THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MELTON COBB, ET AL.,

Grievants,

v. **DOCKET NO. 2009-1017-CONS**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Melton Cobb, Carlos Chafer and Don Stutler ("Grievants") each filed separate grievances challenging the West Virginia Department of Transportation/Division of Highways' (hereinafter "DOH" or "Respondent") placement of a security camera in the lunch room/break room of the DOH's Amma garage. As relief, Grievants seek the removal of the camera and to be made whole.

Pursuant to a *Motion to Consolidate Pending Grievances* filed by Grievants, these three grievances were consolidated on March 24, 2009, via letter by the Grievance Board staff.[1] Thereafter, a Level Two mediation was conducted on May 20, 2009.

A Level Three hearing was conducted before the undersigned Administrative Law Judge ("ALJ") at the Grievance Board's Charleston, West Virginia, office on November 2, 2009.[2] Grievants appeared at the Level Three hearing pro se; however, they have been

---

[1] The record does not reflect that a hearing was conducted on the Grievants' Motion. Nor has an order ever been entered. No party has objected to the consolidation and, insofar as an order was not entered, the undersigned hereby finds the grievances consolidated.

[2] On July 8, 2009, the DOH filed a *Motion to Dismiss* based upon mootness. A hearing was never requested on this Motion, presumably because DOH believed this matter to be resolved by agreement of the parties. *See* Level Three, September 1, 2009,

generally represented throughout this grievance by Gordon Simmons, UE Local 170. The DOH appeared by and through its counsel, Barbara L. Baxter, Esquire. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about December 1, 2009.

Synopsis

Grievants, Transportation Workers for the DOH, challenge the DOH's placement of a security camera in an area used for the personal comfort of employees. Grievants seek removal of the camera. Since the filing of the initial grievance, DOH has removed the camera.

This Grievance Board does not issue rulings upon moot questions or abstract propositions. There is no indication that this is the type of scenario that fits within an exception to the mootness doctrine.

Accordingly, this grievance is **DENIED**.

Based upon a detailed review of the record, the undersigned makes the following Findings of Fact:

Findings of Fact

1. Grievants are employed by the DOH in District One at the I-79 Section Six Headquarters located in Amma, West Virginia. The positions they hold are classified as Transportation Worker 2- Equipment Operator.

2. On or about December 29, 2008, cameras were installed by a private vendor at

---

Telephone Conference. The Level Three hearing afforded Grievants the opportunity to provide evidence as to why this Grievance should not be dismissed for mootness, as well as any factual evidence they deemed relevant. As this Grievance is found to be moot, the *Motion to Dismiss* is not further addressed.

the Amma headquarters. The private vendor determined the location of the cameras, which were installed for security purposes.

3. During the installation, on December 31, 2008, the vendor installed a camera in the employee lounge area. This area is used for the personal comfort of the employees.[3]

4. On January 8, 2009, the initial grievance was filed regarding the security camera in the lounge area.

5. Less than two weeks later, the camera was removed.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 4.21 (2008). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).

The Grievants challenge the DOH's placement of a camera in the lounge area used by employees for personal comfort. Since the filing of this grievance, DOH has removed the camera from this area. *See* W.VA. CODE § 21-3-20(a)(stating it is unlawful for an employer or employer's agent to operate a surveillance device in an "employee lounge" or "other area designed for the health or personal comfort of the employees").[4]

---

[3] This area contained a table and chairs, a "Lazy Boy" reclining chair, lockers, a water cooler, two soda machines and a refrigerator. Grievants used this area for eating and preparing meals.

[4] Some courts have recognized that employees have constitutional and/or common-law privacy interests at stake where employers video employees inside the workplace, particularly in lunch rooms or locker rooms. For example, see *Com. v. Hem*, 62 Va. Cir.

Grievants all admit and agree that there is no security camera in the employee lounge area and there has not been since January, 2009. There is no "live" controversy presently existing between the parties.

> "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. Dep't 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 & Human Res., Docket No. 2008-0812-CONS (May 30, 2008); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). "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); *Spence*, *supra*.

Grievants argue that this is the type of conduct that could evade review and urges

---

480 (2003)(unpublished opinion); *State v. Williams*, 84 N.J. 217, 417 A.2d 1046 (1980); *State v. Bonnell*, 75 Haw. 124 (1993). *See also Trujillo v. City of Ontario,* 428 F. Supp. 2d 1094 (C.D.Cal. 2006); *Doe by Doe v. B.P.S. Guard Servs., Inc.,* 945 F.2d 1422 (8th Cir. 1991); *Liberti v. Walt Disney World Co.*, 912 F. Supp. 1494 (M.D.Fla. 1995).

that a ruling on the merits be issued finding the DOH's conduct was contrary to law and unreasonable. This ALJ is not persuaded by the Grievants' argument. All the evidence suggests that this was a one time incident; not repetitious conduct. Likewise, there is no indication that this scenario will evade review in the future. Where conduct is repetitious and has the potential to evade review, an exception to the mootness doctrine exists. *State ex rel. M.C.H. v. Kinder*, 173 W. Va. 387, 317 S.E.2d 150 (1984)(discussing exceptions to the mootness doctrine). This Grievance does not fit within any exception to the mootness doctrine and must be denied.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 4.21 (2008).

2. "[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. Dep't 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 & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008).

3. "'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).

4. 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.

5. The DOH's removal of the camera in the area used by employees for personal comfort rendered this Grievance moot and there is no indication that this event is one that could evade review in the future.

Accordingly, this grievance is **DENIED**.

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 Order. *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 WEST VIRGINIA CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: December 31, 2009

_____

Mark Barney
Administrative Law Judge