THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

HEIMO RIEDEL,
Grievant,

v. **Docket No. 2008-1767-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DISMISSAL ORDER

This grievance was filed by Grievant, Heimo Riedel, against his employer, West Virginia University, on June 12, 2008, in reaction to evidentiary hearing testimony in a previous grievance. Mr. Riedel's lengthy statement of grievance asserts that a witness in a previous grievance hearing provided false testimony, violated confidentiality requirements of the grievance procedure, and it was an act of reprisal against Grievant. Mr. Riedel seeks an investigation against the individual he accuses of providing false testimony, disciplinary action against the individual, and that he be compensated for any damage that has occurred as a result of the actions of Respondent's staff.

Respondent filed a Motion to Dismiss on January 29, 2009. Grievant did not file any memorandum in opposition to Respondent's Motion to Dismiss. However, there was some delay in the proceedings of this grievance pending the outcome in circuit court of the companion case relating to the accusations of false testimony. Monongalia County Circuit Judge Russell M. Clawges, Jr. issued an Order Dismissing Petition for Judicial Review on July 15, 2010, and the undersigned Administrative Law Judge then considered the pending Motion to Dismiss mature for consideration. Grievant appears *pro se*. Respondent appears by Kristi A. McWhirter, Assistant Attorney General.

Synopsis

Grievant's claim that a witness provided false testimony during an evidentiary hearing in a previous grievance proceeding is a matter over which the Grievance Board does not have subject matter jurisdiction. The reprisal claim is now moot. The relief requested by Grievant, monetary damages, is not the type of relief available through the grievance procedure. This grievance is dismissed.

The following findings of fact are made based upon the record of this matter and the companion grievance docketed as *Riedel v. West Virginia University*, Docket No. 07-HE-411 (Aug. 5, 2008).

Findings of Fact

1. Grievant is a tenured professor at West Virginia University ("WVU") in the Department of Biochemistry and the Mary Babb Randolph Cancer Center. He has been so employed since August 18, 2003. He was previously employed by Wayne State University. Grievant moved his lab from Wayne State to WVU in late October 2003.

2. Respondent formerly employed Dr. Dan Flynn as the Deputy Director of the Mary Babb Randolph Cancer Center.

3. Dr. Flynn's last date of employment with WVU was December 31, 2008.

4. Grievant did not prevail in a previous grievance and filed a Petition for Judicial Review in the Monongalia County Circuit Court.[1] In this appeal Grievant challenges the veracity of Dr. Flynn's testimony during the hearing conducted in the matter during which

[1] *Riedel v. West Virginia University School of Medicine*, Case No. 08-C-AP-32, Cir. Ct. of Monongalia County (July 8, 2010).

Dr. Flynn testified about various issues including conversations he had with Biochemistry Chair candidates Dr. Yehia Daaka and Dr. J.P. Jin.

5. Grievant alleges that Dr. Flynn violated the confidentiality provisions of W. VA. CODE § 6C-2-3(q) by allegedly speaking to Drs. Jin and Daaka about his grievance claims and that Dr. Flynn allegedly presented false testimony during prior hearings conducted on the grievance. Grievant alleges that Dr. Flynn's discussion about other grievance claims is reprisal.

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."

As defined by statute, a grievance must allege "a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee." W. VA. CODE § 6C-2-2(i). The scope of the authority of the Grievance Board is limited to that set forth in the Grievance statutes. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997). The veracity of the testimony of a witness during an evidentiary hearing following the completion of the grievance process is outside this tribunal's statutory authority. The Grievance Board is authorized to address allegations that a witness presented false testimony during evidentiary hearings only to the extent that it makes determinations on the credibility of witnesses. In this case, Grievant received an opportunity to cross examine Dr. Flynn during the hearings conducted in his grievance.

The Grievance Board's jurisdiction to address the credibility of Dr. Flynn's testimony ended following the Decision in the case and appeal.

The Grievance Board does not have the authority to grant the requested relief in this grievance. The Grievance Board does not award tort-like or punitive damages, such as Grievant is seeking. "[F]air 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).

Based upon the above, the claims that Grievant raises and the relief Grievant requests in this grievance are wholly unavailable and present no case in controversy. 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).

Finally, Grievant's claim asserting reprisal by Dr. Flynn in this grievance is now a moot point. W. VA. CODE § 6C-2-3(h) provides that no "reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." Dr. Flynn is no longer an employee of Respondent and is not subject to an insubordination charge. To the extent that Grievant's request for relief includes the imposition of disciplinary action upon Respondent's employee, and an investigation into Dr. Flynn's testimony, such relief is not available given the undisputed facts of this grievance. A ruling on Grievant's claim regarding the propriety of Dr. Flynn's statements to Drs. Daaka and Jin or his retaliation claim would produce no practical relief and would result in an improper advisory opinion. 156 C.S.R. 1 § 6.21 (2008).

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 on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2008).

2. As defined by statute, a grievance must allege "a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee." W. VA. CODE § 6C-2-2(g)(1).

3. The scope of the authority of the Grievance Board is limited to that set forth in the Grievance statutes. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).

4. "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).

5. This grievance presents no claim upon which relief can be granted.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this Order 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: October 13, 2010

Ronald L. Reece
Administrative Law Judge