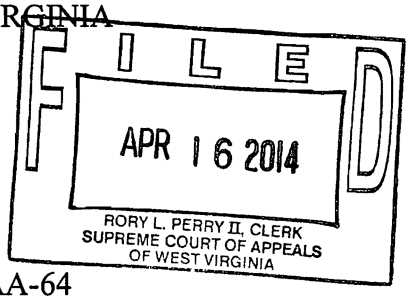
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-1086



THE BOARD OF EDUCATION OF
WEBSTER COUNTY,

Petitioner,

Civil Action No. 13-AA-64
Honorable Tod J. Kaufman
Circuit Court of Kanawha County, West Virginia

v.

DAWN J. HANNA, RUSSELL FRY,
Acting Executive Director, WorkForce West
Virginia; JACK CANFIELD, Chairman, Board
of Review, GINO COLUMBO, Member, Board
of Review; and LES FACEMYER, Member,
Board of Review,

Respondents.

PETITIONER'S REPLY BRIEF

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I. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner The Board of Education of Webster County, West Virginia ("Board") incorporates by reference its request for Rule 20 oral argument as set forth in its opening brief due to the fact that this case involves an issue of first impression and due to the significant legal and public policy issues presented in this appeal.

II. ARGUMENT

The Board respectfully submits this reply brief to supplement its original brief and to respond to notable misstatements of fact and law in Respondent Dawn J. Hanna's ("Hanna") response brief. As the Board established in its opening brief, the Board of Review correctly found that Hanna voluntarily resigned from her position with the Board to avoid criminal prosecution for an alleged felony. In an exercise of free will, Hanna made a choice to resign her employment rather than be prosecuted. Her resignation involved no fault on the part of the Board, as it was Hanna who set in motion the events that led to her decision to voluntarily resign her employment. Allowing her to receive unemployment benefits under these circumstances will undoubtedly set a precedent unintended by West Virginia's clear public policy in favor of the protection of the unemployment compensation fund "against claims by those not entitled to the benefits of the Act." Childress v. Muzzle, 222 W. Va. 129, 133, 663 S.E.2d 583, 587 (2008).

1. The Board of Review Correctly Weighed the Facts of Record to Determine that Hanna Resigned Voluntarily Without Fault on the Part of the Board, and Its Findings of Fact are Entitled to Substantial Deference.

The Board of Review adopted the ALJ's Findings of Fact in their entirety. (App. 23). The Board of Review thus found that, "To avoid prosecution by the Webster County Prosecuting Attorney Office, [Hanna] resigned her employment on December 17, 2012." (App.

18-19, 23). The Board of Review found further that, "If the claimant had not resigned her employment, the claimant could have remained employed as a teacher and risked prosecution by the office of the prosecuting attorney of Webster County." (App. 19, 23). Thus, the Board found that Hanna had a clear choice - either resign her employment with the Board or be prosecuted for a felony. These factual findings by the Board of Review were crucial to its determination that Hanna was ineligible for unemployment benefits and are entitled to substantial deference. Syl. Pt. 3, Adkins v. Gatson, 192 W. Va. 561, 453 S.E.2d 395 (1994). The Circuit Court not only failed to afford substantial deference to these findings, but it completely ignored them.

Hanna uses much of her response brief to espouse theories as to why the Board wanted rid of her and how the Board contrived an elaborate scheme to force Hanna's resignation. It is evident that such claims are baseless, without support in the record, and wildly speculative. Hanna's assertion that this case cannot be decided without resort to West Virginia school personnel laws is unfounded. There is absolutely no evidence that the Board concocted a scheme to make an end-run around such laws and ultimately force Hanna's resignation. Nor is there any evidence that the Board conspired with the prosecuting attorney's office to prevent Hanna from seeking legal counsel so that she would resign her employment rather than contest the charges made against her. All of these assertions are utterly meritless, as are Hanna's "suggestions" and hypotheticals asserted throughout her brief. The relevant fact finders in this case gave no credence to these allegations, and neither should this Court. The relevant inquiry before this Court is whether Hanna resigned voluntarily and without fault on the part of the Board. The record clearly demonstrates Hanna's voluntary resignation, and there is no evidence that the Board is at fault in any manner for that resignation.

The record wholly supports the Board of Review's Findings of Fact, and these are entitled to substantial deference. Syl. Pt. 3, Adkins v. Gatson, 192 W. Va. 561, 453 S.E.2d 395 (1994). Hanna was responsible for collecting the school's fundraiser money and turning it into the school office at the end of the school year. (App. 1, 9 at 13). When it was discovered at the beginning of the following school year that money from the fundraiser was missing, an investigation was conducted by the Board. (App. 17 at ¶ 2). After that investigation was completed, the Board contacted the prosecuting attorney's office and requested that it perform its own investigation. (App. 17 at ¶¶ 3-4). That office then conducted a formal investigation which was completed shortly before Hanna began her leave of absence due to illness in September 2012. (App. 17 at ¶ 5). Because of Hanna's illness, she was not interviewed by the Assistant Prosecutor until after she returned to work in December 2012. (*Id.*). On December 10, 2012, Hanna was confronted by a State Trooper upon her return from a leave of absence and threatened with arrest for the alleged theft. (App. 1). The Assistant Prosecutor then met with Hanna and gave her the choice of resigning and repaying the money or facing prosecution. (App. 17 at ¶ 6). The Assistant Prosecutor imposed the deadline of four days for Hanna to make her decision. (App. 17 at ¶ 6) ("I also told her that I wanted her decision on that by December 17, 2012."). Hanna resigned on December 17, 2012. (App. 1).

These facts undoubtedly support the Board of Review's finding that Hanna voluntarily resigned her employment to avoid prosecution and that such resignation did not involve fault on the part of the Board. Hanna's attempt at muddying the waters with - at best speculative, and at worst grossly irresponsible - allegations should fail.

2. The Circuit Court Misapplied West Virginia Code Section 21A-6-3(1) in Concluding that Ms. Hanna Resigned Under Duress Rather than Voluntarily.

Hanna was given a clear choice between resignation and prosecution. In Hanna's own words, she "chose to quit." (App. 1). Contrary to Hanna's argument, this statement, along with the other facts of record, sufficiently establish that Hanna's choice to resign her employment was voluntary, as the Board of Review found. Hanna argues that the choice presented to her was not a real choice because prosecution for the alleged felony was not a risk but a certainty if she did not resign from her position. This distinction is one without a difference. The fact that prosecution may have been considered by Hanna to be a certainty if she chose not to resign her position does not change the fact that Hanna was given a choice, and in an exercise of free will, she chose to resign.

Hanna argues that she did not voluntarily resign her employment because her resignation was submitted under duress. Rather than citing to or relying on any controlling authority in support of her position, however, Hanna does no more than offer a contrived version of events that is based solely on baseless speculation and gross innuendo. Hanna has never established duress in this matter. Hanna argues in her response brief that duress includes the use of "*threats* . . . to compel someone to act contrary to his/her wishes or *interests*." (Resp. Brief at 10) (citation omitted) (emphasis in original). Hanna's argument in this regard belies the Board of Review's finding that Hanna's decision to resign was voluntary because it was in her best interests to avoid prosecution for an alleged felony. The Board of Review found that Hanna was faced with a clear choice and chose to do that which most benefitted her.

Hanna has pointed to absolutely no legal authority which would support her argument that a choice between resigning and facing prosecution for a crime is not a real choice

and thus cannot be considered voluntary. Neither did the Circuit Court when it reversed the Board of Review's decision and failed to defer to the Board of Review's factual findings showing that Hanna resigned her employment voluntarily. Hanna cites to a nearly century old contract case to establish that an employee is not capable of voluntarily resigning one's employment when such resignation is submitted under duress. See Machinery Hauling, Inc. v. Steel of W. Va., 181 W.Va. 694, 696-97, 384 S.E.2d 139, 141-42 (1989). Hanna has cited to no relevant authority in the unemployment context that would support her position in this case. This is because the only authority relevant to the inquiry is cited in the Board's opening brief and supports the Board's argument that a difficult choice is a choice nonetheless, and that Hanna herself triggered the disqualifying event by freely choosing to resign her position to avoid criminal prosecution.

In its opening brief, the Board cited numerous decisions from this and other jurisdictions that have addressed the relevant issue in the context of unemployment compensation benefits. Hanna's attempt at distinguishing these cases falls short. Contrary to Hanna's assertions, she did have a right to respond to the allegations made against her. Had she chosen to so respond and contest the charges made against her, she would have retained her job, as Hanna admits throughout her brief, and as the Board of Review concluded. (App. 19, 23).

Significantly, numerous courts have held, although not in the context of unemployment compensation, that "resignations can be voluntary even where the only alternative to resignation is facing possible termination for cause or criminal charges." Hargray v. City of Hallandale, 57 F.3d 1560, 1568 (11th Cir. 1995) (holding that a resignation was voluntary when the plaintiff-employee was given the option to resign or face criminal charges); Poindexter v. Dep't of Human Res., 946 F. Supp. 2d 1278, 1289 (M.D. Ala. 2013),

reconsideration denied (June 14, 2013), appeal dismissed (Sept. 30, 2013). In Stone v. Univ. of Maryland Med. Sys. Corp., 855 F.2d 167 (4th Cir. 1988), the United States Court of Appeals for the Fourth Circuit instructed:

> the mere fact that the choice is between comparably unpleasant alternatives—e.g., resignation or facing disciplinary charges—does not of itself establish that a resignation was induced by duress or coercion, hence was involuntary. This is so even where the only alternative to resignation is facing possible termination for cause, unless the employer actually lacked good cause to believe that grounds for termination existed.

Id. at 174; see also, Christie v. U. S., 518 F.2d 584 (Ct. Cl. 1975) (finding a resignation voluntary because "plaintiff had a choice. She could stand pat and fight. She chose not to. Merely because plaintiff was faced with an inherently unpleasant situation in that her choice was arguably limited to two unpleasant alternatives does not obviate the voluntariness of her resignation.").

Clearly, the mere fact that Hanna was faced with an unpleasant decision does not in itself render her resignation involuntary. While Hanna insinuates that the Board concocted a scheme to get rid of her, there is absolutely no evidence to suggest this. Hanna concedes as much, as she couches her speculative and baseless assertions with "suggestions" and hypotheticals. See Resp. Brief at 9 ("It is *suggested* that the employer knew they could not risk a challenge to the charges.") (emphasis added); Resp. Brief at 17 ("it is also *suggested* that fault on the part of the employer is found in the very tactic using the prosecutor's office to deliver the employer's threat of prosecution.") (emphasis added); Resp. Brief at 18.

Hanna's duress argument, which was relied on by the Circuit Court, is predicated solely on the fact that Hanna was given four days to choose whether to resign her employment by the Assistant Prosecutor. Notwithstanding the fact that the Board did not impose the

deadline, the four day deadline does not constitute duress under these circumstances. See, e.g., Seacrist v. City of Cottage Grove, 344 N.W.2d 889 (Minn. Ct. App. 1984) (where employee was asked to resign on the same night he was first confronted with the misconduct at issue). Even excluding the weekend during which Hanna could consider the choices presented to her, Hanna could have contacted legal counsel after her meeting with the Assistant Prosecutor on December 13, at any time on December 14, or at any time on December 17 prior to submitting her resignation. She chose not to do so.

While the Board's position is that the four day deadline does not constitute duress, it is clear that Hanna was apprised of an impending arrest on December 10 and that her resignation was not submitted until one full week later. Hanna admits that she was threatened with arrest on December 10, 2012, when confronted by the State Trooper. (Resp. Brief at 5, 6, 11, 16). Hanna's resignation was submitted on December 17. (App. 1). Thus, even assuming that the four day deadline did not provide Hanna with enough time to consult legal counsel about her decision, Hanna actually had a full week to consult with legal counsel about the charges threatened by the State Trooper on December 10.

Hanna has not demonstrated that her resignation was submitted under duress. The legal authorities on point all agree that the circumstances extant in this case do not prevent the choice between resigning and facing criminal prosecution from being a voluntary one. Hanna voluntarily resigned her employment and should be disqualified from receiving unemployment benefits.

3. The Circuit Court Misapplied West Virginia Code Section 21A-6-3(1) Because No Evidence Establishes Fault on the Part of the Webster County Board of Education.

Hanna argues that even if her resignation is considered voluntary, it was submitted as a result of fault on the part of the Board because of the Board's involvement in obtaining her resignation. As established in the Board's opening brief, Hanna must establish a nexus between good cause and the alleged action of the employer that led to the resignation. See Verizon Services Corp. v. Epling, 230 W. Va. 439, 447, 739 S.E.2d 290, 298 (2013). Hanna has failed to establish this required nexus. Only Hanna was responsible for the actions that led to the choice presented to her to either resign or face criminal prosecution. It is undisputed that Hanna was in charge of a student fundraiser from which money went missing. (App. 1). Because the investigation into the theft was not completed until Hanna's leave of absence from work began in September 2012, the Board, along with a State Trooper, confronted Hanna about the missing funds at its first opportunity when she returned to work. (App. 1). At this time, Hanna concedes that she could not locate her copy of the records for the fundraiser. (Resp. Brief at 8). She also states that after her resignation, and after she was told that the alleged theft constituted a felony, she located two unsold cookbooks in her locker at the school (Resp. Brief at 9), yet she did not find these missing books between December 10, when she was first confronted about the theft, and December 17, when she submitted her resignation. Hanna's own actions led to the choice presented to her to either resign or be prosecuted.

Hanna argues that her resignation was due to fault on the part of the Board because the Board gave Hanna the choice to resign or be prosecuted for the alleged felony and because the Board determined that Hanna should have only four days to make this decision. The evidence of record does not support these claims. Hanna herself stated that it was the Assistant

Prosecutor who gave her the choice to resign or be prosecuted. (App. 1) ("She [Dara Acord] told me that I could resign and agree to repay the money or they were going to prosecute."). Hanna further stated that she resigned because [she] was threatened by the Prosecutor's office and [the] State Trooper. (App. 1). In fact, she stated that she "never heard from" the Board when she was given the choice to resign or face prosecution. (App. 1).

Hanna's argument that the Assistant Prosecutor was acting as an agent of the Board is without support in the record and the law.[1] The only evidence of record on which Hanna relies in this regard is Ms. Acord's statement that the Board desired to have Hanna's resignation rather than see her prosecuted for a felony. Even if the Board did wish to see Hanna resign as opposed to facing a potentially humiliating and public prosecution, this can hardly create fault on the part of the Board for Hanna's ultimate decision to resign. Hanna asks the Court to find as a matter of law that an employer's desire to see an employee resign and not be subjected to criminal prosecution results in that employer being held at fault for the employee's resignation. Certainly such a finding would severely hinder an employer's ability to deal with a situation such as that at issue in this appeal in the best manner the employer sees fit for both it and its employee.

Finally, Hanna argues that the Board imposed the deadline of four days for Hanna to choose whether to resign her employment, the sole fact relied upon by the Circuit Court in reversing the Board of Review's decision. All evidence, however, is to the contrary. It was the Assistant Prosecutor who imposed the deadline of four days. (App. 17 at ¶ 6) (I also told her that **I** wanted her decision . . . by December 17, 2012) (emphasis added). The only evidence relied

[1] Under Hanna's logic, the prosecuting attorney's office is an agent of every entity and person who reports a crime to it.

on by Hanna in this regard is that she *thought* the Board, in addition to the Assistant Prosecutor, wanted her resignation in four days. (App. 11). Contrary to Hanna's assertion, the evidence establishes that Hanna actually "never heard from" the Board after her meeting with the Assistant Prosecutor on December 13. (App. 1). Ms. Acord's statement establishes only that *she* wanted Hanna's decision in four days.

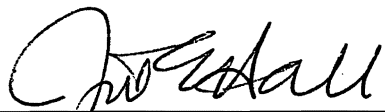
Clearly, Hanna has not established fault on the part of the Board for her ultimate decision to resign and avoid criminal prosecution. Nor could she. It was Hanna who set in motion the series of events that led to the choice posed to her. Hanna asks this Court to improperly expand on West Virginia law with regard to what constitutes fault on the part of an employer under our unemployment statute. The Court should decline to do so.

III. CONCLUSION

West Virginia's unemployment statute "is not intended . . . to apply to those who 'willfully contributed to the cause of their own unemployment.'" Hill v. Board of Review, 166 W. Va. 648, 651, 276 S.E.2d 805, 807 (1981) (quoting Board of Review v. Hix, 126 W. Va. 538, 541, 29 S.E.2d 618, 619 (1944)). Hanna undoubtedly contributed to the cause of her own unemployment. The Board of Review's Findings of Fact demonstrate that Hanna set in motion the series of events that led to her ultimate resignation. Her resignation was voluntary. The choice presented to her was a real choice, and Hanna's decision was based on what would be in her best interests. She must accept all of the benefits and the consequences associated with that decision. She escaped criminal prosecution for an alleged felony. She should also be disqualified from receiving unemployment benefits. The Board of Review correctly found that Hanna is disqualified from receiving unemployment benefits, and this decision should be reinstated. The Circuit Court's order should be reversed.

Respectfully submitted this 16th day of April, 2014.

THE BOARD OF EDUCATION OF WEBSTER COUNTY



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CERTIFICATE OF SERVICE

I, Jill E. Hall, counsel for Hanna and Respondent Below, The Board of Education of Webster County , do hereby certify that the foregoing ***"Petitioner's Reply Brief"*** has been served this 16th day of April, 2014, via U.S. Mail, postage prepaid, upon the following persons as follows:

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