WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LISA ROSS,
Grievant,

v. **Docket No. 2009-0757-DOT**

DIVISION OF MOTOR VEHICLES,
Respondent.

DISMISSAL ORDER

Grievant, Lisa Ross, filed a grievance against the West Virginia Division of Motor Vehicles ("DMV"), Respondent, on December 3, 2008, protesting a six-month leave restriction imposed on December 2, 2008. She sought to have this leave restriction lifted. A hearing was held at Level One on January 21, 2009, and the grievance was denied at that level on February 11, 2009. Grievant appealed to Level Two and a Mediation session was held on May 4, 2009. A Level Three Hearing was held before the undersigned Administrative Law Judge on August 6, 2009, in the Grievance Board's Charleston office. Grievant appeared in person and was represented by Gordon Simmons, Steward, UE Local 170, West Virginia Public Workers Union. Respondent, Division of Motor Vehicles, was represented by Gretchen A. Murphy, Assistant Attorney General.

A full hearing on the merits of the issue(s) in contention was held. Initially, the parties were to present proposed findings of fact and conclusions of law prior to September 4, 2009. However, upon request, an extension was granted. This case became mature for decision on or about September 11, 2009, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Subsequently, on September 23, 2009, Respondent filed a "Motion to Dismiss" in that Grievant had tendered her resignation on September 15, 2009. Respondent highlighted that Grievant was no longer an "employee" as defined by West Virginia Public Employees Grievance Procedure, W. VA. CODE § 6C-2-2(d)(1) and there is no viable relief available in this action. A telephone conference was held on the Motion on October 1, 2009, both parties were afforded the opportunity to present their position orally and fortify their arguments with written documentation due prior to October 19, 2009. Both parties submitted written documents.

Respondent requested that the instant grievance be dismissed, arguing that Grievant "requested the revocation of restriction" and in that Grievant "is no longer employed by Respondent and her requested remedy is not available, the resignation moots the issues she raised in this grievance." Grievant contended that the grievance is mature and the disposition of the issue(s) to be determined by this grievance has material relevance to another grievance filed, for which remedy is still available.[1]

Whether or not Respondent properly (justifiably) extended Grievant's leave restriction plan was at issue. The issues raised by the grievance are of interest to Grievant and the definitive determination of the issue in dispute (legality of the leave restriction extension) may have bearing on other pending grievance(s). However, as to the instant grievance the relief requested is moot. "Because it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this

[1] Grievant filed a grievance on August 31, 2009 against Respondent subsequent to a disciplinary action (ten-day unpaid suspension). The disputed matter in the instant grievance is the underlying basis applied to justify the suspension (progressive disciplinary).

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). The determination of controverted rights of an employee should not be ceremonially dismissed, such interest has relevance. Nevertheless, as to the instant grievance, it is not possible for any actual relief to be granted. The requested relief would only be available to an individual, who was still employed by Respondent.

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

Findings of Fact

1. Lisa Ross, Grievant, was classified as a Data Entry Operator employed with the West Virginia Division of Motor Vehicles Driver Safety Unit, Respondent. She had been employed with Respondent for approximately fourteen years.

2. A memorandum was issued by DMV to the Grievant on May 1, 2008, stating that due to excessive leave abuse from May 1, 2007 to May 1, 2008, she was being placed on a six-month leave restriction improvement plan, beginning May 1, 2008 through November 1, 2008. The Grievant was required to provide a physician's excuse after each sick leave absence. (Resp. Ex. 2).

3. Grievant accepted the first employee corrective action leave restriction plan dated May 1, 2008 to November 1, 2008, by signing the memorandum indicating that she had read and acknowledged the statement. Grievant did not grieve the plan.

4. Grievant complied with the conditions and restrictions of the first employee corrective action leave restriction plan.

5. At the conclusion of the first employee corrective action leave restriction plan Respondent elected to implement an extension of the restriction period for an additional six months under the same conditions, beginning December 2, 2008 to June 2, 2009. This was a second and distinct corrective action plan.

6. Grievant did not agree with this disciplinary action and believed the extension as administered was unlawful. Grievant was given a copy of the plan extension memorandum, but refused to sign the copy given to her. Grievant grieved the action.

7. When leave abuse is suspected an employer may request verification.[2] Grievant has never provided her employer with any type of documentation regarding a diagnosis from a physician to indicate that she is suffering from any particular malady to reasonably justify excessive use of sick leave. The right of an employer to request verification of illness is also spoken to in the W. Va. Division of Personnel Rules at § 15.05.

8. This case became mature for decision on or about September 11, 2009, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

9. Prior to the rendering of a decision on the issue but after completion of the Level Three Hearing proceedings, Grievant voluntarily retired from her employment. Grievant resigned as an employee of Respondent on September 15, 2009.

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

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[2] A physician's statement does not remove an absence from consideration for determining leave abuse, if all of the facts and circumstances support the conclusion that an employee has abused sick leave. *Parker v. W. Va. Dept. of Health and Human Resources*, Docket No. 97-HHR-042B (Sept. 30, 1997).

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 issues raised by this grievance are of interest to Grievant and the definitive determination of the legality of the leave restriction extension, may have bearing on other pending grievance(s); however, as to the instant grievance the relief request is moot.

5. The resignation of Grievant on September 15, 2009 renders the requested relief of this Grievance moot.

Based upon the foregoing, the "Motion to Dismiss" is **GRANTED** and the above-styled action 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).

LANDON R. BROWN
Administrative Law Judge

Date: October 29, 2009