THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

JAMIE NIBERT,

Grievant,

v. **Docket No. 06-HHR-310**

DEPARTMENT OF HEALTH and HUMAN

RESOURCES/LAKIN HOSPITAL,

Respondent.

DISMISSAL ORDER

Grievant, Jamie Nibert, grieved her termination for verbal and physical patient abuse by her employer, Department of Health and Human Resources/Lakin Hospital ("HHR"). The relief sought was to have the findings removed from her personnel record, her Certified Nurse Assistant license cleared, and to be made whole.

This grievance was filed directly to Level IV on September 18, 2006. A Level IV hearing was scheduled for December 8, 2006. On December 5, 2006, HHR's attorney, B. Allen Campbell, Senior Assistant Attorney General, filed a Motion to Dismiss. At the scheduled hearing Grievant was given an opportunity to respond to the Motion to Dismiss, and to present evidence. Grievant chose not to present any evidence, but also elected not to withdraw her grievance and asked for a ruling on the Motion.

After a review of the Motion to Dismiss, the attached exhibits, and Grievant's Statement of Grievance, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed as a Health Service Worker at Lakin Hospital. 2. On August 30, 2006, following an investigation, Grievant was dismissed for verbal and physical abuse of patients in her care.

3. HHR is required to report any findings of patient abuse and did so to the West Virginia Office of Health Facility Licensure and Certification. This Agency's Registry Review Committee substantiated the abuse allegations after an independent investigation and notified Grievant by letter dated October 26, 2006, of its findings and of Grievant's right to a hearing. Grievant was instructed in the letter to request this hearing within 30 days of receipt of the notice. Grievant was also informed in this letter that if she did not request a hearing within the time frame, her case would be considered uncontested, and her name would be placed permanently on the Abuse Registry. Motion to Dismiss, Exh. No.1.

4. Grievant did not request a hearing and by letter dated December 1, 2006, she was notified that her name had been placed on the Nurse Aide Abuse Registry. Motion to Dismiss, Exh. No. 2.

5. 42 C. F. R. § 483.13(c)(1)(ii) prohibits state facilities from employing individuals who have been placed on the Nurse Aide Abuse Registry.

Discussion

Respondent asserts that even if Grievant were to win her grievance, HHR would still be prohibited from employing Grievant because of her placement on the Nurse Aide Abuse Registry. HHR's assertion is established as correct by 42 C. F. R. § 483.13(c)(1)(ii). Additionally, it is also clear Grievant's failure to request a hearing and present evidence to the West Virginia Office of Health Facility Licensure and Certification Registry Review Committee caused her named to be entered in the Nurse Aide Abuse Registry. At this point in time, the undersigned Administrative Law Judge is without authority to require HHR to employ Grievant as a Health Service Worker. Thus, even if Grievant were to prevail in her grievance, the relief sought, to be made whole including reinstatement, is not a remedy the undersigned could grant, thus the issue is moot.

This Grievance Board does not issue advisory opinions on moot issues. Collins v. Dep't of Transp./Div. of Highways, Docket Nos. 02-DOH-227/248 (Jan. 3, 2003); Priest v. Kanawha County Bd. of Educ., Docket No. 00-20-144 (Aug. 15, 2000); Dooley v. Dep't of Transp., Docket No. 94-

DOH-255 (Nov. 30, 1994); Pascoli & Kriner v. Ohio County Bd. of Educ., Docket Nos. 91-35-229/239 (Nov. 27, 1991); Procedural Rules of the West Virginia Education & State Employees Grievance Bd. 156 C.S.R. §§ 4.12 & 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. Serv., Docket No. VR-88-055 (Mar. 28, 1989)." Baker v. Bd. of Directors, Docket No. 97-BOE-265 (Oct. 8, 1997). Under these circumstances, the issue has become moot and any ruling on the merits of this issue would constitute an inappropriate advisory opinion.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. Since Grievant cannot be employed as a Health Service Worker, she is requesting is an advisory opinion which this Grievance Board does not issue, nor does it respond to moot issues. Collins v. Dep't of Transp./Div. of Highways, Docket Nos. 02- DOH-227/248 (Jan. 3, 2003); Priest v. Kanawha County Bd. of Educ., Docket No.00-20-144 (Aug. 15, 2000); Dooley v. Dep't of Transp., Docket No. 94-DOH-255 (Nov. 30, 1994); Pascoli & Kriner v. Ohio County Bd. of Educ., Docket Nos. 91-35-229/239 (Nov. 27, 1991); Procedural Rules of the West Virginia Education & State Employees Grievance Bd. 156 C.S.R. §§ 4.12 & 4.22.

2. "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. Serv., Docket No. VR-88-055 (Mar. 28, 1989)." Baker v. Bd. of Directors, Docket No. 97-BOE-265 (Oct. 8, 1997).

Accordingly, this grievance is **DISMISSED**.

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. 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.

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Janis I. Reynolds

Senior Administrative Law Judge

Date: February 27, 2007