THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MISCHELLE RENEE ARNOLD,
Grievant,

v. **Docket No. 2011-0437-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,
Respondent.

DECISION

Grievant, Mischelle Renee Arnold, is employed by Respondent, Department of Health and Human Resources, Bureau for Children and Families. On September 27, 2010, Grievant filed this grievance against Respondent stating, "I gave my 2 weeks notice of my resignation – under duress – to be effective 9/17/10. On 9/24/10 – I requested to withdraw my resignation and it was denied. I received no form of acceptance of my resignation." For relief, grievant seeks to be reinstated into her former position.

Following the December 9, 2010 level one conference, a level one decision was rendered on December 22, 2010, denying the grievance. Grievant appealed to level two on December 23, 2010. Grievant perfected the appeal to level three of the grievance process on July 28, 2011. A level three hearing was held on July 31, 2012, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union, Respondent was represented by counsel, Anne B. Ellison, Assistant Attorney General. This matter became mature for decision on August 31, 2012, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant alleges constructive discharge due to the conduct of her former supervisor and also alleges that Respondent improperly denied her right to withdraw her resignation. While the former supervisor's treatment of Grievant was harsh and unpleasant, it was not so intolerable that a reasonable person would have been compelled to resign. Grievant did not feel intimidated or threatened to the point where she could not exercise free choice. Respondent did not act improperly in denying Grievant's request to withdraw her resignation as Respondent had already acted in good faith reliance on Grievant's tender of resignation.

Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was previously employed by Respondent's Logan County office as an Economic Service Worker in the Income Maintenance Unit ("IMU").

2. Grievant began work in the IMU in 2006 and was supervised by Mary Cavendish at that time. Approximately one year later, a second supervisor, Rebecca Gore, was hired. Sometime thereafter, Grievant was transferred to the supervision of Ms. Gore.

3. In 2009, Grievant filed a grievance objecting to the treatment she was receiving from Ms. Gore. This grievance was settled with the agreement that Grievant would be transferred back to the supervision of Ms. Cavendish.

4. Although Ms. Gore was no longer Grievant's supervisor, Ms. Gore continued to interact with Grievant.

5. Ms. Gore's interactions with Grievant were always work-related, and there was no allegation that Ms. Gore's interactions with Grievant were either personally insulting or threatening.

6. The only specific example Grievant gave of Ms. Gore's conduct was, after Ms. Gore was removed as her supervisor, Ms. Gore came to Grievant's office while she was on the phone with a client and was questioning her about her actions on another case. Although Grievant was on the phone and indicated to Ms. Gore multiple times that she was on a call, Ms. Gore continued to question her. She described Ms. Gore's tone as "badgering." This was a typical example of the interactions between Grievant and Ms. Gore.

7. Other members of the IMU viewed the interactions between Ms. Gore and Grievant as very unpleasant and one described Ms. Gore's treatment of Grievant to be "very rough, very demanding, very degrading…very aggressive and very demeaning."[1] Ms. Gore continued this treatment of Grievant even after the previous grievance was settled and even when Grievant's own supervisor was present.

8. Ms. Gore's treatment of Grievant was unduly harsh and unprofessional.

9. Grievant did not file any additional grievance regarding Ms. Gore's treatment of her or the breach of the settlement agreement. Grievant did not discuss her continuing problems regarding Ms. Gore with her immediate supervisor, Ms Cavendish. Grievant did speak to Darlena Ables, the Community Service Manager, but

[1] Level three testimony of Regina Mullins.

it is not clear the extent and nature of these discussions. Grievant took no formal action to complain about Ms. Gore's treatment of her, and when her informal complaint to Ms. Ables provided no improvement, she did not complain to any other higher level management.

10. On September 15, 2010, Grievant sent an email titled "resignation/2 weeks notice" to her supervisor, Ms. Cavendish, in which she states, "As of Friday, 9/17/10, I am giving my 2 weeks notice. My last day of work will be Thursday, 9/30/10."[2] Grievant placed a signed copy of the same on Ms. Cavendish's door.

11. On the same day, Ms. Cavendish called Grievant into her office to discuss the notice of resignation. Ms. Cavendish did not ask Grievant for an explanation of why she was resigning. Ms. Cavendish does not recall giving Grievant any formal acceptance of the resignation.

12. Ms. Cavendish forwarded the notice of resignation to her supervisor, Ms. Ables, and to the Financial Clerk, Linda Deaner. Ms. Ables also contacted Ms. Deaner and asked her to get the position posted.

13. Carla Lusk, Accounting Clerk, then prepared a WV-11, Personnel Action Form, which is a payroll and personnel form used to make changes to employment. On September 20, 2010, she emailed the completed WV-11, projected last timesheet, and a copy of the resignation to Respondent's regional office for processing.[3]

14. On September 22, 2010, Grievant sent the following email to Ms. Ables, James Kimbler, Regional Director, and Sara Walker, Division of Personnel Director,: "I

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[2] Grievant's Exhibit # 1.

[3] Respondent's Exhibit # 1.

want it to be known that I have handed in my resignation under duress from the hostile working environment that I have been subjected to since Rebecca Gore became a supervisor in [L]ogan [C]ounty. To my knowledge it is your responsibility to screen potential supervisors for their ability to maintain the work [e]nvironment. I feel that this supervisor has failed to maintain a positive atmosphere, therefore, hampering the stability of the employees hired in the income maintenance unit."[4]

15. On September 24, 2010, Grievant sent an email to Ms. Ables, Ms. Cavendish, and Ms. Deaner stating, "I wish to withdraw my resignation effective today, 9/24/10."[5]

16. Ms. Ables denied Grievant's request to withdraw her resignation.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "The 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).

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[4] Grievant's Exhibit #2.

[5] Grievant's Exhibit #3.

I. Constructive Discharge

The starting point for examining resignation grievances is that, "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); *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 forced by others, rather than voluntary, 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).

In order to prove a constructive discharge, a grievant must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary that a grievant prove that the employer's actions were taken with a specific intent to cause her to quit. Syl. Pt. 6, *Slack v. Kanawha County Housing*, 188 W. Va. 144, 423 S.E.2d 547 (1992); *Preece v. Public Serv. Comm'n*, Docket No. 94-PSC-246 (Apr. 25, 1997); *Coster v. W. Va. Div. of Corrections*, Docket No. 94-CORR-600 (Aug. 12, 1996); *Jenkins v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002). "The trier of fact must be satisfied that the…working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have

felt compelled to resign." *Slack,* 423 S.E.2d at 556 (citing *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977). A reasonable person is "neither an automaton nor an exceptional man, but an ordinary member of the community. Being an ordinary person, the law makes allowance for mere errors in his judgment and does not visualize him as exercising extraordinary care. Normality is the quintessence of this characterization." Syl. Pt. 6, *Patton v. City of Grafton*, 116 W.Va. 311, 180 S.E. 267 (1935); *Honaker v. Mahon,* 210 W.Va. 53, 552 S.E.2d 788 (2001).

In this case, Grievant alleges she was forced to resign due to Ms. Gore's "hostile" treatment. The evidence on this point is all provided by witness testimony. It is, therefore, necessary to make a credibility determination of the witnesses. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An administrative law judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.,* Docket No. 93-HHR-050 (Feb. 4, 1993). The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the

plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.,* Docket No. 93-HHR-050 (Feb. 4, 1993).

The testimony relevant to constructive discharge was provided by Grievant, her co-workers, Dorothy Hatfield and Regina Mullins, her supervisor, Mary Cavendish, and the Community Services Manager, Darlena Ables. The undersigned Administrative Law Judge had an opportunity to observe the demeanor of these witnesses and to assess their words and actions during their testimony. Despite the existence of motive, Grievant was a credible witness. Her demeanor was forthright and respectful of the process. She did not seem to attempt to exaggerate events and her testimony was plausible. Dorothy Hatfield was not a very credible witness. Ms. Hatfield did not respond to the questions actually asked, seemed reluctant to answer questions posed on cross examination, and often hesitated in her answers. Regina Mullins was a mostly credible witness. Although she appeared to have some personal bias against Rebecca Gore, possibly from previous personal association with Ms. Gore personally outside of the office, her testimony did appear to be truthful and plausible, though possibly somewhat exaggerated. Her office was very near Grievant's, giving her the opportunity to observe the interactions for over a year. Ms. Cavendish was not a very credible witness. Her answers were vague and she often paused for long periods of time prior to answering questions. It does not appear that Ms. Cavendish intended to be untruthful, but it seemed she was simply so disconnected from the atmosphere in the office that she did not know what was going on. In addition, she contradicted herself between

direct examination and cross examination stating on direct that she had accepted the resignation while stating that she didn't recall on cross.

Therefore, weighting the testimony given while considering the credibility of the source, it is clear that Grievant had a very difficult relationship with her former supervisor, Ms. Gore. Grievant had been successful in a previous grievance to remove herself from the supervision of Ms. Gore. Despite the settlement agreement from that grievance, Ms. Gore continued to treat Grievant in a harsh and unprofessional manner. While there was testimony about very few specific instances, the opinion testimony of Ms. Mullins was persuasive regarding Ms. Gore's treatment of Grievant. The harshness of Ms. Gore's treatment of Grievant was enough to make Ms. Mullins nervous and for her to go to her own supervisor to express concern. Although Ms. Gore's discussions with Grievant were always work-related, her attitude, tone of voice, and method of questioning Grievant were harsh and unprofessional.

The question then becomes if the conduct of Ms. Gore was so intolerable that a reasonable person would be compelled to resign. While Grievant's situation was very unpleasant, it cannot be said that a reasonable person would have been compelled to resign. In fact, both of Grievant's witnesses testified that they tried to talk her out of resigning, knowing the difficulties she faced with Ms. Gore. The conduct was frustrating and unpleasant, but not such that Grievant felt intimidated or threatened and therefore unable to exercise her free choice. She had other options available to her other than resignation. She had previously pursued a grievance and was successful in her grievance, so she knew the grievance process was available to her and she could be successful. She never discussed the situation with her supervisor, Ms. Cavendish.

Although she testified she did speak to Ms. Ables regarding Ms. Gore's continuing conduct and nothing was done, Grievant did not attempt to make any formal complaint to Ms. Ables or go up the chain of command when Ms. Ables failed to address her concerns. This was an action Grievant obviously knew she could take and felt able to take, as evidenced when she sent her explanatory email to those persons explaining her resignation. It appears from the record that this is the only attempt to officially notify anyone of her difficulties. Expecting Grievant to complain to her supervisor, make formal complaint, follow the chain of command in her complaints, or file an additional grievance is not expecting her to exercise extraordinary care. These are normal and expected actions a reasonable person might take.

While the undersigned is sympathetic to Grievant for the difficulties she faced, I cannot find that the situation was so intolerable that a reasonable person would have been compelled to resign.

II. Rescinding a Resignation

The West Virginia Supreme Court has recently clarified the law regarding resignation of state civil service classified employees. "Unless otherwise provided by law, a classified public employee may rescind or withdraw a tender of resignation at any time prior to its effective date as long as the withdrawal occurs before acceptance by the employing agency. Syl. Pt. 3, *W. Va. Dep't of Envtl. Prot. v. Falquero*, 228 W. Va. 773, 724 S.E.2d 744 (2012). "Acceptance of a tender of resignation of public employment may occur when the employer (1) clearly indicates acceptance through communication with the employee, or (2) acts in good faith reliance on the tender." *Id.* at Syl. Pt. 4.

Grievant attempted to withdraw her resignation prior to its effective date, and there was no evidence presented that Respondent clearly communicated its acceptance of the resignation to Grievant. At issue, then, is whether Respondent acted in "good faith reliance on the tender." In adopting its more flexible approach to an employer's acceptance, the Court reasoned, "the tender of a resignation should not render an agency at the mercy of the employee until the appointed date of resignation arrives." *Id* at 751. The Court does not go so far as to define what type of act in good faith reliance is sufficient under this new standard. However, in discussing the case, the Court took note that "[n]o evidence was presented by DEP that any formal or informal actions were taken by the agency in reliance on the resignation when it was tendered." *Id.* This would indicate that even informal actions by the Respondent may be sufficient. Prior to Grievant's attempt to withdraw her resignation, Respondent had completed Grievant's termination paperwork, forwarded the same to the regional office, and contacted the state office to request Grievant's position be posted. These actions were sufficient to qualify as acting in good faith reliance on the tender.

Grievant also appears to argue that Respondent's reasons behind their refusal to allow the withdrawal are relevant to this grievance and that those reasons were somehow improper. However, that is not the standard. There is no law or policy that requires Respondent to give a reason for its denial, much less a law or policy that sets standards for what reasons are proper for denying the withdrawal of a resignation. The relevant question of law is only whether Respondent accepted the resignation through either clear communication with Grievant or by acting in good faith reliance upon the

resignation. Grievant could not rescind her resignation because Respondent had already acted in good faith reliance upon her resignation.

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 her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "The 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 starting point for examining resignation grievances is that, "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); *Jenkins v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002).

3. To determine whether an employee's act of resignation was forced by others, rather than voluntary, 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).

4. It is not necessary that a grievant prove that the employer's actions were taken with a specific intent to cause her to quit. Syl. Pt. 6, *Slack v. Kanawha County Housing*, 188 W. Va. 144, 423 S.E.2d 547 (1992); *Preece v. Public Serv. Comm'n*, Docket No. 94-PSC-246 (Apr. 25, 1997); *Coster v. W. Va. Div. of Corrections*, Docket No. 94-CORR-600 (Aug. 12, 1996); *Jenkins v. Dep't of Health and Human Resources/ Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002).

5. "The trier of fact must be satisfied that the…working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Slack,* 423 S.E.2d at 556 (citing *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977). A reasonable person is "neither an automaton nor an exceptional man, but an ordinary member of the community. Being an ordinary person, the law makes allowance for mere errors in his judgment and does not visualize him as exercising extraordinary care. Normality is the quintessence of this characterization." Syl. Pt. 6, *Patton v. City of Grafton*, 116 W.Va. 311, 180 S.E. 267 (1935); *Honaker v. Mahon,* 210 W.Va. 53, 552 S.E.2d 788 (2001).

6. While Ms. Gore's treatment of Grievant was harsh and unprofessional, it was not so intolerable that a reasonable person would have been compelled to resign. Grievant had other reasonable options in the form of filing an additional grievance or making a formal complaint up the chain of command. Grievant did not feel intimidated or threatened to the point she was unable to exercise free choice.

7. "Unless otherwise provided by law, a classified public employee may rescind or withdraw a tender of resignation at any time prior to its effective date as long as the withdrawal occurs before acceptance by the employing agency. Syl. Pt. 3, *W. Va. Dep't of Envtl. Prot. v. Falquero*, 228 W. Va. 773, 724 S.E.2d 744 (2012).

8. "Acceptance of a tender of resignation of public employment may occur when the employer (1) clearly indicates acceptance through communication with the employee, or (2) acts in good faith reliance on the tender." *Id.* at Syl. Pt. 4.

9. Although Respondent did not clearly indicate acceptance of the resignation through communication with Grievant, it did act in good faith reliance on the tender.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: October 5, 2012

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Billie Thacker Catlett
Administrative Law Judge