of Veterans Affairs, 50 F.3d 1005, 1007(Fed. Cir. 1995); Scharf, 710 F.2d at 1574; Christie, 518 F.2d at 587; Perlman, 490 F.2d at 933; Heining, 68 M.S.P.R. at 519-20. See also Smith v. W. Va. Dept. of Corrections, supra. Factors to be considered in the analysis are whether the employee was given time to consider his 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 was not in a state of mind to exercise intelligent judgment. Vandiver v. GAO, 3 M.S.R.P. 158 (1980). Duress has been found where the employee involuntarily accepted the employer's terms; circumstances surrounding the resignation permitted no other alternative; and the circumstances were the result of coercive acts of the employer. Vandiver, citing Freuhauf Southeast Garment Co. v. United States, 111 F. Supp. 945 (Ct. Cl 1953).

8. Where an employee is faced with merely the unpleasant choice of resigning or being subject to possible removal for cause, such limited alternatives do not make a resulting resignation an involuntary act. Glasscock, supra.

9. Grievant has failed to prove by a preponderance of the evidence that his resignation was involuntary or a “constructive discharge.”

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Summers 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: September 20, 2001

Footnote: 1 *Grievant has no clear memory of signing the resignation or agreeing to it, but other witnesses, including his wife, agreed that he did.*