TRACEY MIKER,

Grievant,

v. **Docket No. 06-HE-133**

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Tracey Miker ("Grievant"), employed by West Virginia University ("WVU"), as a Program Assistant II, filed two grievances in May 2005, challenging a letter of reprimand placed in her personnel file for failure to fulfill her duties, and alleging that her supervisor disclosed her personal medical information to other staff members. For relief, Grievant requested $2.5 million dollars for each claim, that she be transferred, and her supervisor be dismissed. The record does not indicate any activity at level one. The grievances were consolidated and denied at levels two and three. A level four appeal was filed on May 1, 2006. A "Motion To Dismiss" was filed by WVU on June 13, 2006, and a hearing on the Motion was conducted on July 6, 2006. WVU was represented by Kristi A. McWhirter, Assistant Attorney General. Grievant was present and represented by Peter D. Dinardi, Esq.

The following facts essential to this matter are undisputed.

Findings of Fact

1. Grievant is employed by WVU as a Program Assistant II assigned to the Civil and Environmental Engineering Department ("CEE"), of the College of Engineering and Mineral Resources ("COEMR"). Grievant's duties include serving as communications representative for the CEE Department. 2. On April 29, 2005, Grievant failed to attend a Charter Banquet. The reason for her absence was a lack of child care as her spouse was working that evening, and her mother had a doctor's appointment. Attendance was required as Grievant was to greet attendees, set up awards to be given out, package items to be returned to the department after the banquet, and write an article about the banquet for the department newsletter. Grievant did not give notice of her non-attendance in time for a replacement to be found.

3. On May 10, 2005, Grievant presented her immediate supervisor, Kim Clayton, with a

physician's excuse, stating that she could not attend the CEE Graduation Brunch on Sunday, May 15, 2005. Ms. Clayton acknowledged the excuse, and advised Grievant that she would not be required to attend the Brunch.

4. CEE Office Administrator Kim Clayton issued Grievant a First Letter of Warning on May 12, 2005, as a result of her failure to attend the banquet.

5. Pursuant to WVU policy, the May 12, 2005, letter was removed from Grievant's personnel file on May 16, 2006.

6. WVU maintains employees' medical information and records within the Human Resources Medical Management Department. Information is confidential, and provided to the employee's department only if it is required to arrange for accommodations within the department necessary for the employee's return to work.

Arguments and Issues

Grievant denies that her absence from the Banquet impaired her ability to perform the duties of communication representative because she did prepare a newsletter addressing the function. Therefore, she argues, the letter of warning was issued inretaliation for presenting the physician's note excusing her from the Brunch. Grievant additionally asserts that a violation of the Family Medical Leave Act ("FMLA") occurred when Ms. Clayton disclosed her personal medical information to other staff members. For relief, Grievant requests $2.5 million dollars each for the letter of warning and the alleged FMLA violation for a total of $5 million dollars, the letter be removed from her file, Ms. Clayton be dismissed, and that Grievant be transferred to another department where her medical information is unknown to other employees.

WVU argues that the letter of warning has been removed from Grievant's file, thus, any decision on the retaliation claim and challenge to the letter would provide no substantive relief. As to the request that Ms. Clayton be fired, WVU argues that the Grievance Board lacks authority to order disciplinary action be taken against an employee. Grievant has suffered no actual damages, and WVU argues that an award of financial damages is unavailable in this forum.

Discussion

Grievant indicated no desire to amend her requested relief, and counsel explained that she simply wants to complete the administrative process prior to filing in another forum. Accordingly, the following rulings are made.

Punitive damages

___*W. Va. Code* § 29-6A-5(b) allows for the provision of “fair and equitable” relief which has been interpreted by the Grievance Board to encompass such issues as back pay, travel reimbursement, and overtime, but not to include punitive or tort-like damages for pain and suffering. *Spangler v. Cabell County Bd. of Educ.,* Docket No. 03-06-375 (Mar. 15,2004); *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep't of Transp*., Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).

Letter of warning

The letter of warning has been removed from Grievant's file. Grievant did not suffer any loss of pay or benefits as a result of the letter, and this issue is now moot. “Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable issues.” *Sergent v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 03-RJS-188 (Dec. 30, 2003); *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003).

Discipline Ms. Clayton

Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Education and State Employees Grievance Board. *Jarrell v. Raleigh County Bd. of Educ*., Docket No. 95-41-479 (July 8, 1996). *See also Coster v. W. Va. Div. of Corr*., Docket No. 98-CORR-506 (Feb. 24, 1999)*; Rice v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-288 (Apr. 30, 1997); *Daugherty v. Bd. of Directors*, Docket No. 93-BOD-295 (Apr. 27, 1994); *Daggett v. Wood County Bd. of Educ*., Docket No. 91-54-497 (May 14, 1992).

A decision concerning disciplinary action resides with the employer, and it is a management determination. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee'seffective job performance or health and safety. *W. Va. Code* § 29-6A-2(i). *See Ball v.Dep't of Highways*, Docket No. 96-DOH-141 (July 31, 1997)." *Rice v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997). Accordingly, the relief sought cannot and will not be granted.

Grievant's transfer

Finally, Grievant's request for her own transfer lies within her control, to the extent that similar positions are available. WVU confirmed that Grievant is in no way restricted from seeking a transfer. To ensure that she is placed in a position which she finds acceptable, Grievant should exercise her option to secure this relief on her own.

The above-discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. *W. Va. Code* § 29-6A-5(b) allows for the provision of "fair and equitable" relief which has been interpreted by the Grievance Board to encompass such issues as back pay, travel reimbursement, and overtime, but not to include punitive or tort-like damages for pain and suffering. *Spangler v. Cabell County Bd. of Educ.,* Docket No. 03-06-375 (Mar. 15, 2004); *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep't of Transp*., Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).

___2. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable issues." *Sergent v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 03-RJS-188 (Dec. 30, 2003); *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003). 3. Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Education and State Employees Grievance Board. *Jarrell v. Raleigh County Bd. of Educ*., Docket No. 95-41-479 (July 8, 1996). *See also Coster v. W. Va. Div. of Corr*., Docket No. 98-CORR-506 (Feb. 24, 1999)*; Rice v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-288 (Apr. 30, 1997); *Daugherty v. Bd. of Directors*, Docket No. 93-BOD-295 (Apr. 27, 1994); *Daggett v. Wood County Bd. of Educ*., Docket No. 91-54-497 (May 14, 1992).

Accordingly, this grievance is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." 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. Theappealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: JULY 18, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE