WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHARLES ADKINS, ET AL,
Grievant,

v. **Docket No. 2010-0985-CONS**

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION/GENERAL SERVICES DIVISION,
Respondent.

DISMISSAL ORDER

Grievants[1] filed what became a consolidated grievance on March 15, 2010, against their employer, West Virginia Department of Administration, General Services Division ("GSD"). The primary statement of grievance alleges, "Improper overtime practices." For relief, Grievants sought "revision of overtime policy."

A level one hearing was held on March 10, 2010. Grievants were represented by Gordon Simmons, United Electrical Radio and Machine Workers of America Local 170, and Respondent was represented by Stacy L. DeLong, Esq. On March 25, 2010, the level one Grievance Evaluator issued a written decision granting the grievance. On August 19, 2010, Grievants' Representative appealed the grievance to level two. Respondent filed a Motion to Dismiss on September 28, 2010. A phone conference was held on October 13, 2010, to hear arguments from Mr. Simmons and Ms. DeLong concerning the Motion to Dismiss. Respondent asserts that the grievance was granted, there is no identified issue in dispute. Respondent contends the granting of the relief requested rendered this matter

[1] Charles R. Adkins, Docket No. 2010-0832; Terry Parsons, Docket No. 2010-0984; Leonard Spencer, Docket No. 2010-1296; and James Allen Debolt, Docket No. 2010-1297.

moot. Grievants disagree. It is further noted that Grievants did not receive an adverse decision, and no information or fact has been provided to establish an appealable issue within the facts of this matter as filed. The parties declined to file additional written arguments making this issue ripe for decision.

Findings of Fact

1. On March 3, 2010, Grievants filed a grievance regarding alleged improper overtime practices. Grievants requested revision of the overtime policy.

2. A Motion to Consolidate the grievances of Terry Parsons and Charles Adkins was filed and the grievances were heard simultaneously at level one.

3. A level one hearing was held. Grievants were represented by Gordon J. Simmons.

4. A level one decision was issued on March 25, 2010, granting the grievance. David M. Oliverio, Director General Services Division explicitly provided, " I will grant the relief sought and revise the overtime policy. I appreciate you bringing this issue to my attention."

5. Grievants appealed the level one decision to the Grievance Board on March 27, 2010.

6. On April 6, 2010, the grievances of Charles Adkins, Terry Parsons, Leonard Spencer and James Allen DeBolt were consolidated by the Public Employees Grievance Board for the purpose of hearing and decision under the instant Docket No. 2010-0985-CONS.

7. The Relief requested by Grievants was the revision of the Agency's Overtime Policy. The Policy was revised.

8. Respondent's Overtime Policy was revised on or about April 23, 2010.

9. Grievants appealed to level three on September 14, 2010.

10. On September 28, 2010, Respondent filed a Motion to Dismiss.

11. A telephonic conference was scheduled to address issues relevant to the pending Motion to Dismiss.

12. A telephonic conference was conducted on October 13, 2010, where the parties argued their respective positions with regard to the issue(s) of the pending motion. All known and recognized parties of this grievance participated in the telephonic conference.

13. Grievants by their Representative were afforded an opportunity to demonstrate why this consolidated grievance should not be dismissed. No information was provided nor identified during or after the October 13, 2010, phone conference which established a requisite for further proceeding.

Decision

Respondent, by counsel, has moved for the dismissal of the instant grievance. When an employer seeks to have a grievance dismissed, the employer has the burden of demonstrating such request should be granted by a preponderance of the evidence. Once the employer has met its burden of proof, the employee has the burden of demonstrating how and why the employer is incorrect. *See Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996).

Respondent's level one decision granted the grievance and provided the relief that Grievants requested. The Relief requested by Grievants was the revision of the Agency's Overtime Policy. The Policy was revised. Respondent filed a motion to dismiss this grievance highlighting that there is no further relief to be granted. Grievants have not identified or demonstrated there is a viable 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). In that Grievants have been unable to identify any further 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*.

Lastly, it is common practice for grievants to request "to be made whole" in conjunction with very specific relief. However, a request "to be made whole" will not be sufficient to address a separate issue not raised in the statement of grievance. If the Grievance Board were to allow that, instead of the process being fair and expedient, it would become a process of ambush, and repeated continuances for Respondents to prepare to defend obtuse claims that might come to fruition. *Hendrix v. W. Va. Department of Transportation/Division of Highways,* Docket No. 2010-1229-DOT (Nov. 12, 2010).

The level one decision granted the instant grievance and provided the relief that Grievants requested. The lower level ruling is not adverse to Grievants. *See* W. VA. CODE § 6C-2-4(b)(1) and 156 C.S.R. 1 § 4.4. Respondent has established facts sufficient to justify its motion to dismiss.

For all the above reasons, the undersigned finds that at this time there has been no viable grievance demonstrated in these facts for which any relief would be appropriate. This matter will be dismissed.

Conclusions of Law

1. When an employer seeks to have a grievance dismissed, the employer has the burden of demonstrating such request should be granted by a preponderance of the evidence. Once the employer has met its burden of proof, the employee has the burden of demonstrating how and why the employer is incorrect. *See Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996).

2. W. VA. CODE § 6C-2-4(b)(1) allows a grievant to appeal an adverse decision.

3. 156 C.S.R. 1 § 4.4 allows a grievant to appeal when he/she did not receive the relief being sought.

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. "'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).

5. The level one decision granting this grievance is not an adverse decision, Grievants were granted the specific relief requested.

6. Grievants have not provided adequate rationale to proceed with this grievance as filed.

Accordingly, Respondent's motion to dismiss is hereby **GRANTED**. This grievance is hereby **DISMISSED and STRICKEN** from the Grievance Board docket.

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 Dismissal 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 W. VA. 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 (2008).

Date: December 3, 2010

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Landon R. Brown
Administrative Law Judge