THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SHELLY DAWN PERKINS,
Grievant,

v. **Docket No. 2012-0885-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

Grievant, Shelly Dawn Perkins, filed this grievance against her employer, Department of Health and Human Resources, alleging constructive discharge after her assignment to a schedule other than the day shift. Grievant seeks to be reinstated to her former position on day shift at Sharpe Hospital. This grievance was denied at level one following a hearing conducted on March 24, 2012. A level two mediation session was conducted on December 20, 2012. Grievant perfected her appeal to level three on January 28, 2013. A level three hearing was conducted before the undersigned Administrative Law Judge on July 18, 2013, at the Grievance Board's Westover office location. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Harry C. Bruner, Jr., Assistant Attorney General. This matter became mature for consideration upon the receipt of the last of the parties' proposed findings of fact and conclusions of law on August 30, 2013.

Synopsis

Grievant worked as a Health Service Worker at Sharpe Hospital from March 2010 until her last day of work on March 1, 2012. Grievant made clear to management that she could only work day shift. When Respondent first hired Grievant as a full-time employee, Grievant worked as a "float" assigned to a particular patient. In February 2012, Grievant was informed by her supervisor that Grievant would be moving to another unit since her assigned patient was being moved. In addition, it was explained that Grievant's schedule would be changed to either an evening or midnight shift. Grievant contends her resignation was forced by the schedule change, and amounted to a constructive discharge. Grievant established by a preponderance of the evidence that a material fact that would have avoided her resignation was concealed from Grievant. Grievant's resignation was not voluntary thereby rendering her resignation void and of no effect.

The following findings of fact are based upon the record of this grievance.

Findings of Fact

1. Grievant began employment as a Health Service Worker on March 16, 2010, with the William R. Sharpe, Jr., Hospital, a psychiatric facility operated by the West Virginia Department of Health and Human Resources.

2. Grievant received good performance appraisals during her employment, and had no history of discipline or performance improvement plans.

3. Grievant worked for Respondent on day shift, apart from one short period, until March 1, 2012. When Respondent first hired Grievant as a full-time employee, Grievant worked as a "float" assigned to a particular patient.

4. On or about February 18, 2012, Grievant's supervisor, Janice Woofter, informed Grievant that she would be moving to another unit because Grievant's patient was being moved. In addition, Ms. Woofter explained that Grievant's schedule would be changed to either an evening or midnight shift.

5. On February 18, 2012, Grievant communicated to Ms. Woofter and the Nurse Manager, Darlene Bender, that she could not work an evening or midnight shift because she had nobody to watch her children.

6. On February 20, 2012, Ms. Woofter informed Grievant that she was not aware of any available day shift positions at the time. Ms. Woofter ended the communication by indicating that if she did not hear anything further from Grievant, she would consider the email communication as Grievant's two weeks notice and that her last day would be March 2, 2012.

7. Grievant responded to Ms. Woofter that she was not giving her two weeks notice at that time, but if management could not arrange for Grievant to work day shift, the notice would be Grievant's next step.

8. Ms. Woofter indicated that management had worked out a day shift option for Grievant during a nurse director's meeting on March 2, 2012. While at the meeting, Ms. Woofter received word that Grievant had resigned her position. Ms. Woofter did not attempt to contact Grievant to explain that a day shift position had been arranged.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 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). "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).

Grievant's claim is that she was coerced into resigning because of a change in her work schedule. If management's actions were unreasonable, on the whole, and Grievant had no other alternative than to resign, then constructive discharge is a viable claim. "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." *Falquero v. Dep't of Enviro. Protection*, Docket No. 2008-1596-DEP (Dec. 16, 2008); *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).

A truly voluntary resignation on the part of the employee is not ordinarily grievable. The employer in such a situation has not taken any action adverse to the employee, and there is no grievable act within the meaning of the controlling statute. However, if the resignation is involuntary and, for example, was submitted as a result of agency coercion, the Grievance Board would have jurisdiction to determine whether the grievant was improperly dismissed from employment. The grievant bears the burden of proving by a preponderance of the evidence that the resignation was involuntary. *McClung*, *supra*.

Factors to be considered in the analysis are whether the employee was given time to consider his or her 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 is not of a state of mind to exercise intelligent judgment. Duress has been found in situations where the employee involuntarily accepted the employer's terms; the circumstances surrounding the resignation permitted no other alternative; and the circumstances were the result of coercive acts of the employer. Whether a resignation was voluntary is a question of fact which must be resolved on a case-by-case basis. *Smith v. W. Va. Dep't of Corrections*, Docket No. 94-CORR-1092 (Sept. 11, 1995).

The facts surrounding Grievant's resignation are not in dispute. Grievant made clear to Respondent from her initial interview for employment that she could only do day shifts because of her children. When Grievant was hired as a full-time employee she once again made clear that she was available for day shifts only. Grievant indicated that after her divorce, not continuing on day shifts represented an even greater hardship than at the time of her initial hire. Ms. Woofter acknowledged that management had worked out a day shift option for Grievant during a nurse director's meeting on March 2, 2012. While at the March 2, 2012, meeting, Ms. Woofter received word that Grievant had tendered her resignation from her position. The record is unclear at what point, if any, this offer was accepted by the Respondent. However, the record did establish that this event occurred at the same time of the management decision that Grievant could work a day shift.

Grievant indicated that, in her mind, she had no choice but to resign because the Respondent did not give her a choice of shifts which would allow her to continue her

employment. Grievant made clear that she did not want to resign her position. The record established that Ms. Woofter did not attempt to contact Grievant to inform her that a day shift position had been made available for her to work.

There can be little question under the circumstances of this case that Grievant's resignation was involuntary. On March 2, 2012, Sharpe Hospital management deliberately deceived Grievant by concealing the option of an available day shift position. But for the failure of management to disclose the fact that a day shift position was available, it is more likely than not that Grievant would not have tendered her resignation. This ruling renders the resignation on the part of Grievant void and of no effect. Consequently, Grievant is entitled to reinstatement to her full-time position.

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. Procedural Rules of the W. Va. Public Employees Grievance Board 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).

2. "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." *Falquero v. Dep't of Enviro. Protection*, Docket No. 2008-1596-DEP (Dec. 16, 2008);

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).

3. A resignation, by definition, is a voluntary act on the part of an employee seeking to end the employer-employee relationship. Resignations which are obtained through coercion or deception are contrary to public policy. *Adkins*, *supra*; *McClung*, *supra*; *Falquero*, *supra*.

4. Grievant has proven by a preponderance of the evidence that her resignation was the result of deception on the part of Respondent's management. Rescission of the resignation is, therefore, the appropriate remedy.

Accordingly, the grievance is **GRANTED**.

Respondent is hereby **ORDERED** to reinstate Grievant to the Health Service Worker position, with applicable back pay and interest, seniority, and benefits.

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 (eff. July 7, 2008).

Date: October 1, 2013

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Ronald L. Reece
Administrative Law Judge