THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DWIGHT MCGUIRE,
Grievant,

v. **Docket No. 2010-1529-MerED**

MERCER COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Dwight McGuire, Grievant, on June 2, 2010 against Respondent, Mercer County Board of Education. Grievant was a custodian at Straley Elementary School. Grievant was employed as a substitute custodian for Respondent for two years before becoming a regular custodian in August 2008. Grievant challenges the validity of his resignation. As relief, Grievant seeks "reinstatement with compensation for lost wages with interest and all other benefits, pecuniary and nonpecuniary, lost as a result of Grievant's separation of employment from Respondent."

A level one hearing was held on June 22, 2010. Grievant was represented by John E. Roush, Esq., West Virginia School Service Personnel Association. Respondent was represented by John Shott, Esq. The grievance was denied at that level. A level two mediation was held on November 3, 2010. Grievant filed an appeal to level three on November 9, 2010, requesting the appeal be submitted on the record developed at level one. Respondent did not object. This matter became mature for decision on December 29, 2010.

Synopsis

Grievant, a custodian at Straley Elementary School, was accused of allowing a prostitute to enter school premises. Respondent subsequently met with Grievant and presented the Grievant with the option of resigning or facing a termination hearing. Grievant chose to resign. The Board of Education ("BOE") accepted Grievant's resignation. Thereafter, Grievant notified Respondent that he would like to rescind his resignation. Grievant argues that his resignation was involuntary, asserting that he mistakenly believed he was only resigning from his assignment at Straley Elementary School and that his resignation was made under duress. Grievant has failed to meet his burden of proof. This grievance is DENIED.

Findings of Fact

1. Grievant was an employee for Mercer County Board of Education, Respondent. Grievant began employment in October 2006 as a substitute custodian. Grievant has been employed as a regular custodian since August 2008.

2. At the time Grievant resigned on May 21, 2010, Grievant was assigned to Straley Elementary School.

3. On May 21, 2010, Dr. Deborah Akers, Superintendent, and Don White, Assistant Superintendent, met with Grievant. During the meeting, Grievant was informed of the allegation that he had allowed a prostitute to enter school premises.

4. During the May 21, 2010 meeting, Dr. Akers and Mr. White informed Grievant that disciplinary action was warranted. Grievant was given the option of resigning or facing a termination hearing.

5. Grievant chose to resign his employment.

6. During the May 21, 2010 meeting, Grievant read and signed a resignation letter[1] prepared by Respondent.

7. The body of the letter, in entirety, states:

> I desire to resign my position at Straley Elementary School effective today, May 21, 2010.

8. After signing the letter of resignation, Grievant was asked to surrender his identification badge and his keys to the school.

9. Grievant promptly surrendered his identification badge and his keys to the school without protest. Grievant did not ask any questions about the resignation, nor did he express a desire to request additional time to consider his resignation or consult with an attorney. Grievant did not inquire about being assigned to a different school.

10. The BOE accepted Grievant's resignation on May 25, 2010.

11. On May 27, 2010, Grievant submitted a letter[2] to Dr. Akers rescinding his resignation, stating he did not intend to resign from Respondent, only from his assignment at Straley Elementary School.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*,

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[1]Administration's Exhibit No. 1

[2]Grievant's Exhibit No. 1

Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argues that his resignation was involuntary and made under duress. Grievant asserts that he mistakenly believed his choice to resign was applicable only to his assignment at Straley Elementary School and not from other possible assignments for Respondent. The burden of proving by a preponderance of the evidence that a resignation was involuntary lies with the Grievant. *Harvey v. Summers Co. Bd. of Educ.*, Docket No. 01-45-360 (Sept. 20, 2001); *Glasscock v. W. Va. Dep't of Corrections*, Docket No. 95-CORR-093 (May 31, 1995). Whether a resignation is voluntary is a question of fact which must be resolved on a case-by-case basis. *Id*.

The totality of the circumstances must be reviewed to determine whether an employee was deprived of free choice in determining to tender a resignation. *Harvey*, *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. *Id*. (citations omitted). 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. *Carder v. McDowell County Board of Education & Department of Education*, 2008-0403-McDED (February 26, 2009); *Bailey v. Eberle Technical Center*, 98-49-189 (Sept. 30, 1998); *McClung v. W. Va. Dep't of Public Safety*, Docket No. 89-DPS-240 (Aug. 14, 1989).

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 v. GAO*, 3 M.S.P.R. 158 (1980). No evidence was presented that Grievant's resignation was given under duress. On the contrary, Grievant was given an alternative to resigning. Grievant could have chosen to have a termination hearing before the BOE to dispute the allegations but chose to resign instead.

When viewing the totality of the circumstances of the instant grievance, the undersigned concludes that Grievant voluntarily resigned. Grievant testified at the level one hearing that when he was asked to surrender his identification badge and keys to the school, during the May 21, 2010 meeting, he realized he would not be relocated to another school and that he was resigning completely from Respondent. The May 21, 2010 meeting lasted about twenty-five minutes. After surrendering his identification badge and keys to the school, Grievant did not express that his intention was only to resign from his Straley Elementary School assignment. Grievant did not express any concerns during the meeting about not understanding the extent of or ramifications from his resignation. Grievant did

not resign under duress and did not request additional time to consider his options.

Grievant signed his letter of resignation on May 21, 2010. The BOE accepted his resignation on May 25, 2010. Grievant submitted a letter on May 27, 2010 attempting to rescind his resignation. Grievant testified at the level one hearing that at the time he submitted his May 27, 2010 letter, he didn't know whether the BOE had acted on his resignation. The undersigned infers from this testimony that Grievant knew his resignation could have been withdrawn at any time before it was accepted by Respondent, yet Grievant chose to wait six days before submitting his written request not to resign from Respondent. It has been affirmed by the Grievance Board that an offer to resign by a classified, state employee may be withdrawn at any time before it is accepted by the employer. The tender of a resignation by such employee, is a mere offer to mutually rescind the contract of employment and is not binding on either party to the contract until its acceptance by the employer. *Falquero v. W. Va. Dep't of Envtl. Protection,* Docket No. 2008-1596-DEP (Dec. 16, 2008); *Le Masters v. Board of Education of Grant District*, 105 W.Va. 81, 141 S.E. 515 (1928).

The following conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence

is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. The burden of proving by a preponderance of the evidence that a resignation was involuntary lies with the Grievant. *Harvey v. Summers Co. Bd. of Educ.*, Docket No. 01-45-360 (Sept. 20, 2001); *Glasscock v. W. Va. Dep't of Corrections*, Docket No. 95-CORR-093 (May 31, 1995). Whether a resignation is voluntary is a question of fact which must be resolved on a case-by-case basis. *Id*.

3. The totality of the circumstances must be reviewed to determine whether an employee was deprived of free choice in determining to tender a resignation. *Harvey*, *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. *Id*. (citations omitted). 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. *Carder v. McDowell County Board of Education & Department of Education*, 2008-0403-McDED (February 26,

2009); *Bailey v. Eberle Technical Center*, 98-49-189 (Sept. 30, 1998); *McClung v. W. Va. Dep't of Public Safety*, Docket No. 89-DPS-240 (Aug. 14, 1989).

4. 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 v. GAO*, 3 M.S.P.R. 158 (1980).

5. The tender of a resignation by a classified, state employee, is a mere offer to mutually rescind the contract of employment and is not binding on either party to the contract until its acceptance by the employer. *Falquero v. W. Va. Dep't of Environmental Protection,* Docket No. 2008-1596-DEP (Dec. 16, 2008); *Le Masters v. Board of Education of Grant District*, 105 W.Va. 81, 141 S.E. 515 (1928). To the respect that an offer to resign may be withdrawn at any time before it is accepted by the employer, the employment of education employees is similar to that of classified, state employees. *Id*.

6. Grievant's resignation was voluntary and not given under duress.

This grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: April 12, 2011

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Jennifer Lea Stollings-Parr
Administrative Law Judge