TERESA JENKINS,

Grievant,

v. DOCKET NO. 02-HHR-214

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

MILDRED MITCHELL BATEMAN HOSPITAL,

Respondent .

D E C I S I O N

This grievance was filed at Level IV by Grievant, Teresa Jenkins, against her former employer, Respondent, Department of Health and Human Resources ("HHR"), on July 14, 2002. Grievant had attempted to file the grievance at Level I of the grievance procedure, but was told by HHR personnel that she could not do so. The statement of grievance reads:

> On 7/8/02 I received a letter from DON Kathy Robertson stating the organization will continue with my resignation. I did not resign verbally or written. Later 7/12/02 in a letter I was denied the due process stating I severed the employee/employer relationship. I did not resign at all, I was terminated.

As relief Grievant sought, “[r]einstatement of my position as a RN and my denied benefits returned.” (See footnote 1)

The following Findings of Fact are made based upon the record developed at Level IV.

Findings of Fact

1. Grievant was employed by HHR at Mildred Mitchell Bateman Hospital (“MMBH”) as a Staff Nurse. She had been employed by HHR for five and a half years, and worked on unit T-2.

2. The management staff at MMBH decided to reorganize the hospital staff, which resulted in staff being reassigned. Grievant was to be reassigned to unit A-4. On July 1, 2002, Grievant's husband, who also works at MMBH and is an LPN, was informed of his reassignment, and of

Grievant's reassignment. Grievant's husband called Grievant at home and told her she was going to be transferred to unit A-4.

3. Grievant called Kathy Robertson, Director of Nursing, from her home. Ms. Robertson was in a meeting with Lawrence Ventura, Chief Executive Officer of MMBH. Grievant told Ms. Robertson she had heard she was being transferred to unit A-4, and she wanted to let her know that she would have to resign her position if she was assigned to unit A-4, but she would accept the supervisor's position they had offered her. Ms. Robertson responded, “okay,” and Grievant told her she would be in to talk to her at 3:00 p.m.

4. Grievant had been offered a supervisory position in mid-June. Grievant had declined to accept the position, because it would have required her to work a different shift from her husband in order to avoid concerns about her supervising him, and she was afraid she would never see him.

5. Patricia Lewis, Assistant Director of Nursing, spoke with Grievant in person at the hospital at 3:30 p.m., on July 1, 2002. Ms. Lewis told Grievant they needed her to go to unit A-4 to work. Grievant responded, “then I'll resign.” Ms. Lewis told her she accepted her verbal resignation. Grievant then asked Ms. Lewis about the supervisor's job. Ms. Lewis called Ms. Robertson, and after speaking with her told Grievant they could not work it out so that she would not be supervising her husband. Grievant told Ms. Lewisshe had always said she would give a month's notice, and that would give her time to decide what to do. Ms. Lewis told Grievant she would need to see the Director of Human Resources, Kieth Anne Worden, about giving a month's notice, and that Ms. Worden might need something in writing.

6. Ms. Lewis and Ms. Robertson had the authority to accept Grievant's resignation.

7. Grievant did not go to talk with Ms. Worden. She immediately returned to her unit and wrote a letter which stated the following:

> After a lot of thought and careful consideration I resend (See footnote 2) [sic] my idea of resigning my position here at MMB Hospital.
>
> As always, I will do what I feel is in the best interest of our patients and staff. I am officially informing all concerned that I will not work on A-4. There are several things to consider in my reasoning; stability of Unit 2 and my inability to do the job I once could due to health conditions of my mother and myself. To go to an acute unit at this time in my life would be detrimental to my family. My loyalty to this hospital and these people should remind you to consider seniority and any other policies that are being overlooked in this matter.

> I will not willingly leave here without a fight for what is right for all involved, patients, co-workers, and administration personnel alike.

8. MMBH declined to accept Grievant's rescission of her resignation. Ms. Robertson notified Grievant of this decision by letter dated July 2, 2002, in which she stated that she and Mr. Ventura "believe it is in the best interest of this organization to continue with your resignation."

9. Grievant had been experiencing health problems which caused dizziness since May 2002. She was afraid that with her health problems, she would not be able to handle unit A-4, because the patients on that unit have been brought to the hospital against their will and are difficult, and at times a quick response to a situation is required. 10. Grievant's mother was terminally ill, and she had been working a shift on unit T-2 which allowed her to care for her mother several days a week. Grievant did not believe that the shift she would have on unit A-4 would allow her to provide the care her mother needed. Ms. Robertson was aware of Grievant's mother's illness, and Grievant's concern with her schedule.

11. Grievant did not believe it would be good for the patients and staff for her to leave unit T-2.

12. Sometime between April and July 2002, Jamie Stoner, a Staff Development Nurse at MMBH, resigned her position. She works in an area which affects education of hospital employees. Mr. Ventura asked Ms. Stoner why she was resigning, if she wanted to reconsider, and gave her 24 hours to reconsider. When Ms. Stoner asked to rescind her resignation, she was allowed to do so.

13. Wally Summers, an LPN at MMBH, was upset with his reassignment. Mr. Summers' wife, who also is employed at MMBH, made the statement that Mr. Summers was talking about leaving the hospital and taking her with him if he was reassigned. Mr. Summers' reassignment did not take place.

14. Grievant was considered a good employee.

Discussion

The issue presented here is whether Grievant resigned. In nondisciplinary matters, the grievant has the burden of proving her case by a preponderance of the evidence. Tucci v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995). Grievant argued she was

shocked by her reassignment, and was under duress due to her mother's illness, as well as her own. She felt she was being required to choose between her mother and her job. She stated she never said she resigned. However, she admitted she stated she would not go to unit A-4, and would have to resign, but she would take the supervisor's position. She also admitted she told Ms. Lewis she had always saidshe would give a month's notice, and that Ms. Lewis told her she was to accept her verbal resignation.

"A resignation is, by definition, a voluntary act on the part of an employee seeking to end the employer-employee relationship. Smith v. W. Va. Dept. of Corrections, Docket No. 94-CORR-1092 (Sept. 11, 1995). See Welch v. W. Va. Dept. of Corrections, Docket No. 95-CORR-261 (Jan. 31, 1996). As a general rule, an employee may be bound by her verbal representations that she is resigning when they are made to a person or persons with the authority to address such personnel matters. See, Welch, supra; Copley v. Logan County Health Dept., Docket No. 90-LCHD-531 (May 22, 1991). The representations must be such that a reasonable person would believe that the employee intended to sever his relationship with the employer." Hale-Smith v. Mingo County Bd. of Educ., Docket No. 98-29-075 (Sept. 30, 1998).

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. Dep't of Public Safety, Docket No. 89-DPS-240 (Aug. 14, 1989); See Adkins v. Civil Serv. Comm'n, 171 W. Va. 132, 298 S.E.2d 105 (1982). "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)." Dooley v. Dep't of Transp., Docket No. 98-DOH-312D (Aug. 3, 1999).

In this case, Grievant gave her employer an ultimatum, at two different times. She would resign rather than go to unit A-4. MMBH chose to continue with its decision to reassign Grievant to unit A-4, and Grievant was informed of this. Grievant then talked about giving 30 days' notice. A reasonable person would have concluded that Grievantintended to sever her employment relationship. She gave a verbal resignation to a person with authority to accept it, and that is sufficient. Albright, supra. Even Grievant's letter, while rescinding her "idea of resigning," clearly states that she "will not work on A-4."

Grievant pointed to the Division of Personnel's Rules on resignations, and argued her resignation was not effective, because she did not place it in writing. The Division of Personnel's Rule 12.1 provides as follows with regard to resignations:

> 12.1. Resignations - An employee who resigns shall present the reasons for the resignation in writing to the appointing authority. The appointing authority shall forward a copy of the resignation to the Director of Personnel who shall record the resignation. If a written resignation cannot be obtained, the appointing authority shall notify the Director of Personnel in writing of the resignation of the employee and the circumstances of the resignation. The appointing authority shall not treat an intra-agency nor an inter-agency transfer as a resignation except when the employee is resigning from a classified position to accept employment in a classified-exempt position.

This Rule is directed toward employees, not employers, and does not preclude an employer from accepting a verbal resignation, nor does it provide an out for an employee who has verbally resigned, but declined to place the resignation in writing.

Certainly Grievant's personal circumstances placed her in a difficult situation, and there is no doubt that she would have been upset by the changes facing her. However, the undersigned cannot conclude that Grievant was coerced. Grievant made the choice to give her employer an ultimatum, and her employer did not respond to it as Grievant had intended.

It appears Grievant is also claiming discrimination based upon HHR's refusal to allow her to rescind her resignation. Inasmuch as Grievant is no longer an employee, whether she was discriminated against would be at issue only in terms of whether the treatment she received was so severe that it amounted to a constructive discharge. Albright v. Dep't of Health and Human Resources, Docket No. 00-HHR-130 (Dec. 27, 2000). Grievant did not claim she was constructively discharged, or that discriminatory treatment caused her to resign. Even if Grievant were allowed to pursue her claim that she was discriminated against because she was not allowed to rescind her resignation, Grievant has not demonstrated that any other similarly situated employee was allowed to rescind his or her resignation. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

(a) that he is similarly situated in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievant demonstrated that one employee, Ms. Stoner, was allowed by MMBH to rescind her resignation. That employee was not a staff nurse as Grievant was, she did not refuse reassignment, and she did not give her employer an ultimatum. Grievant was not in the same situation as Ms. Stoner, and it was not discriminatory for MMBH to not accept Grievant's rescission of her resignation. The undersigned would further note that Grievant's letter in which she attempted to rescind her resignation is contradictory, as she plainly stated that she would not accept reassignment to unit A-4. Grievant also demonstrated that an LPN who was upset with his reassignment, Mr. Summers, was not reassigned. Grievant is not similarly situated to Mr. Summers, as she is not an LPN. Further, while Mr. Summers' wife said he was talking about resigning, Mr. Summers did not make such a statement, and did not give the hospital an ultimatum, which is much different from Grievant's situation.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In nondisciplinary matters, the grievant has the burden of proving her case by a preponderance of the evidence. Tucci v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995).

2. "A resignation is, by definition, a voluntary act on the part of an employee seeking to end the employer-employee relationship. Smith v. W. Va. Dept. of Corrections, Docket No. 94-CORR-1092 (Sept. 11, 1995). See Welch v. W. Va. Dept. of Corrections, Docket No. 95-CORR-261 (Jan. 31, 1996). As a general rule, an employee may be bound by her verbal representations that she is resigning when they are made to a person or persons with the authority to address such personnel matters. See, Welch, supra; Copley v. Logan County Health Dept., Docket No. 90-LCHD-531 (May 22, 1991). The representations must be such that a reasonable person would believe that the employee intended to sever his relationship with the employer." Hale-Smith v. Mingo County Bd. of Educ., Docket No. 98-29-075 (Sept. 30, 1998).

3. 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. Dep't of Public Safety, Docket No. 89-DPS-240 (Aug. 14, 1989); See Adkins v. Civil Serv. Comm'n, 171 W. Va. 132, 298 S.E.2d 105 (1982). "Moreover, whether working conditions are intolerable must be assessed by the objective standard ofwhether 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)." Dooley v. Dep't of Transp., Docket No. 98-DOH-312D (Aug. 3, 1999).

4. Grievant verbally, voluntarily resigned her position to the proper authority. Her resignation was not coerced.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: October 22, 2002

Footnote: 1

A Level IV hearing was held on September 10, 2002. Grievant was represented by her husband, Todd Jenkins, and HHR was represented by Jon R. Blevins, Esquire. This grievance became mature for decision upon receipt of the parties' written arguments on September 25, 2002.

Footnote: 2

Grievant meant to use the word "rescind," and this is what MMBH personnel believed she was saying.