THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

VIVIAN EICHELBERGER,
Grievant,

v. **Docket No. 07-DOH-310**

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION/DIVISION OF HIGHWAYS,
Respondent.

DISMISSAL ORDER

Grievant Vivian M. Eichelberger was employed by the Respondent in District Nine, Greenbrier County. On October 30, 2006, Grievant filed a grievance alleging Respondent was engaging in retaliation due to a new work schedule being posted. Additionally, on December 20, 2006, Grievant filed two grievances claiming Respondent had discriminated and retaliated against her by denying her leave requests. These grievances were denied at the lower levels under the old grievance procedure.[1] Grievant appealed these grievances to the next level of the grievance procedure. On December 28, 2007, Respondent terminated Grievant's employment due to continued and habitual unauthorized leave. On January 7, 2008, Grievant filed a grievance challenging her termination. On February 8, 2008, the Grievance Board placed the above styled grievance

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[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 CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA.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.

in abeyance pending the outcome of the grievance challenging her termination. On October 7, 2008, the undersigned Administrative Law Judge issued a Decision upholding Respondent's termination of Grievant's employment. On November 30, 2009, Kanawha County Circuit Court Judge James C. Stucky issued a Final Order affirming and upholding the Grievance Board Decision. Grievant represented herself at all levels of the grievance. Respondent appeared by its counsel Krista L. Duncan and Carrie A. Dysart, Division of Highways, Legal Division.

Synopsis

The issues of discrimination, harassment, and retaliation raised in this grievance are a moot point since Grievant is no longer an employee of Respondent. In addition, there has already been an effective stop of any alleged actions characterized as discrimination, harassment, and retaliation. Under these circumstances, there is no additional relief that could be granted by the Grievance Board even if Grievant were to prevail on the merits. Accordingly, the grievance is dismissed.

After a through review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant was employed by Respondent until December 28, 2007, when she was dismissed from her job.

2. Prior to being dismissed from her employment, Grievant filed two different grievances claiming discrimination, harassment, and retaliation by her employer. These grievances were filed on October 30, 2006, and December 20, 2006.

3. On October 7, 2008, the Grievance Board issued a Decision upholding Respondent's decision to terminate Grievant's employment. This Decision was affirmed by the circuit court on November 30, 2009. No appeal was made to the West Virginia Supreme Court of Appeals.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

The Respondent has moved that this grievance be dismissed because the relief requested by the Grievant is moot due to her dismissal. "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]." *Pritt, et al., v. Dep't of Health & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008). The

Grievance Board will not hear issues that are moot. *Cobb, et al. v. Div. of Highways*, Docket No. 2009-1017-CONS (Dec. 31, 2009).

This Board has found that where a grievant is no longer an employee, "a decision on the merits of her grievance would be a meaningless exercise, and would merely constitute an advisory opinion." *Muncy v. Mingo County Bd. of Educ.*, Docket No. 96-29-211 (Mar. 28, 1997). "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).

Any order requiring Respondent and its agents to prevent such treatment of Grievant in the future would be meaningless since Grievant is no longer employed by Respondent. Furthermore, the determination of whether or not the decision to terminate was for good cause has been fully litigated. Because Grievant would gain no concrete remedy from this grievance, it is now moot and any ruling would amount to an advisory opinion.

The Procedural Rules for the West Virginia Public Employees Grievance Board state in part that:

A grievance may be dismissed, in the discretion of the administrative law

judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.[2]

Because Grievant is no longer employed by the Division of Highways, any prospective relief that might be available is moot. Accordingly, the grievance fails to raise a claim on which relief can be granted and is dismissed.

The following conclusions of law support the decision reached in this Order.

Conclusions of Law

1. "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]." *Pritt, et al., v. Dep't of Health & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008). The Grievance Board will not hear issues that are moot. *Cobb, et al. v. Div. of Highways*, Docket No. 2009-1017-CONS (Dec. 31, 2009).

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 questions raised by this grievance would merely be an advisory opinion.

4. Because Grievant is no longer employed by Respondent, any prospective relief that might normally be available to her is moot.

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[2]156 C.S.R. 1 § 6.11.

Accordingly, the grievance is **DISMISSED**.

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. *See* W. VA. CODE § 29-6A-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 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 Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: May 21, 2010

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Ronald L. Reece
Administrative Law Judge