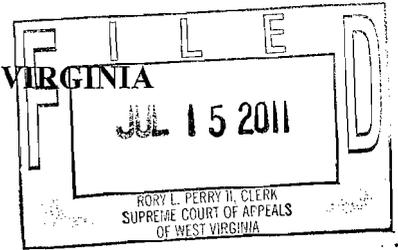


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Petitioner,

v.

DOCKET NO. 11-0629

MICHELLE FALQUERO ,

Respondent.

RESPONDENT'S BRIEF IN RESPONSE TO
THE PETITIONER'S PETITION FOR APPEAL
PURSUANT TO RULE 10(d)

Date: July 15, 2011

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES ii

II. ARGUMENT 1

A. The Circuit Court of Kanawha County correctly upheld the December 16, 2008, Decision of the West Virginia Public Employees Grievance Board that the West Virginia Department of Environmental Protection improperly refused to allow the Respondent to rescind her resignation.

B. The ALJ’s decision to overrule *Copley* does not exceed his statutory authority and was not arbitrary or capricious.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION..... 7

IV. CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

<i>Armistead v. State</i> , 583 P.2d 744 (Cal. 1978).....	3
<i>Booth v. Sims</i> , 193 W.Va. 323, 456 S.E.2d 167 (1995).....	5
<i>Bradshaw v. Soulsby</i> , 210 W.Va. 682, 558 S.E.2d 681 (2001).....	5
<i>Cahill v. Mercer County Bd. of Educ.</i> , 208 W.Va. 177, 539 S.E.2d 437 (2000).....	2
<i>Davis v. Marion Cty. Engineer</i> , 60 Ohio St.3d 53, 573 N.E.2d 51 (1991).....	3
<i>Ex Parte Rhea</i> , 426 So.2d 838 (Ala. 1982).....	3
<i>First National Bank of Gallipolis v. Marietta Manufacturing Co.</i> , 151 W.Va. 636, 153 S.E.2d 172 (1967).....	4, 5
<i>Holt v. Personnel Advisory Board of the State of Missouri</i> , 679 S.W.2d 340 (Mo. App. W.D. 1984).....	3
<i>LeMasters v. Bd. of Educ. of Grant District</i> , 105 W.Va. 81, 141 S.E. 515 (1928).....	4
<i>Poland v. Glover</i> , 111 F.Supp. 675 (W.D.N.Y. 1953).....	3

Administrative Authority:

<i>Copley v. Logan County Health Department</i> , Docket No. 90-LCHD-531.....	5, 6, 7
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ARGUMENT

- A. The Circuit Court of Kanawha County correctly upheld the December 16, 2008, Decision of the West Virginia Public Employees Grievance Board that the West Virginia Department of Environmental Protection improperly refused to allow the Respondent to rescind her resignation.**

The Petitioner argues that this Court must overturn the Circuit Court's ruling which affirmed the decision of the Administrative Law Judge that the Petitioner wrongfully refused to accept the Respondent's rescission of her resignation. In that regard, the Administrative Law Judge made various findings of fact which are of importance to this appeal. The pertinent Findings of Fact include the following:

12. On February 28, 2008, Grievant Falquero gave Ms. Cosco[her new supervisor] a copy of her letter of resignation that stated: "This letter serves as notice that I am resigning from my position at the West Virginia Department of Environmental Protection. My last day of work will be June 15, 2008." Grievant told Ms. Cosco that things would never change at WVDEP and that Grievant had set that date of her departure more than three months in the future so that she could look for another job. Ms. Cosco's only response was to say "okay".

13. No other action was taken regarding Grievant's resignation for a month.

14. After spending time in her new office, Grievant realized that she was no longer subject to the perceived hostile environment in the Executive Suite. Grievant spoke with Ms. Cosco on March 26, 2008, regarding whether she could rescind her resignation. Ms. Cosco indicated that she did not know. On March 27, 2008, Grievant submitted a memorandum to Kathy Cosco and Sandy Kee which stated: "As of today I am rescinding my resignation. Thank you."

15. On April 1, 2008, Ms. Cosco gave Grievant a letter stating:

"The West Virginia Department of Environmental Protection (DEP) accepted your February 28, 2008, letter resigning your position as a Secretary II with the DEP's Public Information Office. On March 27, 2008, you notified me in writing that you were rescinding your resignation. I regret to inform you that the DEP has decided to deny your request and that your last day of employment will be June 15, 2008, as you initially indicated in your letter of resignation."

This was the first communication the WVDEP had with Grievant regarding the acceptance of her resignation. (See pages 7 and 8 of the December 16, 2008, Decision of the Administrative Law Judge attached to the Petitioner's brief as Exhibit 1.)

Importantly, the Administrative Law Judge did not make any finding that the Petitioner took any action to process or otherwise accept Ms. Falquero's offer to resign effective June 15, 2008, until after she formally rescinded her offer of resignation. Petitioner's counsel argues on page 4 of the Petition for Appeal that Ms. Cosco informed the appropriate executive personnel of the offer of resignation and began the internal process of transitioning Ms. Falquero's duties to other personnel within her department. However, these facts were not found by the Administrative Law Judge.¹ It is well-established that "a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge[.]" Syl. Pt. 3, *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000).

¹ Ms. Falquero did not work at DEP from June 15, 2008, until some point in 2009 when the Circuit Court denied DEP's motion to stay the ALJ's Order. Perhaps her duties were reallocated during this time.

The specific legal issue before the Administrative Law Judge, the Circuit Court, and this Honorable Court, is whether a public civil service employee may rescind a resignation which has not, in fact, taken effect and was not, formally or informally, accepted by the employer. Further, under the facts of this case, the employer took no action to its detriment in response to the tendered resignation. Although authority on this issue in West Virginia is sparse, this specific legal issue has been addressed by other jurisdictions.

In *Davis v. Marion Cty. Engineer*, 60 Ohio St.3d 53, 573 N.E.2d 51 (1991), the Supreme Court of Ohio specifically found that “a public employee may rescind or withdrawal a tender of resignation at any time prior to its effective date, so long as the public employer has not formally accepted such tender of resignation.” *Id.* 573 N.E.2d 51, 55 (1991). See also *Armistead v. State*, 583 P.2d 744, 748 (Cal. 1978) (holding that, unless valid enactments provide otherwise, employee is entitled to withdraw resignation if done (1) before effective date, (2) before acceptance, and (3) before appointing power acts in reliance on the resignation); *Ex Parte Rhea*, 426 So.2d 838, 840 (Ala. 1982) (holding that where correspondence operating as effective tender of resignation was not accepted prior to letter withdrawing the same, employee was entitled to be reinstated); *Holt v. Personnel Advisory Board of the State of Missouri*, 679 S.W.2d 340, 343 (Mo.App.W.D. 1984), superceded by statute on other grounds (holding that resignation of merit system employee that was prospective or conditional in character may be withdrawn at any time before it is accepted and removal of such employee from state payroll after withdrawal of resignation was tantamount to involuntary dismissal); and *Poland v. Glover*, 111 F. Supp. 675, 676 (W.D.N.Y. 1953) (holding that prospective resignation of public employee could not be accepted, except upon the terms stated therein).

While the ALJ relied, in part, on *LeMasters v. Bd. of Educ. of Grant District*, 105 W.Va. 81, 141 S.E. 515 (1928), that case was not the sole basis of his decision. Nevertheless, *LeMasters*, although not specifically analogous to the case at hand because it involved educational personnel, does provide an indicator of the law in West Virginia regarding the ability of a public employee to withdraw a tender of resignation before it is formally accepted. This is particularly true in light of a letter of resignation that announces resignation, in fact, at some future date.

In any event, there is no evidence or factual finding in the case at hand that DEP took any action to accept Ms. Falquero's letter of resignation until such time as it received her letter rescinding her tender of resignation. While a classified civil service employee in West Virginia may not have an express contract, he or she certainly has protections not available to a customary at-will employee. A decision in this case should have little, if any, affect on private at-will employment relationships because an at-will employee in the private sector can generally be discharged at any time. Why would an at-will employee argue over an at-will employer's refusal to rescind a voluntary resignation when the employer could simply discharge the employee without cause?²

On page 9 of its Petition, DEP directs the Court to *First National Bank of Gallipolis v. Marietta Manufacturing Co.*, 151 W.Va. 636, 153 S.E.2d 172 (1967) for the proposition that Ms. Falquero's tender of resignation at some future date, accompanied by a supervisor saying "okay" in response to its receipt, constitutes a binding contract. This is a misinterpretation of that case. In *First National*, the Bank loaned money to a third party based upon a promise by Marietta to pay back a portion of the loan. The case turned on the fact that the Bank took action, providing a loan, in reliance upon Marietta's offer to repay the loan. While there was no formal acceptance

² The only possible reason would involve unemployment compensation eligibility issues.

of Marietta's initial offer to repay the loan, the Bank performed to its detriment in reliance upon the offer. This detrimental reliance upon an unqualified offer, before the offer was rescinded, created binding contractual obligations between the parties.

The law set forth in *First National*, when applied to the facts of the instant matter, proves that Ms. Falquero rightfully rescinded her resignation. She tendered an offer to resign at some future date and the DEP took no action to its detriment, or otherwise, in reliance upon her tender. She then rescinded the offer before formal or informal acceptance. Under these specific facts, the ruling of the ALJ and the Circuit Court must be upheld.

B. The ALJ's decision to overrule *Copley* does not exceed his statutory authority and was not arbitrary or capricious.

The DEP asserts that the ALJ did not have authority "to overrule, override, refine, clarify, change, alter or otherwise amend the decision of another ALJ at Level III in an entirely separate case." Clearly, the ALJ in the case *sub judice* did not change the ruling of another ALJ in an entirely separate case. Instead, he simply applied a different set of facts to the law as he understood it. This is clearly permissible. While previous decisions of another ALJ on a separate case may provide persuasive authority, they are not legally binding on future decisions of another ALJ.

While the judicial doctrine of *stare decisis* "rests upon the important principle that the law by which people are governed should be "fixed, definite, and known," *Booth v. Sims*, 193 W.Va. 323, 350 n. 14, 456 S.E.2d 167, 194 n. 14 (1995), and not subject to frequent modification in the absence of compelling reasons." *Bradshaw v. Soulsby*, 210 W.Va. 682, 690, 558 S.E.2d 681, 689 (2001). The Court "does not blindly adhere to precedent in every case." *Id.* Further, as

a practical matter, a precedent-creating opinion that contains no extensive analysis of an important issue is more vulnerable to being overruled. *Id.*

The DEP argues that another ALJ's decision in *Copley v. Logan County Health Department*, Docket No. 90-LCHD-531 (May 22, 1991) was improperly overruled. Along this line, DEP argues that if a prior decision of an ALJ suffered fatal legal flaws, the Circuit Court of Kanawha County had the authority to remedy them. DEP continues by claiming that it is not within the power of the Public Employees Grievance Board to "heal itself." Certainly, a compelling reason to modify or overrule a prior decision is to "heal" a decision that was wrong. The Court should note that the WV Education & State Employees Grievance Board's website database shows that the *Copley* decision was not appealed to the Circuit Court. (See Database Search Results from Grievance Board website attached hereto as Exhibit A.) How can an incorrect decision be corrected through appeal, if it was never appealed? Following DEP's logic, the ruling could never be corrected because an appeal of any subsequent decision would be fruitless based on the doctrine of *stare decisis*.

The *Copley* decision is not the type of well-reasoned and vigorously argued decision which should establish the law in perpetuity. In *Copley*, the ALJ expressed the uncertainty of the law regarding public employees' right to rescind a prospective resignation. The ALJ specifically noted that "The inquiry has been hampered by the fact that no briefing whatsoever was submitted on the issue." *Copley* at page 6. In Footnote 7, the ALJ notes that briefing was required on this issue. *Id.* Nevertheless, the parties apparently ignored this requirement. The DEP now argues that this decision, which was not argued by the parties through legal briefs nor appealed, is the absolute law of the land. This kind of untested decision should hold very little precedential value.

The *Copley* ALJ also found it “critical” that the resignation of Copley was not in the least due to circumstances at work. *Copley* at 7. This is a fact by which Ms. Falquero’s case is distinguishable. In the case at hand, the tendered resignation was due to a hostile work environment. The ALJ specifically found that “there is ample evidence that the work environment experienced by Grievant was very unpleasant. The actions of her co-workers toward her appeared to be petty, sophomoric and generally not consistent with reasonable and appropriate office behavior.” (See page 12 of the December 16, 2008, Decision of the Administrative Law Judge attached to the Petitioner's brief as Exhibit 1.) This “critical” fact makes the case *sub judice* distinguishable from the *Copley* decision. In other words, because the ALJ in *Copley* found the reason for the tender of resignation “critical,” she may very well have ruled in favor of Ms. Falquero based on the facts of her case.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent holds the opinion that oral argument pursuant to Rule 19 or 20 is appropriate because the case involves issues of first impression and of fundamental public importance. The West Virginia Supreme Court of Appeals has not ruled on the primary legal issue of this case. Further, this issue may involve any civil service public employee in the State of West Virginia.

CONCLUSION

The ruling of the Circuit Court of Kanawha County affirming the decision of the ALJ was not (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority or jurisdiction of the Public Employees Grievance Board; (3) made upon unlawful procedures; (4) affected by other error of law; (5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by

abuse of discretion or clearly unwarranted exercise of discretion. The underlying findings of fact and conclusions of law are well reasoned, accurate and should be affirmed.

MICHELLE FALQUERO

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WV EDUCATION & STATE EMPLOYEES GRIEVANCE BOARD

HOME

DATABASE SEARCH RESULTS

Records 1 - 1 of 1

[BACK TO BLANK SEARCH FORM](#)

<u>GR'S FIRST:</u>	DEBORAH	<u>GR'S LAST:</u>	COPLEY
<u>DECISION DATE:</u>	5/22/1991	<u>LAST UPDATED:</u>	
<u>DOCKET NO.:</u>	90-LCHD-531	<u>ALJ:</u>	SA
<u>RESPONDENT:</u>	LOGAN COUNTY HEALTH DEPARTMENT		
<u>TYPE EMPLOYMENT:</u>	STATE	<u>JOB TITLE:</u>	SECRETARY

TOPICS: RESCISSION OF RESIGNATION

PRIMARY
ISSUES: Whether employee can rescind a prospective resignation if employer has not taken any action thereon

OUTCOME: DENIED

STATUTES:

RELATED
CASES:

KEY
WORDS: PROSPECTIVE RESIGNATION; RESCISSION;

CIRCUIT
COURT:

SUPREME
COURT:

SYNOPSIS: Grievant, a secretary, decided to resign due to purely personal reasons unrelated to her employment and submitted her resignation in October, to be effective at the end of the year. A few days after she submitted it, she requested it back. Her request was refused. **DECISION:** Grievant's argument that her resignation was not accepted and therefore was ineffective was rejected ('Since Grievant's contract of employment was for an indefinite duration and therefore she could terminate it at will [cite omitted], it was not necessary for [the Director of Respondent agency] to agree to her resigning for such resignation to be effective.') Grievant's alternative argument, that she should have been allowed to rescind her resignation, was also rejected. Grievant therefore did not establish any abuse of discretion.

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CERTIFICATE OF SERVICE

I, Thomas H. Peyton, counsel for the Respondent, Michelle Falquero, do hereby certify that on July 15, 2011, the foregoing “RESPONDENT’S BRIEF IN RESPONSE TO THE PETITIONER’S PETITION FOR APPEAL” was served upon Petitioner by hand-delivering the same to counsel of record at the following address:

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