THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

THOMAS W. SPENCE,
Grievant,

v. **DOCKET NO. 2010-0149-CONS**

DIVISION OF NATURAL RESOURCES,
Respondent.

DISMISSAL ORDER

Grievant, Thomas W. Spence, a Conservation Officer, filed two grievances against his employer, Respondent, the Division of Natural Resources, on May 19 and July 6, 2009, respectively. Both grievances complained that other Conservation Officers employed by Respondent were not being required to wear their flashlights, while he was being required to do so. Grievant asserted he was being held to a higher standard, and this constituted harassment and a hostile work environment. When he filed the first grievance, Grievant sought as relief, "[r]escind this special requirement/policy and remove all negative actions taken against me thereafter." In the second grievance, Grievant sought as relief, "[r]escind this special requirement or make a policy for all conservation officer[s] to follow. Remove all negative actions(insubordination documentation) taken against me after this special requirement was enacted."

A conference was held at level one on the first grievance, and a level one decision was issued denying the grievance. The second grievance was waived to level three on July 17, 2009. Grievant appealed the first grievance to level two on June 19, 2009, and a mediation session was held on August 6, 2009. Grievant appealed to level three on

August 14, 2009, and the grievances were consolidated. After the level three hearing was set, Respondent filed a Motion to Dismiss the grievance as moot. Grievant did not respond to the Motion, and a telephone conference was held on the Motion on October 13, 2009, at which time the level three hearing set for October 21, 2009, was cancelled by the undersigned. Grievant represented himself, and Respondent was represented by William R. Valentino, Assistant Attorney General.

Attached to the Motion to Dismiss was a Memorandum to all District Captains of the Division of Natural Resources, dated August 31, 2009, regarding "Stinger Flashlights," issued by Colonel D.E. Murphy. That Memorandum states as follows:

> It has recently come to my attention that not all Conservation Officers are wearing the state-assigned Stinger flashlight in the issued holster on their duty belt.
>
> Effective immediately, all Conservation Officers, while wearing their issued duty belt, shall wear the Stinger flashlight in the issued holster. The carrying of the Stinger flashlight, while wearing the issued duty belt, in any manner other than in the issued holster is not in compliance with this order. The failure to adhere to any part of this order by any Conservation Officer shall constitute insubordination, and such Conservation Officer shall be subject to disciplinary action.
>
> All Conservation Officers who have been authorized by the Chief to wear a "paddle" or "pancake" style holster on their uniform pant belt are exempt from wearing of the Stinger flashlight while wearing the "paddle" or "pancake" style holster.
>
> Please notify all employees in your district of this change and notify me of any questions.

At the beginning of the telephone conference the undersigned asked Grievant to explain why this grievance should not be dismissed, as this Memorandum appeared to resolve all the issues in this grievance. Grievant acknowledged that the Memorandum had been issued, and that he is no longer being treated differently from other Conservation

Officers with regard to the wearing of the flashlight, as far as he knows. Grievant did not indicate that any "negative actions" had, in fact, been taken against him. Grievant, however, complained that the Memorandum would make an employee subject to insubordination if he used or charged his flashlight, or removed it as directed for training. Grievant acknowledged that this speculation was not what his original grievance was about.

> 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, 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).

Pritt, et al., v. Dep't of Health and Human Res., Docket No. 2008-0812-CONS (May 30, 2008). "Because it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. '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. 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)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

It is clear that this grievance is moot, and it will be dismissed.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant is employed by the Division of Natural Resources as a Conservation Officer.

2. On August 31, 2009, Colonel D.E. Murphy issued a Memorandum to all District Captains directing them to inform the employees in their districts that they were required to wear their Stinger flashlights on their issued holster while wearing their duty belts. Employees who had been "authorized by the Chief to wear a "paddle" or "pancake" style holster on their uniform pant belt are exempt from wearing of the Stinger flashlight while wearing the "paddle" or "pancake" style holster"

The following Conclusions of Law support the Dismissal of this grievance.

Conclusions of Law

1. "[T]he 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)." *Pritt, et al., v. Dep't of Health and Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008).

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. 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)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

3. When it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion.

4. The Memorandum issued by Colonel Murphy on August 31, 2009, resolved all the issues raised by this grievance, and this grievance is moot.

Accordingly, this grievance is **DISMISSED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: October 29, 2009