WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAMELA L. SPENCE,
Grievant,

v. **Docket No. 2012-0026-DHHR**

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

DECISION

Grievant, Pamela L. Spence, was employed by the Respondent, Department of Health and Human Resources, ("DHHR") at Mildred Mitchell-Bateman Hospital ("Bateman Hospital") since 2006. Her last position at the Hospital was a Payroll Assistant. Ms. Spence filed a level three grievance[1] form dated July 5, 2011, and as her statement of grievance she wrote: "False claim of 'resignation' by Respondent/termination." As relief Grievant seeks, "To be made whole including all lost wages with interest & benefits restored & promised job position."

A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on June 6, 2012. Grievant personally appeared and was represented by Donald R. Jarrell, Esquire. Respondent DHHR was represented by Michael Bevers, Esquire, Assistant Attorney General. At the conclusion of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions

[1] *See* W. VA. CODE § 6C-2-4(a)(4) for circumstances in which a grievance may be filed directly to level three.

of Law, the last of which was received at the Grievance Board on August 8, 2012. This matter became mature for decision on that date.

Synopsis

Respondent asserts that Grievant voluntarily resigned and her employment was terminated when the verbal resignation was accepted by the Hospital Chief Executive Officer ("CEO"). Grievant counters that she did not mean to resign and when she realized that the CEO thought Grievant resigned, Grievant withdrew the resignation before it was acted upon. Additionally, Grievant alleges that she was constructively discharged from employment without cause.

Respondent proved that Grievant voluntarily resigned rather than work for a particular supervisor and that the Bateman Hospital CEO accepted Grievant's resignation before Grievant withdrew it. Additionally, Grievant was unable to prove that that she was constructively discharged when Respondent moved her position into the Human Resources department as a result of a reorganization plan. Th 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, Pamela Spence, has been employed by DHHR at Bateman Hospital since 2006. She was initially classified as an Accounting Technician 2, but was eventually promoted to the classification of Payroll Assistant.

2. Grievant consistently received performance evaluations indicating that her performance was good and met the standards expected for her position. *See* Grievant's Exhibits 4 through 9, Employee Performance Evaluation forms.

3. In May 2011, the management for the DHHR's Bureau for Behavioral Health and Health Facilities decided to structure the operation of all State Hospitals consistently. This restructuring required the Payroll personnel at Bateman Hospital to move from the Fiscal Services Department to the Human Resources Department. The management of Bateman Hospital decided that this restructuring would become effective on July 1, 2011 to coincide with the beginning of the new fiscal year.

4. Kieth Anne Worden is the Director of the Human Resources Department and Grievant had previously worked under Ms. Worden's direction. James Spencer is the Chief Financial Officer ("CFO") for Bateman Hospital and was Grievant's immediate supervisor in the Fiscal Services Department.

5. Grievant Spence became aware of the pending reorganization in May and during the months of May and June she began telling co-workers and supervisors that she would not work for Kieth Anne Worden and that she would quit before she would work in Human Resources under Ms. Worden's direction. Additionally, Grievant expressed these intentions to her supervisor, James Spence as well as the Bureau's Assistant Commissioner.

6. CFO Spencer was considering creating another position in the Financial Services Department of Bateman Hospital with the classification of an Accounting Technologist 3. He had not discussed this with Patricia Frantz who was the Chief

Executive Officer ("CEO") for Bateman Hospital. The position could not be created or posted without the approval of CEO Frantz.

7. CFO Spencer arranged for himself and Grievant to receive training in the Keane general ledger accounting package. CFO Spence felt that the training would enhance Grievant's qualifications for the new position in the Financial Services Department if such a position was posted. CEO Frantz was not aware of this training.

8. CFO Spencer told Grievant that he felt she would be qualified for the new position but there was no guarantee that she would get it.

9. On June 24, 2011, Director Worden sent an e-mail asking CEO Frantz if he had completed the position description and organizational chart for the vacancy in his department. She informed him that she could not post it until the Central Office reviewed the position description. On the same day, CFO Frantz replied that he wanted Director Worden to post an Accounting Tech 3 position under his supervision. Grievant's Exhibit 11.

10. Director Worden could not post the position until it had been approved by CEO Frantz and then by the DHHR Central Office. The process for filling the position was not going to be completed until significantly after July 1, 2011, when Grievant was to be transferred to the Human Resources Department.

11. Grievant believed Director Worden did not follow proper procedures in performing financial functions and did not want to work for her. Grievant testified that she had seen a document [2] stating that Director Worden had been suspended in the 1990's for alleged financial irregularities. She told CFO Spencer that she would not

[2] Grievant did not produce the document or any other evidence of alleged prior misdeeds she attributed to Director Worden.

work for Director Worden. CFO Spencer encouraged Grievant to speak with Director Worden and CEO Frantz about her concerns.

12. Grievant Spence went on vacation from June 18, 2011, through June 26, 2011. She returned to work on June 27, 2011, and met with CFO Spencer as soon as he arrived at work that morning. Grievant informed CFO Spencer that she was not going to transfer to Human Resources to be a payroll clerk even if she had to take a leave of absence or quit. CFO Spencer encouraged Grievant to speak with CEO Frantz about her feelings. CFO Spencer sent CEO Frantz an e-mail advising her of this conversation and noting that if Grievant quit, Human Resources had no one trained to prepare the payroll for the following week.[3]

13. During the afternoon of June 27, 2011, Grievant met with CEO Frantz. She told CEO Frantz that she had no intention to work under Director Keith Anne Worden when the reorganization went into effect on Friday.[4] CEO Frantz told Grievant that the organizational change was going into effect on July 1, 2011, and if Grievant could or would not work with Ms. Worden, her verbal resignation was accepted. CEO Frantz then asked Grievant if she was sure that was what she wanted to do and Grievant respondent affirmatively and left the office.[5]

14. On Monday, June 27, 2011, at 3:54 p.m. CEO Frantz sent Grievant an e-mail stating the following:

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[3] Grievant's Exhibit 10, an e-mail from Spencer to Frantz June 27, 2011, at 11:14 a.m. Under cross examination, Grievant confirmed that she told CEO Frantz "I'll quit before I'll work for her," referring to Director Worden.
[4] Friday was July 1, 2011.
[5] Grievant's Exhibit 15, a memorandum to Grievant from CEO Frantz recounting the discussion they had in Ms. Frantz's office on June 27, 2011.

> The purpose of this is to confirm the verbal resignation you made this afternoon. You stated your resignation will be effective Thursday, June 30, 2011.

Grievant's Exhibit 17.

15. When CEO Frantz came to work at 8:30 a.m. on June 28, 2011, she noticed that Grievant had cleared all of her personal belongings from her office.

16. Grievant responded to CEO Frantz by an e-mail sent June 28, 2011, at 3:08 p.m. which stated, "There was no verbal resignation. You must have misunderstood our conversation." Grievant's Exhibit 16.

17. CEO Frantz sent Grievant a memorandum on June 29, 2011, expressing her surprise that Grievant was now denying that she resigned, especially in light of her many expressions of her intent to do so over the last several weeks. She recounted the conversation that they had in CEO Frantz's office and reminded Grievant that CEO Frantz had sent her an e-mail confirming her acceptance of Grievant's resignation.[6] Grievant's Exhibit 15, also admitted as Respondent's Exhibit 3.

18. On June 30, 2011, Grievant left a letter for CEO Frantz in which she again denied that she had resigned and expressed her dissatisfaction with the way she and other employees are treated at Bateman Hospital. Grievant's Exhibit 14, also admitted as Respondent's Exhibit 4.

19. CEO Frantz was the only person at Bateman Hospital with authority to hire or fire employees, or accept an employee's resignation.

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[6] Grievant took a day of approved sick leave on June 29, 2011. Grievant's Exhibit 3

Discussion

There was no disciplinary action taken in this matter. Consequently, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). 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); *See also, Hendrick v. Dep't of Health and Human Res*., Docket No. 2009-0611-DHHR.

Grievant claims that she did not actually resign from her job. She was angry and expressing her frustration but did not intend to give up her employment. As proof of her intent to stay employed at Bateman Hospital, Grievant notes that CFO Spencer was preparing to have an opening in the Fiscal Services Department and that he had sent Grievant to training so that she would be qualified for that position. She argues that she would not have resigned over being transferred to the Human Resources Department because she was going to take a different job in Fiscal Services. In fact, CFO Spencer requested on June 24, 2011, that Director Worden post a position in Fiscal Services. However, he was informed that the position had to be approved by CEO Frantz and the Department of Personnel before it was posted. It became apparent that the transfer of Grievant's position to Human Resources was going to take place at least weeks before the position in Fiscal Services was filled. Furthermore, there was no guarantee that Grievant would get the posted position.

The facts simply do not support Grievant's version of the events. In her own testimony, Grievant confirmed that, for weeks prior to the date of the transfer, she had

told a number of people that she would quit before she would work for Director Worden in Human Resources. Grievant was on vacation when CFO Spencer made his failed attempt to get a position posted in Fiscal Services that Grievant might apply for before the transfer date of July 1, 2011. When Grievant returned on June 27, she found out that her transfer was going to take place as planned that Friday. She met with Mr. Spencer that morning and told him she would quit before she would accept a transfer to Human Resources. Grievant's Exhibit 10. She then met with CEO Frantz and told her, "I'll quit before I'll work for her," referring to Director Worden. CEO Frantz told Grievant that the organizational change was going into effect on July 1, 2011, and if Grievant could not or would not work with Ms. Worden, her verbal resignation was accepted. CEO Frantz then asked Grievant if she was sure that was what she wanted to do and Grievant responded affirmatively and left the office. After CEO Frantz confirmed her acceptance of Grievant's resignation in an e-mail, Grievant responded that Ms. Frantz must be confused and she did not resign.

It may well be that Grievant was bluffing and did not believe that her threat to quit would be accepted. However, any reasonable person who was listening to Grievant's statement would believe that she intended to resign. She had stated that intent for weeks and specifically told CEO Frantz that she would quit rather than be transferred. Those statements clearly led CEO Frantz to believe that Grievant intended to resign and when she asked Grievant if that was her intent, Grievant replied affirmatively.

Grievant does not deny that she told CEO Frantz that she would quit if she was transferred, but she does deny that she said her last day would be June 30, 2011, or that she confirmed that she was resigning. Where the credibility of testimony becomes

an important issue, 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' information. *See Gramlich v. Div. of Motor Vehicles,* Docket No. 2010-0929-DOT (June 14, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1588-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

CEO Frantz was calm and testified in a businesslike manner. Since Grievant was admittedly a good employee and losing Grievant right before the payroll was due would create problems for the facility, she had no motivation to misstate Grievant's words. Grievant admitted that a great deal of the conversation took place as Ms. Frantz stated, and given Grievant's prior statements regarding her intent, CEO Frantz's version of the conversation is quite plausible. Additionally, Grievant's counsel introduced a transcript of a hearing that took place when Grievant was seeking unemployment compensation. That transcript was admitted solely for the purpose of comparing the testimony of the level three witnesses with their prior sworn statements. The testimony of CEO Frantz was substantially the same in both instances. Her testimony was credible.

Grievant, on the other hand, admitted that she was quite angry when she was talking to CEO Frantz and she became agitated during her testimony at level three. She consistently stated that she did not resign but her words conveyed a clear message that she meant to do just that unless she got her way. She confirmed that she made all the statements described by Ms. Frantz except the final confirmation. It does not seem likely that Ms. Frantz would fabricate that small portion of the conversation. It seems more likely that Grievant in her agitated and angry state might have forgotten that specific fact. Under the circumstances and based upon the testimony of both witnesses, the version of events described by CEO Frantz is more likely than that described by Grievant.

As an indication that she did not really resign, Grievant points to the fact that she did not put her resignation in writing. The Grievance Board has addressed this issue on several occasions. In the case of *Jenkins v. Dep't of Health and Human Res.*, Docket No. 02-HHR-214 (Oct. 22, 2002) the Administrative Law Judge noted:

> 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). As a general rule, an employee may be bound by her verbal representations that she is resigning when they are made to a person or persons with the authority to address such personnel matters. *See, Welch, supra; Copley v. Logan County Health Dep*t., Docket No. 90-LCHD-531 (May 22, 1991). The representations must be such that a reasonable person would believe that the employee intended to sever his relationship with the employer." *Hale-Smith v. Mingo County Bd. of Educ.*, Docket No. 98-29-075 (Sept. 30, 1998).

Id.

The facts in *Jenkins supra.* are strikingly similar to this matter. In *Jenkins*, the grievant gave her employer an ultimatum, at two different times. She stated she would

resign rather than be transferred to a particular Unit. The employer chose to continue with its decision to reassign the grievant to that unit and she then talked about giving thirty days' notice. Based upon these facts, the Administrative Law Judge concluded:

> A reasonable person would have concluded that Grievant intended to sever her employment relationship. She gave a verbal resignation to a person with authority to accept it, and that is sufficient. *Albright, supra*. *Jenkins v. Dep't of Health and Human Res.*, Docket No. 02-HHR-214 (Oct. 22, 2002).

The same is true in this case. Grievant made her ultimatum that she would quit before transferring to the Human Resources Department. She made that statement to the Hospital CEO who was the person authorized to take her resignation. When the CEO told her that the transfer was going to take place and asked if it was her intent to resign she agreed that it was. Just like in *Jenkins*, a reasonable person in CEO Frantz's position would believe that Grievant intended to sever her relationship and that was sufficient. *Jenkins*, *supra.*

Next, Grievant argues that she rescinded her resignation before it was accepted by her employer which rendered the resignation void. The West Virginia Supreme Court of Appeals has recently addressed this issue in *W. Va. Dep't of Envtl. Prot. v. Falquero,* 228 W.Va. 773, 724 S.E.2d 744 (2012). In two syllabus points the Court wrote:

> 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.
>
> 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., Syl. Pts. 3 & 4.

In this matter Grievant verbally resigned to CEO Frantz in her office on June 27, 2011. At 3:54 p.m. CEO Frantz sent Grievant an e-mail confirming that she had accepted her resignation. Grievant sent an e-mail the next day denying that she had resigned. The employer clearly indicated acceptance of Grievant's resignation by written communication to her prior to any attempt was made by Grievant to repudiate her resignation. Grievant did not withdraw her resignation before it was clearly accepted by her employer.

Finally, Grievant alleges that she did not resign but was constructively discharged. 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. *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. *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir.1977); *Slack, supra.* In discussing the "reasonable person" standard, the West Virginia Supreme Court of Appeals has described a reasonable person as, "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).

Grievant argued that in the 1990's Director Worden had violated policies and procedures that resulted in her being suspended and payroll being taken from her control in the Human Resources. She also said that she had at least one prior disagreement with Director Worden about how a person should be paid. These allegations were rather amorphous without specific dates or policy violations. No documents or testimony were offered to prove that these incident were true. Further, even if they were true, they apparently happened nearly a decade ago and the Department had enough confidence to require that the payroll function be placed in the Human Resources Department of Bateman Hospital. There was simply no evidence presented that could lead the trier of fact to believe that the working conditions for Grievant under Ms. Worden's direction, would have been so difficult or unpleasant that a reasonable person in the her shoes would have felt compelled to resign. Grievant did not prove that she was constructively discharged, that she did not resign or that she

rescinded her resignation before it was accepted by her employer. Accordingly, the grievance is DENIED.

Conclusions of Law

1. There was no disciplinary action taken in this matter. Consequently, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). 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); *See also, Hendrick v. Dep't of Health and Human Res*., Docket No. 2009-0611-DHHR.

2. An employee may be bound by her verbal representations that she is resigning when they are made to a person or persons with the authority to address such personnel matters. *See, Welch, supra; Copley v. Logan County Health Dept.*, Docket No. 90-LCHD-531 (May 22, 1991). The representations must be such that a reasonable person would believe that the employee intended to sever his relationship with the employer." *Hale-Smith v. Mingo County Bd. of Educ.,* Docket No. 98-29-075 (Sept. 30, 1998)." *Jenkins v. Dep't of Health and Human Res.*, Docket No. 02-HHR-214 (Oct. 22, 2002).

3. Grievant made a verbal resignation to CEO Frantz who was the manager authorized to accept resignation at Bateman Hospital. Her resignation was valid and enforceable. *Jenkins v. Dep't of Health and Human Res.*, Docket No. 02-HHR-214 (Oct. 22, 2002).

4. 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. 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 (2012).

5. Grievant did not prove that she rescinded her resignation before her employer clearly indicated to her, in writing, that her resignation was accepted.

6. 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. *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. *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir.1977); *Slack, supra.*

7. Grievant did not prove that she was constructively discharged because she did not prove that the working conditions for Grievant under Ms. Worden's direction,

would have been so difficult or unpleasant that a reasonable person in the her shoes would have felt compelled to resign. *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir.1977); *Slack, supra.*

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: JANUARY 17, 2013

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE