THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SAMUEL J. PERRIS,

Grievant,

v. **Docket No. 2009-1600-DOT**[1]

DIVISION OF HIGHWAYS,

Respondent.

DISMISSAL ORDER

This grievance was filed by Grievant, Samuel J. Perris, against his employer, the Division of Highways ("DOH"), on May 7, 2009. The statement of grievance reads, "I have been subject to a hostile work environment. I can show proof of favoritism, harassment, and embarrassment. These actions have created undo stress to my job, and have interfered with my ability to perform my duties as a Project Supervisor." Grievant sought as relief: "Monetary compensation for undo stress, added pressure and added work put on me by this violation."

Following a level one conference, the grievance was denied at level one of the grievance procedure on June 11, 2009. Grievant appealed to level two on June 15, 2009, and a mediation session was held on August 24, 2009. Grievant appealed to level three on September 2, 2009. A level three hearing was convened before the undersigned

[1] The Docket Number used on some of the Notices in this matter was incorrectly listed as 2009-1600-CONS.

Administrative Law Judge on December 2, 2009. Grievant appeared *pro se*, and Respondent was represented by Barbara Baxter, Esquire, DOH Legal Division.

After some testimony had been presented by Grievant at the level three hearing, Respondent questioned what relief Grievant was seeking, as it appeared that the cause of Grievant's problems had been eliminated. This issue was discussed on the record, and then Grievant was given until January 7, 2010, to submit a statement in writing, explaining what relief could be granted, and why this grievance should not be dismissed as moot. Grievant did not submit any such written statement.

Synopsis

This grievance was filed because Grievant believed a temporary employee assigned to his bridge project was creating a hostile work environment for Grievant, and the assignment of this employee to Grievant's project was discriminatory and showed favoritism. This employee has not worked for Respondent for many months, and Grievant no longer feels he is being subjected to favoritism, discrimination, or a hostile work environment. The relief requested by Grievant, monetary damages or a discretionary pay increase for the undue stress placed on him, or an assurance that this situation will not occur again in the future, are not the types of relief available through the grievance procedure.

The following findings of fact are properly made based upon the evidence presented at level three.

Findings of Fact

1. Grievant has been employed by the Division of Highways ("DOH") for 17 years.

2. In February 2009, Grievant was the Project Manager of a bridge project in Doddridge County. On February 2, 2009, Donald Hall was assigned to work on this bridge project. Mr. Hall was a temporary employee.

3. Grievant complained to his supervisor about Mr. Hall's work ethic seven times. Grievant was not made aware of any action being taken against Mr. Hall due to Grievant's complaints.

4. Mr. Hall's temporary employment status expired a few days after this grievance was filed, and he has not been employed by DOH since that time.

5. Now that Mr. Hall is not on Grievant's work site, Grievant no longer believes that he is being subjected to favoritism, discrimination, or a hostile work environment. Grievant was not disciplined because Mr. Hall did not complete his work assignments, nor did Grievant receive a bad evaluation. Grievant's supervisors believe Grievant is a good employee.

Discussion

Pursuant to the Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2008), "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."

> 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. 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). In situations where "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).

This Grievance Board has continuously refused to address issues when the relief sought is "speculative or premature, or otherwise legally insufficient." *Stepp v. Dep't. of Trans./Div. of Highways,* Docket No. 06-DOH-215 (Oct 27, 2006) citing *Dooley v. Dep't. of Trans./Div. of Highways*, 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). "[R]elief 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). 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). Thus, relief such as a public apology is not available from this Grievance Board. *Emrick v. Wood County Bd. of Educ.*, Docket No. 03-54-300 (Mar. 9, 2004); *Hall v. W. Va. Div. of Corr.*, Docket No. 89-CORR-687 (Oct. 19, 1990). "The Grievance Board has also held, 'a letter stating that actions of certain employees were inappropriate is in the nature of a request for an apology, which is not available from this Grievance Board.' *Emrick, supra*." *Lawrence v. Bluefield State College*, Docket No. 2008-0666-BSC (June 19, 2008).

In addition, the Grievance Board does not award tort-like or punitive damages, such as Grievant is seeking.

> *W. Va. Code* § 29-6A-5(b) allows for the provision of "fair and equitable" relief which has been interpreted by the Grievance Board to encompass such issues as back pay, travel reimbursement, and overtime, but not to include punitive or tort-like damages for pain and suffering. *Spangler v. Cabell County Bd. of Educ.,* Docket No. 03-06-375 (Mar. 15, 2004); *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep't of Transp*., Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).

Miker v. W. Va. Univ., Docket No. 06-HE-133 (July 18, 2006).

> [A]n administrative law judge may "provide such relief as is deemed fair and equitable in accordance with the provisions of this article . . .". *W. Va. Code* § 18-29-5(b). This Grievance Board has applied this *Code* Section to encompass such issues as back pay, travel reimbursement, seniority, and overtime, to make grievants whole. It has not utilized this Section to award "tort-like" damages for pain and suffering, and will not choose to do so in this case. *Accord, Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n.11 (1995).

Snodgrass, supra.

Grievant's complaint is entirely related to the assignment of Mr. Hall to Grievant's bridge project. Mr. Hall has not worked for DOH for many months now. Grievant acknowledged that he is no longer suffering any ill affects from Mr. Hall's employment on Grievant's bridge project. Grievant believes his supervisors should have responded to his complaints, rather than waiting for Mr. Hall's temporary employment period to expire, and that he should be awarded monetary compensation for his troubles. Grievant is essentially seeking damages, which the Grievance Board does not award, or a discretionary pay increase, which also is not available. An agency's decision not to recommend a discretionary pay increase generally is not grievable. *Lucas v. Dep't of Health and Human Res.*, Docket No. 07-HHR-141 (May 14, 2008).[2] Further, Grievant wants some assurance that this situation will not occur again. The undersigned cannot require Grievant's supervisors to listen to his complaints in the future. Such relief, like an apology, is illusory in nature, and is not available through the grievance procedure.

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

Conclusions of Law

1. "A grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable

[2] "In a memorandum to all West Virginia Cabinet Secretaries dated April 29, 2005, the Governor's [then] Chief of Staff, Larry Puccio, advised that 'merit or salary advancements' should not be granted until further notice, but nondiscretionary increases should continue, which would include pay increases associated with promotion, pay differentials, reclassification, reallocation, increment increases, and temporary upgrades." *Harris v. Dep't of Transp.*, Docket No. 2008-1549-DOT (Dec. 15, 2008). This moratorium on discretionary pay increases remains in effect.

to the grievant is requested." Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 6.11 (2008).

2. The Grievance Board does not award tort-like or punitive damages.

> *W. Va. Code* § 29-6A-5(b) allows for the provision of "fair and equitable" relief which has been interpreted by the Grievance Board to encompass such issues as back pay, travel reimbursement, and overtime, but not to include punitive or tort-like damages for pain and suffering. *Spangler v. Cabell County Bd. of Educ.,* Docket No. 03-06-375 (Mar. 15, 2004); *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep't of Transp*., Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).

Miker v. W. Va. Univ., Docket No. 06-HE-133 (July 18, 2006).

3. "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).

Accordingly, this grievance is **DISMISSED** from the docket of the Grievance Board at level three.

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).

BRENDA L. GOULD
Administrative Law Judge

Date: February 23, 2010