JOHN COLLINS,

Grievant,

v. DOCKET NOS. 02-DOH-227/248

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent .

D E C I S I O N

Grievant, John Collins, filed two grievances against his employer, Respondent, Department of Transportation/Division of Highways ("DOH"), on May 9 and July 2, 2002. The grievances were appealed to Level IV on August 7 and July 26, 2002, respectively, and were scheduled to be heard separately at Level IV on January 3, 2003. Grievant appeared with his representative, Roger Sowards, and Respondent appeared with its counsel, Barbara Baxter, Esquire, and the parties agreed that the two grievances should be consolidated for hearing and decision. This matter became mature for decision at the conclusion of the Level IV hearing, on January 3, 2003, as the parties did not wish to submit written argument.

The first grievance reads:

> Discrimination: Larry Pauley wrote me, John Collins, accusing me of wrong doing. He also has access to a “state”paid lawyer to advise him on how to harrass [sic] me. I do not have the same access to a lawyer to defend myself.

As relief Grievant sought:

> To have the same access to a[n] impartial attorney paid for by the state for a “state” employee. . . me.

Grievant acknowledged at the Level III hearing that the relief sought was not available to him through the grievance procedure, but he did not ask to amend the relief sought. It will also be noted

that it appears that the accusation of wrongdoing referred to in the statement of grievance is a written warning, which was the subject of another grievance. Respondent proved in that grievance that the written warning was warranted. Collins v. W. Va. Dep't of Transp., Docket No. 02-DOH-228 (Sept. 19, 2002).

The second grievance reads:

> Harrassment [sic] and or intimidation: On June 27, 2002, at the Level III hearing, while I was testifying, Larry Pauley disagreed with my testimony, calling me a bear [sic] face liar and proceeded to call me a bear [sic] face liar, got up from his seat, [clenched] his fist, coming toward me in a threatening manner, making me feel I was in danger.

As relief Grievant sought:

> For Larry Pauley to stop the harrassing [sic] and intimidation, acts of a[g]gression must be stopped, and time is of the essence. Any and all costs this grievance may create.

This grievance was dismissed at Level III, as the grievance evaluator found that the Level II decision granted the relief sought, except for the request for costs; and that she did not have authority to award costs. Grievant acknowledged that in his Level II decision dated July 17, 2002, J. Wilson Braley, P.E., District Engineer, concluded that Mr. Pauley had intimidated Grievant, although he did not find evidence of harassment. Mr. Braley's decision states, “by letter I am requesting that Mr. Pauley refrain from this type of behavior in the future.” Grievant stated at the Level IV hearing that he wanted a ruling that Mr. Pauley had harassed him, Mr. Pauley should have been reprimanded, and he had not been provided a copy of Mr. Braley's letter to Mr. Pauley. Respondent provided Grievantwith a copy of the letter to Mr. Pauley. The undersigned informed Grievant that she did not have authority to order that Mr. Pauley be disciplined.

The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Grievant has been employed by DOH in Lincoln County as a Craftworker II for 18 months.

2. At the time these grievances were filed, Larry Pauley was employed by DOH as Lincoln County Supervisor, and was Grievant's supervisor. These grievances allege discrimination, harassment, and intimidation by Mr. Pauley.

3. Mr. Pauley is no longer assigned to Lincoln County and is not Grievant's supervisor.

4. Grievant presented no evidence of any costs he had incurred as a result of these grievances, nor did he present any evidence that DOH had acted in bad faith.

Discussion

At the beginning of the Level IV hearing, the undersigned inquired as to whether Mr. Pauley was still employed in Lincoln County as Grievant's supervisor. The parties advised that he was not. The undersigned then informed Grievant that the Grievance Board does not issue advisory opinions, and that if Mr. Pauley was no longer his supervisor and no longer in Lincoln County, it would appear that the relief requested by Grievant as it related to Mr. Pauley ceasing harassment, intimidation, and acts of aggression, was no longer an issue. Grievant advised that he wanted a decision which said Mr. Pauley had harassed him, as DOH will not guarantee to him that Mr. Pauley will not be returned to Lincoln County at some point. The undersigned advised Grievant that whether Mr. Pauley returned to Lincoln County was speculative, and if he returned, and Grievant believed hewas being subjected to harassment, intimidation, and acts of aggression, he could file a new grievance.

W. Va. Code § 29-6A-1 states that the purpose of the grievance procedure:

> The purpose of this article is to provide a procedure for the equitable and consistent resolution of employment grievances raised by nonelected state employees who are classified under the state civil service system, or employed in any department, other governmental agencies, or by independent boards or commissions created by the Legislature, with the exception of employees of the board of regents [abolished], state institutions of higher education, the Legislature, any employees of any constitutional officer unless they are covered under the civil service system, and members of the department of public safety [West Virginia state police].

Accordingly, “[t]his Grievance Board does not issue advisory opinions. Dooley v. Dep't of Transp., Docket No. 94-DOH-255 (Nov. 30, 1994); Pascoli & Kriner v. Ohio County Bd. of Educ., Docket No. 91-35-229/239 (Nov. 27, 1991).” Priest v. Kanawha County Bd. of Educ., Docket No. 00-20-144 (Aug. 15, 2000). Procedural Rules of the West Virginia Education & State Employees Grievance Bd. § 4.22. “Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]. Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993). De minimus relief is also unavailable. Carney v. W.Va. Div. of Rehab. Services, Docket No. VR-88-055

(Mar. 28, 1989)." Baker v. Bd. of Directors, Docket No. 97-BOE-265 (Oct. 8, 1997).

Grievant sought as relief to have the State of West Virginia pay for an attorney to represent him, costs, and to have Mr. Pauley ordered to quit harassing and intimidating him, and for his acts of aggression to stop. The undersigned has no authority to award attorney fees. Chafin v. Boone County Health Dep't and Div. of Personnel, Docket No. 95- BCHD-362 (June 21, 1996); See e.g., Smarr v. Wood County Bd. of Educ., Docket No. 54- 86-062 (June 16, 1986).

Mr. Pauley is no longer Grievant's supervisor, and is in no position to harass or intimidate Grievant. Thus, Grievant has already received the relief he requested. As toGrievant's concern that Mr. Pauley could be returned to Lincoln County, "[t]he grievance procedure 'is designed to address specific problems or incidents and not general and speculative apprehensions of employees...' Wilds v. W.Va. Dept. of Highways, Docket No. 90-DOH-446 (Jan. 23, 1991)." Id.

As to Grievant's request for costs, W. Va. Code § 29-6A-8 provides that:

> Any expenses incurred relative to the grievance procedure at levels one through three shall be borne by the party incurring such expenses.

W. Va. Code § 29-6A-7 provides:

> Both employer and employee shall at all times act in good faith and make every possible effort to resolve disputes at the lowest level of the grievance procedure. The hearing examiner may make a determination of bad faith and in extreme instances allocate the cost of the hearing to the party found to be acting in bad faith. Such allocation of costs shall be based on the relative ability of the party to pay such costs.

See e.g., Smarr, supra.

> Under this statute, the Grievance Board has explicit authority to allocate costs only in "extreme instances" of bad faith conduct by one of the parties.

. . .

> The Grievance Board has generally followed the standard that "[i]n the absence of specific statutory authority, litigants are normally responsible for their own fees and costs."

Collins and Sowards v. W. Va. Dep't of Transp., Docket Nos. 02-DOH-273, 274, 275 (Jan. 30, 2003)(citations omitted).

Grievant has not demonstrated that he has incurred any costs, or any reason why Respondent should be responsible for any costs he may have incurred.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. The grievance is moot as Mr. Pauley is no longer employed in Lincoln County and is not Grievant's supervisor.

2. "This Grievance Board does not issue advisory opinions. Dooley v. Dep't of Transp., Docket No. 94-DOH-255 (Nov. 30, 1994); Pascoli & Kriner v. Ohio County Bd. ofEduc., Docket No. 91-35-229/239 (Nov. 27, 1991)." Priest v. Kanawha County Bd. of Educ., Docket No. 00-20-144 (Aug. 15, 2000). Procedural Rules of the West Virginia Education & State Employees Grievance Bd. § 4.22.

3. The undersigned has no authority to award attorney fees. Chafin v. Boone County Health Dep't and Div. of Personnel, Docket No. 95-BCHD-362 (June 21, 1996); See e.g., Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986).

4.

> Under this statute [W. Va. Code § 29-6A-7], the Grievance Board has explicit authority to allocate costs only in "extreme instances" of bad faith conduct by one of the parties.
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> . . .
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> The Grievance Board has generally followed the standard that "[i]n the absence of specific statutory authority, litigants are normally responsible for their own fees and costs."

Collins and Sowards v. W. Va. Dep't of Transp., Docket Nos. 02-DOH-273, 274, 275 (Jan. 30, 2003)(citations omitted).

5. Grievant did not demonstrate that Respondent acted in bad faith, or that he otherwise incurred any costs which should be borne by Respondent.

Accordingly, this grievance is **DENIED.**

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State 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 appealing party mustalso provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: January 30, 2003