WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LISA WILLIS,
Grievant,

v. **Docket No. 2013-0265-DHHR**

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

DECISION

Grievant, Lisa Willis, was employed by Respondent, Department of Health and Human Resources ("DHHR") as a registered nurse at William R. Sharpe Jr. Hospital ("Hospital") for approximately two years. Ms. Willis filed a level one grievance form dated August 29, 2013, alleging: "Grievant was denied representation in a predetermination meeting; denied rescission of resignation." As relief Grievant seeks:

> To be made whole including restoration of job with full backpay (sic) plus interest & benefits restored as well as removal of any disciplinary actions or reference to allegations for which Grievant was denied due process.

A level one hearing was conducted on November 7, 2012, and a level one decision denying the grievance was issued on November 30, 2012. Grievant made a timely appeal to level two and a level two mediation was held on April 29, 2013. A level two Order was entered the next day, and Grievant appealed to level three on May 7, 2013.

By letter dated October 25, 2013, Acting Chief Administrative Law Judge Ronald L. Reece confirmed that the parties had agreed to submit the case for decision based upon the record that was developed at the level one hearing. Both parties were given the opportunity to submit Proposed Findings of Fact and Conclusions of Law.

Grievant's submission was received by the West Virginia Public Employees Grievance Board on November 18, 2013. The action became mature for decision on that date. The undersigned Administrative Law Judge has been assigned to render a level three decision.

Synopsis

Grievant alleges that she was required to participate in a meeting where discipline was being contemplated, and was not allowed to have a representative present. Grievant also alleges that she was not allowed to rescind her resignation which she argues was filed under duress. Grievant voluntarily resigned from her employment and that resignation was accepted, in writing, prior to her requesting that it be rescinded. Additionally, no discipline was contemplated nor issued as a result of the meeting Grievant attended without representation. Consequently, there is no specific remedy available and Grievant's resignation rendered that issue moot. 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. Grievant, Lisa Willis, was employed by Respondent, Department of Health and Human Resources as a registered nurse at William R. Sharpe, Jr. Hospital for approximately two years.

2. Constance Alvarez, RN, was Grievant's immediate supervisor. By letter dated, July 26, 2012, Supervisor Alvarez informed Grievant that a predetermination

meeting was scheduled for her at 2:00 PM on August 3, 2012, in the nurse manager's office. The reason for the predetermination meeting was set out as follows:

> Circumstances which constitute a threat to the safety of our patients at William R. Sharpe Jr. Hospital have come to light, and involve your decision to bring and utilize a dremel tool, while on duty at the facility. During the time of the investigation of the alleged incident, other factors regarding your performance have been brought forward.

Grievant's Exhibit 1. The letter also advised Grievant that she had the right to have a representative with her at the conference.

3. Grievant's representative, Jamie Beaton, sent an e-mail indicating that he would not be available for the meeting on August 3, 2012, due to a very serious illness in his family. Grievant's Exhibit 2.

4. Due to the unavailability of Mr. Beaton, the predetermination meeting was rescheduled for August 7, 2012, at 2:00 PM. *Id.*

5. Once again, Mr. Beaton informed all parties that due to the same serious illness in his family, he was unable to represent Grievant that the August 7, 2012, meeting. Mr. Beaton suggested that Craig Miller, the union representative at the Hospital, could possibly represent Grievant at the meeting. *Id.*

6. On August 7, 2012, Craig Miller was working at the Hospital. However, Mr. Miller had client group meetings scheduled at the same time of the predetermination meeting. Management would not let Mr. Miller reschedule the client group meetings to attend the predetermination conference. Accordingly, the predetermination conference was once again canceled.

7. Debbie D. Cook, is the Interim Human Resources Director for the Hospital. Director Cook had received all of the letters and e-mails related to the scheduling of the

predetermination conference. After the predetermination conference was canceled on August 7, 2012, Director Cook sent an e-mail to Grievant, Mr. Craig, Supervisor Alvarez, Mr. Beaton, and John Barnes. In her e-mail, Director Cook noted that the meeting had been rescheduled twice based upon the unavailability of a representative. She went on to state:

> If representation is not available the next time it is scheduled, Ms. Alvarez or whomever can choose to hold it any way with just Ms. Willis attending and make a determination from there. If Ms. Willis nor her representative attend, a decision can be made based upon the information available at the time.

Grievant's Exhibit 2.

8. On August 7, 2012, sometime after Director Cook had sent her e-mail, Supervisor Alvarez called and told Grievant to come see Supervisor Alvarez in her office. When Grievant arrived at Supervisor Alvarez's office, she found that Kim Tucker, Assistant Chief Nursing Officer for the Hospital, was also there.

9. Supervisor Alvarez informed Grievant that the meeting was a counseling session to discuss three issues: tardiness; falsification of weekly payroll sheets; and failure to complete personal leave of absence ("PLA") documentation. Grievant was told that she had been placing a different time of arrival on her timesheets than was recorded when she swiped her identification in the door locking system. Assistant Chief Tucker told Grievant that the difference in time between this swipe card on the door, and what she wrote on the timesheet could be considered fraud or misrepresentation. Ms. Tucker felt that she would have to send this information to the main office in Charleston and it might lead to further discipline.

10. Supervisor Alvarez presented Grievant with a form entitled "William R. Sharp Jr. Hospital Personnel Communication Record." The heading on the form was listed as "COUNSELING." The form noted that Grievant was receiving a counseling related to the three areas discussed and that "You will be placed on a PIP[1] effective 8/7/2012." The form went on to describe what provisions the plan of improvement would contain.

11. Grievant had not specifically requested a representative for this meeting, but refused to sign the form because she believed that Supervisor Alvarez was requiring her to sign the plan of improvement without a representative present.[2]

12. Grievant left the meeting and continued to work her shift at the Hospital. At 6:04 PM on August 7, 2012, Grievant typed an e-mail on her work computer to Debbie Cook, Debbie Foster, Kimberly Tucker, Craig Miller, and Jamie Beaton. In the e-mail, Grievant expressed her frustration with being called to the meeting by Supervisor Alvarez after expressing her desire to have a representative present at her predetermination conference, her disagreement with the issues that were discussed at the meeting, and the fact that she felt like she was being singled out and "nit-picked" by Supervisor Alvarez. Near the end of the mail Grievant wrote the following:

> At this time I would like to inform you that I will be resigning my position at Sharpes (sic) effective August 19, 2012. Until then I will be on PLA times for August 8, 11, 12, 13, 14, 15, 16. I will be unavailable at this time.

Grievant's Exhibit 5. Grievant printed the e-mail and placed a copy in the nurse manager's mailbox. She emailed the document to the remaining recipients.

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[1] PIP is an acronym for Performance Improvement Plan.

[2] This is the form used by Respondent to document counseling sessions. If a PIP had been implemented, it would have been in a different format. Since Grievant had never received a PIP, it is not surprising that she believed that this form was a PIP.

13. Human Resource Director Debbie Cook sent a letter to Grievant dated August 9, 2012, stating, in part, the following:

> Please accept this letter as formal notification that we have accepted your written resignation, effective August 7, 2012, from your position as a nurse at Sharpe Hospital. As you know, you indicated in your resignation e-mail, that you were "resigning your position at Sharpes (sic) effective August 19, 2012, but until then you would be on PLA time for August 8, 11, 12, 13, 14, 15 and would be unavailable at this time." Given the fact that you are not returning to work, the effective date with (sic) be your last working date as indicated above.

Respondent's Exhibit 1.

14. Grievant sent a certified letter dated August 13, 2012, to Debbie Cook, Janice Woofter, Nurse Administrator for the Hospital, and Parker Haddix, Chief Executive Officer ("CEO") for the Hospital. In the letter, Grievant again described the meeting that took place with Ms. Alvarez and Ms. Tucker on August 7, 2012, as well as her frustration with not being able to have a representative at that meeting. Grievant stated that she was emotionally distraught after the "surprise/impromptu" meeting and in that emotional state, she resigned. Grievant closed the letter by stating, "I now wish to rescind my resignation. Please respond in writing as to when I may return." Grievant's Exhibit 3.

15. Director Debbie Cook discussed Grievant's request with Nurse Manager Woofter and CEO Haddix who decided that they would not allow Grievant to rescind her resignation. Director Cook sent a letter to Grievant dated August 16, 2012, stating the following:

> We are in receipt of your certified letter dated August 13, 2012, expressing your desire to rescind your resignation.

> We have given consideration to your request and, at this time, have made the decision that your resignation will stand as given.

16. After receipt of Director Cook's letter, Grievant did not return to work at the Hospital and filed the grievance giving rise to this action on August 28, 2012.

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).

Grievant makes two claims. First, Grievant argues that she was improperly denied representation at the meeting with Ms. Alvarez and Ms. Tucker, in violation of W. VA. CODE § 6C-2-3(g)(1). The statute states that "An employee may designate a representative who may be present … at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action." *Id.* Grievant claims that this meeting was covered under the statute because the potential for discipline was discussed therein. Second, Grievant argues that she submitted her resignation under emotional duress and was entitled to rescind it.

Respondent counters that the August 7, 2012, was a counseling meeting in which no discipline was contemplated nor given. Therefore, Respondent argues that

Grievant was not entitled to a representative at the meeting. Additionally, Respondent claims that Grievant submitted her resignation voluntarily, and Respondent had no obligation to allow Grievant to rescind her resignation after it had been formally accepted.

Resignation:

The West Virginia Supreme Court of Appeals has addressed the issue of public employees rescinding their resignations. In syllabus points 3 and 4 of *W. Va. Dep't of Envtl. Prot. v. Falquero*, 228 W. Va. 773; 724 S.E.2d 744 (W. Va.), the court stated the following:

> 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.
> 4. 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. Grievant submitted her written resignation to Respondent on August 7, 2012. Director Cook clearly indicated Respondent's written acceptance of Grievant's resignation by letter dated August 9, 2012. Grievant then sent a letter dated August 13, 2012, stating her desire to rescind her resignation. Grievant did not rescind her resignation prior to Respondent's written acceptance thereof. Respondent had no obligation to allow Grievant to rescind her resignation. Consequently, if Grievant's resignation was voluntary, it was final and binding upon the parties. *Id.*

A resignation is, by definition, a voluntary act on the part of an employee seeking to end the employer-employee relationship. *Falquero v. Dep't of Env't. Protection*, Docket No. 2008-1596-DEP (Dec. 16, 2008). "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." *Perkins v. Dep't of Health & Human Ser.,* Docket No. 2012-0885-DHHR (Oct. 1, 2013); *Seagraves v. Dep't of Health & Human Ser.,* Docket No. 2013-1475-DHHR (Oct. 29, 2013); *Falquero, supra*; *McClung v. W. Va. Dep't of Public Safety*, Docket No. 89-DPS-240 (Aug. 14, 1989); *See Adkins v. Civil Ser. Comm'n*, 171 W. Va. 132, 298 S.E.2d 105 (1982).

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); *Perkins v. Dep't of Health & Human Ser.,*

Docket No. 2012-0885-DHHR (Oct. 1, 2013); *Seagraves v. Dep't of Health & Human Ser.,* Docket No. 2013-1475-DHHR (Oct. 29, 2013).

In the present case, Respondent did not request Grievant's resignation, nor encourage Grievant to resign in any way. Grievant was under no time restraint that would keep her from consulting with a representative prior to tendering her resignation. Additionally, Respondent made no attempt to coerce Grievant's resignation. It is understandable that Grievant was emotionally distressed after the meeting with Supervisor Alvarez and it is easy to see how Grievant might have been confused about whether that meeting was intended to replace her predetermination meeting. However, the facts in this situation are not consistent with the factors which would indicate the Grievant resigned under duress or involuntarily. Accordingly, Grievant's resignation was voluntary, and is final and binding upon the parties.

Denial of Representation:

Grievant asserts that she was improperly denied representation at the August 7, 2012, meeting with Ms. Alvarez and Ms. Tucker, in violation of W. VA. CODE § 6C-2-3(g)(1). The Grievance Board has interpreted this code section to mean that "[t]he label given the meeting does not matter. If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present if requested." *Koblinsky v. Putnam County Health Dep't*, Docket No. 2010-1306-CONS (November 8, 2010). "However, the decision specifically excepted 'counseling sessions and evaluation meetings where the intent is solely to advise employees of issues related to their employment so that the employee may improve'." Id. *Parsons v. Gen. Serv. Div.* Docket No. 2011-1799-DOA (Jan. 14, 2013).

While this meeting fell on the heels of the canceled predetermination conference, Supervisor Alvarez stated at the start that it was a counseling session. Additionally, Grievant received no discipline as a result of this meeting. The only document that was produced as a result of the meeting was a form used by Respondent to document counseling sessions. Consequently, it appears that Respondent's failure to allow Grievant to have a representative at this meeting did not violate W. VA. CODE § 6C-2-3(g)(1). Moreover, Grievant resigned before contesting this issue, and any remedy that might have been granted at level three would be purely speculative. Consequently, this issue is moot. *See, Komorowski v. Marshall County Board of Education*, W. Va, Sup. Ct. Memorandum Opinion No. 11-1659 and 11-1767 (Kanawha County 11-AA-52 and 09-AA-67). Based upon the foregoing 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. (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."

(4) "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."

Syl. Pts. 3 & 4 *W. Va. Dep't of Envtl. Prot. v. Falquero*, 228 W. Va. 773; 724 S.E.2d 744 (W. Va.).

3. Grievant did not rescind her resignation prior to Respondent's written acceptance thereof. Respondent had no obligation to allow Grievant to rescind her resignation. *See Falquero, supra.*

4. A resignation is, by definition, a voluntary act on the part of an employee seeking to end the employer-employee relationship. *Falquero v. Dep't of Env't. Protection*, Docket No. 2008-1596-DEP (Dec. 16, 2008). "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." *Perkins v. Dep't of Health & Human Ser.,* Docket No. 2012-0885-DHHR (Oct. 1, 2013); *Seagraves v. Dep't of Health & Human Ser.,* Docket No. 2013-1475-DHHR (Oct. 29, 2013); *Falquero, supra*; *McClung v. W. Va. Dep't of Public Safety*, Docket No. 89-DPS-240 (Aug. 14, 1989); *See Adkins v. Civil Ser. Comm'n*, 171 W. Va. 132, 298 S.E.2d 105 (1982).

5. If the resignation is involuntary and was submitted as a result of agency coercion, the Grievance Board has 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*.

6. 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); *Perkins v. Dep't of Health & Human Ser.,* Docket No. 2012-0885-DHHR (Oct. 1, 2013); *Seagraves v. Dep't of Health & Human Ser.,* Docket No. 2013-1475-DHHR (Oct. 29, 2013).

7. Under the facts of the case, Grievant's resignation was voluntary and is final and binding upon the parties.

8. Grievant resigned before contesting the issue of whether she was denied a representative at a meeting in violation of W. VA. CODE § 6C-2-3(g)(1), and any remedy that might have been granted at level three would be purely speculative. Consequently, this issue is moot. *See, Komorowski v. Marshall County Board of Education*, W. Va, Sup. Ct. Memorandum Opinion No. 11-1659 and 11-1767 (Kanawha County 11-AA-52 and 09-AA-67).

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: NOVEMBER 25, 2013.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE