**WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**BARBARA SUMMERS,**

**Grievant,**

**v.**

**Docket No. 08-23-002**

**LOGAN COUNTY BOARD OF EDUCATION,**

**Respondent,**

**and**

**BARBARA PORTER,**

**Intervenor.**

**DECISION**

Barbara Summers ("Grievant") grieves the decision of the Logan County Board of Education ("BOE") that granted, in part, and denied, in part, her grievance filed on or about June 6, 2007. (See footnote 1) In her statement of grievance, Grievant

> contends that her supervisor, Barbara Porter, has engaged in a pattern of discrimination, harassment, and retaliation. Grievant alleges a violation of West Virginia Code 18-29-2, West Virginia Board of Education Policy No. 5902 (Employee Code of Conduct) & Logan County Board of Education Policy V1.9 (Harassment and Violence Policy).

As relief, Grievant seeks "corrective/disciplinary action taken against Ms. Porter; cessation of harassment, discrimination and retaliation; protective measures taken to ensure Grievant an environment conductive to performance of her duties; and such other appropriate andproper relief."

At Level Two, the grievance was granted, in part, and denied, in part. (See footnote 2) The parties

waived Level Three. A Level Four evidentiary hearing was held on October 20, 2008, before the undersigned Administrative Law Judge ("ALJ") in the Grievance Board's Charleston, West Virginia, office. (See footnote 3) The Grievant appeared by and through her counsel, John Everett Roush, with the West Virginia School Service Personnel Association. Respondent BOE appeared by and through its counsel, Leslie K. Tyree. Barbara Porter ("Intervenor") appeared by and through her counsel, Robert B. Kuenzel.

This matter became mature for decision on November 20, 2008, the date proposed findings of fact and conclusions of law were due. The Grievant and the Intervenor have submitted proposed findings of fact and conclusions of law. The BOE has not. This grievance is mature for decision.

**Synopsis**

Grievant alleges that her previous supervisor, an elementary school principal, harassed her, discriminated against her and retaliated against her. She alleges the supervisor did so by requiring Grievant to eat lunch in a supply room, refusing to speak to the Grievant, preventing Grievant from speaking with co-workers and parents, attempting to strand Grievant at the elementary school without a vehicle and a plethora of other acts. At Level Two, Respondent BOE, held that the supervisor had the authority to distribute the work load of the Grievant. However, the BOE found that the Grievant had proven some incidents of unacceptable behavior on the part of the supervisor. The BOE admonished the supervisor for her conduct and instructed her to perform supervisory tasks in a professional manner. Grievant challenges this decision. The supervisor has intervened in this grievance.

The Grievant no longer works in the school where the Intervenor serves as supervisor. She has no contact with the supervisor and is not under the supervisor's direction. Grievant seeks greater punishment for the supervisor. This tribunal has no authority to increase the intervening supervisor's punishment. This grievance is moot.

For the reasons set forth below, the grievance is denied.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

**Findings of Fact**

1. Grievant is employed by the BOE as an aide.

2. In the 2006-2007 school year, Grievant worked at Verdunville Elementary School. The

Intervenor was the principal of Verdunville Elementary School and served as the Grievant's supervisor.

3. On or about June 6, 2007, Grievant filed a grievance alleging that the Intervenor harassed her, discriminated against her and retaliated against her.

4. At Level Two, Wilma Zigmond, Superintendent of Logan County Schools, granted the grievance, in part, and denied the grievance, in part. Superintendent Zigmondfound that the Grievant "demonstrated through testimony that she has been the subject of some incidents of unacceptable conduct towards her by Ms. Porter." As relief, the Superintendent "admonished" Ms. Porter for her behavior and "instructed her to take steps to make certain that her dealings with her staff be professional, free from insult, hateful comments or any other unacceptable conduct." Hence, this portion of the grievance was granted. (See footnote 4) However, insofar as the Intervenor changed the Grievant's work load or assignment, the Superintendent found that "the principal has the authority to assign, reassign, take away and otherwise distribute the work load of her employees." This portion of the grievance was denied.

5. At the time of the Level Four hearing, Grievant was no longer under the supervision of the Intervenor. Grievant no longer worked at Verdunville Elementary School, though she is still employed by the BOE.

**Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the partybearing the burden has not met its burden. *Id*. The burden of proof encompasses not only the elements of the offenses of which the Grievant complains, but also the remedy the Grievant seeks. That is, the Grievant must establish that she is entitled to the remedy. Encompassed within this entitlement concept is the authority of this tribunal to grant the remedy the Grievant requests.

Grievant asks this tribunal to find that she was harassed, discriminated against and retaliated against. She moves that the Intervenor's punishment be increased. This tribunal does not have the

authority to grant the requested remedy and advisory opinions are inappropriate. This Grievance is moot. (See footnote 5)

This Grievance Board does not have the authority to force the Respondent BOE to impose a greater penalty upon the Intervenor. Indeed, this Grievance Board has no authority to order that disciplinary action be taken against an employee. *Daggett v. Wood County Bd. of Educ*., Docket No. 91-54-497 (May 14, 1992); *Redmon v. Jackson Co. Bd. of Educ.*, Docket No. 04-18-100 (Feb. 25, 2005). The Grievant's challenge of the Level Two decision rests solely upon her request for greater disciplinary action against the Intevenor. This grievance must be denied because this tribunal has no authority to order disciplinary action or increase disciplinary punishment against the Intevenor. (See footnote 6) Hence, this grievance is moot because this tribunal does not have the authority to award the requested relief. Grievant argues that this matter is not moot because this ALJ may still determine whether the Grievant was subjected to improper conduct. The Grievant's argument is unpersuasive. The Grievant requests that it be found that she was treated improperly even though she no longer works with, or is under the supervision of, the Intervenor. This grievance is similar to the grievance of *Collins v. W.Va. Dept. of Highways*, Docket No. 02-DOH-227/248 (January 30, 2003). In *Collins*, an employee alleged he was being harassed by his supervisor. However, at the time of the Level Four hearing, the employee was no longer under the direction of the supervisor and worked outside of the county. The *Collins* ALJ held that the grievance was moot and the employee received all the remedy to which he was entitled. Like the employee in *Collins*, the instant Grievant is no longer under the supervision of the Intervenor and no longer works with the Intevenor. The grievable circumstance no longer exists. (See footnote 7) Ruling upon the merits would be advisory in nature.

This Grievance Board does not issue advisory opinions. *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). *See also Kochalka, v. Marshall County Bd. of Educ*., Docket No. 02-25-173 (Nov. 15, 2002)(recognizing that where there is complete cessation of the conduct complained of, there is no relief that canbe awarded and “ruling on the merits would constitute an inappropriate advisory opinion”). “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.” *Wilds v. W.Va. Dept. of Highways*, Docket No. 90-DOH-446 (Jan. 23, 1991). From the

evidence, it does not appear that the Intevenor's conduct was sacrosanct; however, ruling upon the merits would produce no practical consequence. The remedy sought by the Grievant cannot be granted.

The following Conclusions of Law support the decision reached.

**Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id*.

2. This tribunal has no authority to increase the punishment given to an employee at the request of a non-offending Grievant. *See Daggett v. Wood County Bd. of Educ*., Docket No. 91-54-497 (May 14, 1992); *Redmon v. Jackson Co. Bd. of Educ.*, Docket No. 04-18-100 (Feb. 25, 2005).

3. This tribunal does not issue advisory opinions. *Pascoli & Kriner v. Ohio CountyBd. 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).

4. “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-RJA-188 (Dec. 30, 2003)(quoting *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03- HHR-073 (May 30, 2003)).” *Redmon v. Jackson Co. Bd. of Educ.*, Docket No. 04-18-100 (Feb. 25, 2005)(internal quotations omitted).

5. There being nothing further to be resolved, this grievance is moot.

Accordingly, this grievance is **DENIED**.

Any party 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 § 18-29-7. *See* footnote 1. Neither the West Virginia Public

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 West virginia 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:** December 10, 2008

_____

**Mark Barney**

**Administrative Law Judge**

---

Footnote: 1

*In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.*

---

Footnote: 2

*It is unclear from the record when the Level One hearing was held.*

---

Footnote: 3

*This grievance was originally assigned to ALJ Thomas J. Gillooly. It was reassigned to the undersigned for administrative reasons. At the Level Four hearing, there was some disagreement as to whether Judge Gillooly previously ruled upon the mootness issue. There is no memorialization of such a ruling within the record.*

---

Footnote: 4

*West Virginia code §§ 18-4-10; 18A-2-7(a) grants a superintendent, subject to the board of education's approval, sole authority to impose discipline upon an employee. This ALJ notes that there was no indication that the Intervenor's questionable conduct continued after the Superintendent's ruling.*

---

Footnote: 5

*"In general a case becomes moot when the issues presented are no longer live or the parties lack a legally*

*cognizable interest in the outcome." State ex rel. M.C.H. v. Kinder, 173 W. Va. 387, 389 n.2, 317 S.E.2d 150, 152 n.2 (1984)(quoting Murphy v. Hunt, 455 U.S. 478, 481 (1982)(internal quotations omitted).*

---

*Footnote: 6*

*This is not a scenario where the BOE is aware of the conduct and condones it. See generally White v. Monongalia County Bd. of Educ., Docket No. 93-30-371 (Mar. 30, 1994). In this instance, the Intevenor was punished for her transgressions by the Superintendent.*

---

*Footnote: 7*

*Assuming the Grievant could somehow be placed under the Intervenor's supervision in the future, it is still inappropriate to pass upon this issue. "The 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). There has been no allegation that this is a scenario that could potentially evade review.*