THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ALVIN MESSINGER,

Grievant,

v. **Docket No. 2009-0867-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

DISMISSAL ORDER

Grievant Alvin Messinger was employed by the West Virginia Division of Highways ("DOH") in District One. On January 12, 2009, Mr. Messinger filed a grievance and his statement of grievance is as follows:

> Physical assault by a supervisor on December 30, 2008; verbal bullying on January 8, 2009.

As relief Grievant seeks:

> To be made whole including disciplinary action against superior.

A level one hearing was held before a designee of the DOH chief administrator and a decision was rendered denying the grievance on March 10, 2009. A level two mediation was held on June 8, 2009. The grievance was appealed to level three on December 14, 2009.

At all levels of the grievance, Grievant was represented by Gordon J. Simmons, UE Local 170, WVPWU.[1] On January 4, 2010, Robert Miller, Esquire, submitted a letter to the West Virginia Public Employees Grievance Board stating that Grievant had resigned from employment with the DOH on November 30, 2009, and moving that this grievance be

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[1] West Virginia Public Workers Union

dismissed. Enclosed with the letter was a DOT "transaction form"[2] verifying that Grievant had resigned his employment with the DOH on that date due to "regular retirement." A certificate of service was included with the letter confirming that a copy had been mailed to the Grievant's representative. No response to the letter/motion has been submitted.

Synopsis

The only specific remedy requested by Grievant is that supervisory action be taken against his supervisor. The Grievance Board has consistently held that this remedy is not available through the public employees grievance procedure. If the supervisor was found to have treated Grievant improperly, any order to correct that conduct would be meaningless since Grievant is no longer employed by the DOH. Under these circumstances, Grievant fails to state a claim for which a remedy can be granted and the only specific remedy which Grievant seeks is unavailable. Accordingly, the Grievance is dismissed.

After a thorough 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 Alvin Messinger was employed by the DOH until November 30, 2009, when he resigned and retired.

2. Prior to leaving employment with the DOH, Alvin Messinger filed a grievance alleging that his supervisor physically and verbally abused him. The grievance was filed January 12, 2009.

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[2] The form is identified as "Form GL-8"

3. As a remedy, Grievant sought generally to be made whole and specifically that his supervisor be subjected to disciplinary action.

Discussion

At the outset, it is important to note that physical abuse and verbal bullying in the workplace are not condoned and, if proven to exist, can lead to very serious consequences to a Respondent and its agents. *See* West Virginia Division of Personnel Workplace Security Policy. However, Grievant bears the burden of proving that these actions took place by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The 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).

In this case there is no remedy to grant the Grievant even if he were to prove that abusive behavior took place. The sole specific remedy sought by Grievant is disciplinary action against his supervisor. It is a well settled rule that the Grievance Board does not have the authority to order an agency to impose discipline on an employee. Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Grievance Board. *Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.* Docket No. 95-41-479 (July 8, 1996). Any decision concerning disciplinary action generally resides with the employer. *Dunlap v. Dep't of Envtl. Prot.,* Docket No. 2008-0808-DEP (March 20, 2009).

With regard to making Grievant whole, there are limited remedies available. Grievant would not be entitled to monetary damages. Damages such as medical expenses, mental anguish and pain and suffering are generally viewed as "tort-like" damages which have been found to be unavailable under the Grievance Procedure. *See Spangler v. Cabell County Board of* Education, Docket No. 03-06-375 (March 15, 2004); *See also Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997). Additionally, any order requiring the Respondent and its agents to prevent such treatment of Grievant in the future would be meaningless since Grievant is no longer employed by DOH. "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). Because Grievant would gain no concrete remedy from this grievance, it is now moot.

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.

156 C.S.R. 1 § 6.11. In this case, the specific remedy sought by Grievant, disciplinary action against his supervisor is not available. Because Grievant is no longer employed by the DOH, 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.

Conclusions of Law

1. 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. 156 C.S.R. 1 § 6.11.

2. The Grievance Board does not have the authority to order an agency to impose discipline on an employee. Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Grievance Board. *Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.* Docket No. 95-41-479 (July 8, 1996). Any decision concerning disciplinary action generally resides with the employer. *Dunlap v. Dep't of Envtl. Prot.,* Docket No. 2008-0808-DEP (March 20, 2009).

3. Damages such as medical expenses, mental anguish and pain and suffering are generally viewed as "tort-like" damages which have been found to be unavailable under the Grievance Procedure. *See Spangler v. Cabell County Board of* Education, Docket No. 03-06-375 (March 15, 2004); *See also Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).

4. 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).

5. Because Grievant is no longer employed by DOH, any prospective relief that might normally be available to him is moot. No other relief is available to Grievant based upon his specific grievance claim.

Accordingly, the grievance 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 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: **MARCH 8, 2010.**

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE