# THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

# GRIEVANCE BOARD

**MICHAEL DURST,**

**Grievant,**

**v.** **Docket No. 06-26-028**

**Denise M. Spatafore**

**Administrative Law Judge**

**MASON COUNTY BOARD OF EDUCATION,**

**Respondent.**

## DISMISSAL ORDER

This grievance was filed at level four on January 20, 2006, following the termination of Grievant's employment by the Mason County Board of Education ("BOE") on January 19, 2006. After this matter was continued for a period of time, a level four hearing was conducted by Chief Administrative Law Judge Paul Marteney on September 21, 2006, in the Grievance Board's Charleston office. As Grievant had passed away prior to the level four hearing, his interests at the hearing were represented by John E. Roush of the School Service Personnel Association and his widow, Paula Durst. The BOE was represented in this matter by counsel, Gregory W. Bailey. The parties submitted fact/law proposals by November 8, 2006. For administrative reasons, this grievance was reassigned to the undersigned administrative law judge on March 13, 2007. (See footnote 1)

### Synopsis

Grievant's employment was terminated after he exhausted all accrued leave and exercised his

rights to unpaid leave under the Family Medical Leave Act. Because Grievant was still unable to return to work, he was terminated due to “physical incapacity” to work. Since Grievant had passed away after his termination, the BOE requested that this matter be dismissed as moot, because the requested relief of reinstatement cannot be granted. Grievant's counsel argues that a determination of whether his termination wasproper is necessary in order to allow his widow to pursue life insurance benefits through the Public Employees Insurance Agency. Nevertheless, this would amount to a declaratory opinion, which the Grievance Board does not issue.

**Findings of Fact**

1. Grievant was employed by the BOE as a half-time bus operator. He developed medical problems which caused him to be unable to work, beginning sometime in April of 2005. Grievant briefly returned to work for an in-service training session on a day in June of 2005.
2. After exhaustion of his accrued paid leave, Grievant requested and was granted twelve weeks of leave under the Family Medical Leave Act (“FMLA”) at the beginning of the 2005-2006 school year.
3. Grievant's leave under the FMLA expired in November of 2005, and he requested an unpaid medical leave of absence, due to his continued medical problems and inability to operate a school bus.
4. Grievant's request for a leave of absence was denied, and the superintendent recommended that Grievant's employment be terminated, due to his physical inability to work. This recommendation was approved by the BOE on January 19, 2006, following a hearing conducted on January 17, 2006.
5. Grievant passed away unexpectedly as a result of pneumonia on August 7, 2006, which was unrelated to the medical condition which had rendered him unable to work.
6. Grievant's requested relief in this grievance was reinstatement to his bus operator position.

**Discussion**

Grievant's counsel (and his widow) are seeking a determination that Grievant's termination was improper, only for the purpose of allowing his widow to pursue life insurance benefits, which would admittedly have to be pursued in another forum. There can be no question that the request relief, i.e. reinstatement of Grievant to his position, is quite impossible at this point. Accordingly, the

undersigned finds that Grievant's counsel is clearly seeking an advisory opinion as to whether his termination was right to wrong, and this is an option unavailable through the grievance procedure. "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). When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Brackman v. Div. of Corr./Anthony Corr. Center,* Docket No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998).

In addition, Grievant's passing has rendered the issue of his termination moot. The Grievance Board will not hear issues that are 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]." *Bragg v. Dept. of Health & Human Res.,* Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.,* Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996). Accordingly, this matter must be dismissed.

**Conclusions of Law**

1. "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).

2. When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Brackman v. Div. of Corr./Anthony Corr. Center,* Docket No. 02-CORR- 104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998).

3. "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]." *Bragg v. Dept. of Health & Human Res.,* Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.,* Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996).

4. Grievant's passing has rendered his grievance moot, and any decision regarding the propriety of his termination would merely be advisory.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Mason County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a partyto 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 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: March 29, 2007** _____

**DENISE M. SPATAFORE**

**Administrative Law Judge**

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*Footnote: 1* *The undersigned has reviewed the entirety of the BOE record and listened to the recording of the level four hearing conducted on September 21, 2006.*