WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LYN EVERLY-STRAWN,
Grievant,

v. **Docket No. 2012-1163-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MILDRED MITCHELL-BATEMAN HOSPITAL,
Respondent.

DECISION

Lyn Everly-Strawn, Grievant, was employed by Respondent, Department of Health and Human Resources ("DHHR"), at Mildred Mitchell-Bateman Hospital ("Hospital") as a registered nurse. Ms. Everly-Strawn filed a level three grievance form dated April 19, 2012, alleging that she had been subject to a "constructive discharge." As relief, Grievant sought "to be made whole." An order was entered on April 24, 2012, transferring this grievance to level one. On May 15, 2013, the parties agreed to waive levels one and two and proceed directly to level three.[1]

A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on October 29, 2013. Grievant personally appeared and was represented by Gordon Simmons, UE local 170, West Virginia Public Workers Union. Respondent was represented by Stephen R. Compton, Senior Assistant Attorney General. Following the hearing the parties agreed to submit Proposed Findings of Fact and Conclusions of Law, the last of which was received by the Grievance Board on December 11, 2013. This matter became mature for decision on that date.

[1] *See* W. VA. CODE § 6C-2-4(a)(4).

Synopsis

Grievant argues that she was constructively discharged by Respondent when its agents refused to allow her to rescind her resignation. Respondent's agents took sufficient good faith steps in reliance upon Grievant's resignation, prior to her attempt to rescind it, to render the resignation final. Respondent was under no obligation to allow Grievant to rescind her resignation, therefore the grievance is DENIED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Lyn Everly-Strawn, Grievant, was employed as a registered nurse by Respondent, Department of Health and Human Resources ("DHHR"), at Mildred Mitchell-Bateman Hospital ("Hospital"). Grievant was employed at the Hospital in February 2011.[2]

2. Mildred Mitchell-Bateman Hospital is a psychiatric hospital located in Huntington, West Virginia, and operated by the DHHR.

3. Grievant's employee performance appraisals indicated that she met required standards, and, by all accounts, she was a competent nurse and valued employee at the Hospital.

4. On April 22, 2011, Grievant was transferred from the forensic unit, A2, to the substance abuse unit, A6. The transfer was to take effect on May 1, 2011. Grievant was informed of this transfer by a letter that was placed in her work mailbox, without any prior discussion. Grievant's Exhibit 1.

[2] Grievant had previously worked for a number of years as a nurse at William R. Sharpe, Jr. Hospital which is also a psychiatric hospital operated by DHHR.

5. Grievant was upset about the abrupt nature of the transfer, and that the A6 unit was more difficult than A2. Unit A6 had around-the-clock admissions, patients undergoing detoxification and patients with more critical behavior problems than A2. However, Grievant reported to, and worked, in unit A6 as assigned, for approximately ten months. Steve Ashley was the Nurse Supervisor for Unit A6 and Grievant's immediate supervisor.

6. In a memorandum dated March 27, 2012, Nurse Supervisor Stephen Ashley informed Grievant that the staffing committee had decided to transfer her to Unit A3. The transfer was to take effect on April 1, 2012. Grievant's Exhibit 2.

7. Grievant had temporarily been placed on Unit A3 to cover for absences of other staff. Grievant was aware that Unit A3 was a coed unit. The unit was known to have instances of fighting and the need for the use of restraints. Grievant was very upset about this proposed transfer.

8. Grievant spoke with Supervisor Ashley by telephone on March 29, 2012, and asked to not be transferred to Unit A3. When Supervisor Ashley informed Grievant that she had no choice in the transfer, she replied, "then I have to resign."

9. Supervisor Ashley informed Grievant that he was sorry that she was resigning, but accepted her resignation. When he got off the telephone he started the paperwork to process Grievant's resignation. He completed an "Employee Termination Form"[3] indicating that Grievant had resigned. Supervisor Ashley forwarded the form to the Director of Nursing along with an e-mail explaining what happened. Mr. Ashley also sent a copy of the e-mail to the Director of Human Resources at the Hospital. Grievant's Exhibit 4.

[3] This form is also known as the "pink slip" and the original of the form is pink.

10. The Hospital had authorized the Nursing Supervisors to accept resignations of employees and instructed them regarding the procedure for doing so. Supervisor Ashley acted within that authority and followed the procedure as instructed.

11. After her telephone conversation with Supervisor Ashley, Grievant wrote a resignation letter stating, "This letter is to inform you that my resignation will become effective on April 11, 2012." Grievant placed the letter in her supervisor's mailbox that day. Grievant's Exhibit 3.

12. On March 30, 2012, Grievant called Supervisor Ashley and told him that she would like to have her job back. Mr. Ashley stated that he was not authorized to allow Grievant to rescind her resignation, and that the decision would be up to Patricia Hamilton, Director of Nursing and the Hospital Chief Executive Officer ("CEO"), Pat Franz.

13. Supervisor Ashley was able to contact Director of Nursing Hamilton who told him that the Hospital would not allow Grievant to rescind her resignation. Supervisor Ashley informed Grievant of that decision.

14. Kieth Anne Worden, Director of Human Resources, sent Grievant a letter dated April 4, 2012, stating, "This is formal notification that the verbal resignation given by you on March 29, 2012, to Steve Ashley, RN, Interim Nurse Manager, has been accepted." Respondent's Exhibit 1.

15. On April 10, 2012, Grievant sent an e-mail to Director Worden stating, "Could you please put verbal/written on the confirmation of my resignation? I would like for my records to reflect that I gave a verbal and written resignation. I would also like a copy of this letter in my record folder." Respondent's Exhibit 2.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

In her statement of grievance, Grievant alleged that she had been subjected to a constructive discharge. The term "constructive discharge" has specific meaning within the grievance procedure. It is been routinely held that 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).

However, in this case, Grievant does not argue that the working conditions were so difficult or unpleasant that she was compelled to resign. Rather, Grievant argues that Respondent's refusal to allow her to rescind her resignation amounted to Respondent constructively terminating her employment. That is not the case. As discussed herein, Grievant's resignation was a voluntary act to terminate her employment. After that occurred, Respondent was no longer in the position to dismiss her constructively, or otherwise. Because of the inexact wording of the grievance, Respondent argued that Grievant should not be able to raise the issue of rescinding her resignation. However, as the Grievance Board has noted repeatedly, the grievance process is not intended to be "a procedural quagmire where the merits of the cases are forgotten." *Spahr v. Preston County Bd. of Educ*., 182 W.Va. 726, 730, 391 S.E.2d 739, 743 (1990); *Ewing v. Board of Educ. of County of Summers*, 202 W.Va. 228, 503 S.E.2d 541(1998). A Grievant who was not represented by legal counsel might reasonably misunderstand the specific nature of a constructive discharge claim. The undersigned was prepared to give Respondent time to prepare for the resignation issue, but it was apparent at the hearing that, notwithstanding its objection, Respondent prepared to address that argument.

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); *Jenkins v. Dep't of Health and Human Resources/ Mildred Mitchell-Bateman Hosp*., Docket No. 02-HHR-214 (Oct. 22, 2002). As a general rule, an employee may be bound by his representations that he is resigning when the

representations are made to a person with the authority to address such personnel matters. *See Welch v. W. Va. Dept. of Corrections*, Docket No. 95-CORR-261 (Jan. 31, 1996).

With regard to resignation of state civil service classified employees, the West Virginia Supreme Court had held that, "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.

The issue is often 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. The Grievance Board has decided cases, both before and after *Falquero, supra,* related to good faith acts taken by the employer in reliance on the resignation. *See Jenkins v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22,

2002); *Smith v. Dep't of Health & Human Res./Lakin Hosp.*, Docket No. 2009-1542-DHHR (Nov. 10, 2009); *Arnold v. Dep't of Health & Human Res./Bureau for Children and Families*, Docket No. 2011-0437-DHHR (Oct. 5, 2012).

In this case, Grievant gave a spoken resignation to her Nursing Supervisor, who is authorized by the Hospital to accept resignations. Supervisor Ashley accepted Grievant's offer. Grievant then submitted a written resignation later the same day. In reliance upon Grievant's resignation, Supervisor Ashley filled out an "Employee Termination Form" which is the initial paperwork necessary to process Grievant's termination. Supervisor Ashley forwarded the form to the Director of Nursing, and the Director of Human Resources. These are sufficient good faith acts in reliance of Grievant's resignation to render it final. Consequently, Grievant's resignation was accepted and Respondent was under no obligation to allow her to rescind it. *See Jenkins, supra; Smith, supra; and Arnold supra.* Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990).

2. 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).

3. "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.

4. Respondent took sufficient good faith acts in reliance of Grievant's resignation to render it final prior to Grievant's attempt to rescind it. Respondent was under no obligation to allow her to rescind her resignation. *Falquero, supra. See also Jenkins v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002); *Smith v. Dep't of Health & Human Res./Lakin Hosp.*, Docket No. 2009-1542-DHHR (Nov. 10, 2009); *Arnold v. Dep't of Health & Human Res./Bureau for Children and Families*, Docket No. 2011-0437-DHHR (Oct. 5, 2012).

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* 156 C.S.R. 1 § 6.20 (2008).

DATE: DECEMBER 24, 2013.

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WILLIAM B.MCGINLEY
ADMINISTRATIVE LAW JUDGE