THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KATHY RUCKER, et al.,
Grievants,

v. **DOCKET NO. 2009-1645-CONS**

DIVISION OF LABOR,
Respondent.

DECISION

Grievants Kathy Rucker, Kelly Petry, and Penny Treadway filed separate grievances on June 8, 2009, claiming there was a past practice in their agency that some employees could work four ten-hour shifts rather than five eight-hour shifts, but that their request to change to a four-day work schedule was denied. As relief, they seek to be allowed to alter their work schedule to the four-day workweek format.

Following denials at level one and an unsuccessful mediation at level two, a level three hearing was held in the Grievance Board's Charleston office on December 15, 2009, before Administrative Law Judge Mark Barney. The case was reassigned to the undersigned Administrative Law Judge for decision, following ALJ Barney's resignation. Grievants were represented by Gordon Simmons of the West Virginia Public Workers Union, and Respondent was represented by counsel, Elizabeth G. Farber, Assistant Attorney General. The matter became mature for decision on January 15, 2010, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievants requested a change to a new work schedule of four days per week, ten hours per day. Other employees within the Division of Labor were working on that schedule, but Grievants were not permitted to do so. After the grievance was filed, the

issue was rendered moot by the creation of a new policy prohibiting the practice for all employees. Because the complaint is moot, the grievance is denied.

Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. Grievants are employed by Respondent as Office Assistants 3 in the Licensing section.
2. At the time Grievants filed their grievances, other employees of the Division of Labor were permitted to work on an adjusted schedule of four, ten-hour workdays, as opposed to the normal work schedule of working five, eight-hour work days.
3. No employees in the Licensing section worked the adjusted schedule, and of those in other sections that did, one was an Office Assistant 3, who worked in the Safety section.
4. After this Grievance was filed, Commissioner David Mullins established a uniform, agency-wide "flextime" policy, effective September 1, 2009. The new policy eliminated all four-day work schedules, and required all employees to work five days per week between the hours of 8:00 a.m. and 5:00 p.m.
5. Employees are permitted to vary their work schedules on a temporary basis and in extenuating circumstances, subject to the "efficient and effective operation of the Division of Labor." Resp. Exhibit No. 1. According to the new policy, "All flextime variations include working 5 days per work week, 8

hours per day with a starting and ending time between 8:00 a.m. and 5:00 p.m." *Id*.

6. Approval of a request for flextime is entirely within the discretion of the Commissioner, and is subject to the employee being called in to work his or her normal schedule if warranted by work obligations.

Discussion

This Grievance does not involve a disciplinary action, so Grievants bear the burden of proving their claim by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 4.21 (2008). Although not explicitly stated in their original Grievances, the claim made is essentially that Grievants were discriminated against because other employees were granted four-day work schedules, and they were not. Discrimination is "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). Grievants argue that they should be permitted to change their work schedules.

However, Respondent has since remedied the disparity in treatment. By implementing the new, uniform flextime policy, all employees within the Division are subject to the same work schedules, unless they are granted permission to temporarily change their schedule due to extenuating circumstances. The conditions for altering a work schedule are the same for every employee. This policy change renders this grievance 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]." *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, 1009).

Grievants make no argument that the new Flextime Policy is improper, but simply claim it could be different. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety. W. VA. CODE § 29-6A-2(I). [Now W. VA. CODE § 6C-2-2(I).] *See Ball v. Dept. of Highways*, Docket No. 96-DOH-141 (July 31, 1997)." *Rice v. Dept. of Transp./Division of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997). Grievants provided no authority creating an entitlement to a 4-day work week, and made no allegation that the original denial of their request was a violation of anything other than past practice. Typically, a Grievant must show "an injury-in-fact, economic or otherwise" to have what "constitutes a matter cognizable under the grievance statute." *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavy v. Kanawha County Bd. of Educ.*, Docket No. 20-87-102-1 (June 30, 1987). "Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]. *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993).

Grievants do not make an argument that the new flextime policy is improper.

The following conclusions of law support this discussion:

Conclusions of Law

1. Grievants bear the burden of proving their non-disciplinary claim 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. "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, 1009).

3. Respondent's implementation of a uniform policy that prohibits the practice the Grievants complain of renders this grievance moot.

For the foregoing reasons, this grievance is hereby **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 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 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).

March 10, 2010

M. Paul Marteney
Administrative Law Judge