DORIS DINGESS,

Grievant,

v. **DOCKET NO. 03-HHR-341**

DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/

BUREAU FOR CHILDREN AND FAMILIES,

Respondent.

DECISION

On June 30, 2003, Grievant Doris E. Dingess filed a grievance against her employer, the Department of Health and Human Resources, Respondent, claiming: “Discrimination in personnel placement.” As relief, Grievant seeks, “Reinstated to position formerly held, which I was told was given to a less senior employee.”

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston office on March 2, 2004, and May 3, 2004. (See footnote 1) Grievant was represented by Randall Boyd. Respondent was represented by counsel, Landon Brown. The matter became mature for decision at the close of the hearing. Based on a preponderance of the evidence contained in the record and adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant was employed by Respondent as a Supervisor I in the Food Stamp Issuance Unit of the Division of Family Assistance of the Bureau for Children and Families, in charge of accounting and reporting for the federal Food Stamp program. She supervised two employees. She had been in this position since 1971.

2. In 2003, the Food Stamp program was phased out, to be replaced by the Electronic Benefit Transfer (EBT) program; instead of physical coupons, benefit recipients now use a debit card. Actual

Food Stamps stopped being issued May 1, 2003, but a pilot program for EBT card began in October 2002.

3. The Food Stamp program had numerous reporting requirements, and Grievant compiled the information for and completed a number of reports to keep track of the distribution of the stamps. As the EBT program was phased in, Grievant also began completing two reports to account for those benefits.

4. Another DHHR employee, Don Mercer, was in charge of the physical Food Stamps, which were stored in “the Vault” at a different work location than Grievant's. Mr. Mercer is younger than Grievant.

5. Concurrent with the elimination of the Food Stamp program by the federal government, DHHR planned a reorganization of its Food Stamp unit, in order to retain the employees instead of laying them off. Since Food Stamps would no longer exist, neither would any of the Food Stamp reporting requirements, and therefore the duties assigned to Grievant's position would be eliminated, and she would be assigned to a new position after the transition. 6. The Food Stamp Issuance Unit was dissolved. Rather than lay off employees, during the transition, all the employees with Food Stamp duties were assigned to temporary jobs, with the exception of Mr. Mercer. Grievant was assigned temporary duties in the Flood Assistance Unit.

7. Grievant believed these events were a conspiracy to force her to retire. When she told her Supervisor, Randy Thomas, that she was planning to retire, he told her she should not because the transition would only take three months and a new job would be found for her. Grievant nevertheless filed for retirement, effective June 30, 2003.

8. Because the state had stopped issuing Food Stamps, it was left with a vault full of $12 million worth of unissued Food Stamps. Because Mr. Mercer was in charge of the vault, he stayed on to account for and maintain security for these coupons until they could either be destroyed or returned to the federal government. These remaining duties were the same as the duties he had before the unit was dissolved.

9. On Grievant's last day of work, she found out that two of the reports she completed and that were still required for the EBT program were to be assigned to Mr. Mercer during the transition. She then requested to rescind her resignation and stay on to do those reports. Her request was not accepted by Respondent.

10. Now that the transition to the EBT program is complete, Grievant's position no longer exists. The two EBT-related accounting reports she had previously completed and which were temporarily assigned to Mr. Mercer have been assigned to Sarah Young, a Health and Human Resources Specialist whose position is that of policy specialist and bookkeeper. Compilation of data for the monthly reports takes about 45 minutes per day and is a very minor part of her regular duties.

DISCUSSION

"When a grievant complains that [her] employer has forced [her] to resign, [s]he bears the burden of proving that the circumstances surrounding the alleged coerced resignation deprived [her] of [her] ability to exercise free choice. *See McClung v. W. Va. Dept. of Public Safety*, Docket No. 89-DPS-240 (Aug. 14, 1989)." *Glasscock v. Div. of Corrections*, Docket No. 95-CORR-093 (May 31, 1995). Since this grievance does not challenge a disciplinary action, Grievant bears the burden of proving, by a preponderance of the evidence a violation, a misapplication or misinterpretation of any law, rule, regulation or policy under which she worked. *See Unrue v. W. Va. Div. of Highways,* Docket No. 95-DOH-287 (Jan. 22, 1996).

Grievant claims discrimination and favoritism forced her retirement when another, younger and male employee, was assigned portions of her position after she was told the position would be eliminated. Respondent maintains that no discrimination occurred because Grievant's position was indeed eliminated and no longer exists, and that no rule or law mandates that it reinstate an employee after she voluntarily resigns.

"A resignation is, by definition, a voluntary act on the part of an employee seeking to end the employer-employee relationship. [Citations omitted.] 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. [Citations omitted.] The representations must be such that a reasonable person would believe that the employee intended to sever his relationship with the employer." *Jenkins v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02- HHR-214 (Oct. 22, 2002).

"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 beexamined 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). '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. [Citations omitted.]'" *Jenkins*, *supra*; *Dooley v. Dep't of Transp.*, Docket No. 98- DOH-312D (Aug. 3, 1999).

Grievant's resignation was not coerced. While it is clear Grievant did not like the work she was doing at the Flood Relief Unit, it is equally clear that she knew unequivocally that the reassignment was temporary. That she believes she was the victim of discrimination or favoritism, by having her position assigned to someone else after she was told it was eliminated, is unreasonable. She was not discriminated against, and Mr. Mercer was not shown favoritism.

"'Discrimination' means 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." W. Va. Code § 29-6A-2(d). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h).

Grievant apparently believes that two tasks temporarily assigned to her position and which survived the transition from Food Stamps to the EBT constituted her entire position. In fact, those two tasks now make up a very minor part of the duties of the employee to whom they are now assigned. Even if Grievant's resignation were rescinded, her position no longer exists and she would not be assigned the same duties she had before.

A grievant, seeking to establish a *prima facie* case of discrimination and/or favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that she has, to her 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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Grievant failed to make a *prima facie* case of either discrimination or favoritism because she failed

to show that she was similarly situated to any employee or that she had been subject to detrimental treatment that another employee had not. The positions occupied by all employees in the Food Stamp Issuance Unit were eliminated and no longer exist. All those employees were assigned temporary duties during the transition, until new jobs could be found for them. Grievant was the only one who found Respondent's attempts to avoid a layoff to be so heinous that the only alternative was to quit. Contrary to Grievant's assertion that Respondent orchestrated the whole event so as to favor a younger employee, she admitted her supervisor told her retirement was not a good idea.

Grievant has not proven by a preponderance of the evidence that her resignation was, in fact, a constructive discharge, or that Respondent had a duty to allow her to rescind her resignation.

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. “When a grievant complains that [her] employer has forced [her] to resign, [s]he bears the burden of proving that the circumstances surrounding the alleged coerced resignation deprived [her] of [her] ability to exercise free choice. *See McClung v. W. Va.Dept. of Public Safety*, Docket No. 89-DPS-240 (Aug. 14, 1989).” *Glasscock v. Div. of Corrections*, Docket No. 95-CORR-093 (May 31, 1995).

2. Since this grievance does not challenge a disciplinary action, Grievant bears the burden of proving a violation, misapplication or misinterpretation of any law, rule, regulation or policy under which she worked. Her claim must be proven by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claims are more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Boylan v. W. Va. Dep't of Transportation*, Docket No. 94-DOH-211 (Oct. 25, 1994); *Leichliter v. W. Va. Dep't of Health and Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

3. "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." *Jenkins v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002); *Hale-Smith v. Mingo County Bd. of Educ.*, Docket No. 98-29-075 (Sept. 30, 1998). 4. 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). *Jenkins*, *supra*.

5. A grievant, seeking to establish a prima facie case of discrimination and/or favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

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

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

6. Grievant's resignation was voluntary, and Respondent is entitled to accept it. She was not the victim of discrimination or favoritism that rendered her working conditions intolerable, and a reasonable person in Grievant's position would not have felt compelled to resign.

For the foregoing reasons, this grievance is **DENIED**. Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or 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 (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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: May 19, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Respondent made a motion to dismiss on the ground that the grievance was not timely appealed to level four. This motion was denied after Grievant explained she originally sent the appeal to the temporary office used by the Grievance Board after it was displaced by a flood, and this filing was returned as undeliverable because the Grievance Board had just moved back. She then filed it at the original location.