THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

LORI A. BLANEY,
Grievant,

v. **Docket No. 2012-0135-BBC**

WEST VIRGINIA BOARD
OF MEDICINE,
Respondent.

DISMISSAL ORDER

Grievant, Lori Blaney, filed this grievance against her former employer, West Virginia Board of Medicine, on August 4, 2011. Grievant challenged a written reprimand and performance improvement plan issued to her on that same date. Grievant seeks to be made whole including the removal of the disciplinary record from her personnel file.

A level one hearing was conducted on October 20, 2011, before Jennifer Taylor, Hearing Examiner and designee of the Board of Medicine. Ms. Taylor issued her ruling on November 3, 2011, which granted, in part, and denied, in part, the grievance. Grievant appealed to level two on November 9, 2011. Before the grievance could be scheduled for a level two mediation session, Respondent filed a Motion to Dismiss on November 21, 2011. Grievant was given an opportunity to respond to this motion in the weeks that followed, but did not do so. Grievant appeared by her representative, Gordon Simmons, UE Local 170. Respondent appeared by its counsel, Katherine A. Campbell, Assistant Attorney General. The Motion to Dismiss is now mature for consideration.

Synopsis

Grievant was placed on a performance improvement plan and given a written reprimand for conduct which she grieved. Grievant severed her employment relationship with Respondent on November 15, 2011. This was after the level one hearing, but before the matter was scheduled for a mediation session. Grievant's resignation from her employment with Respondent rendered her grievance moot. Accordingly, this grievance is dismissed.

The following findings of fact are undisputed.

Findings of Fact

1. Grievant was employed by the West Virginia Board of Medicine.

2. Grievant filed this challenge to a written reprimand and being placed on a performance improvement plan.

3. A level one hearing was conducted on October 20, 2011. The grievance was denied by Decision issued on November 3, 2011. Ms. Taylor found that Respondent failed to meet its burden of proof by a preponderance of the evidence that the letter of reprimand was warranted. She ruled that the letter of reprimand should be replaced with a less severe warning that could be removed from Grievant's personnel file upon completion of the improvement plan.

4. Appeal to level two was perfected on November 9, 2011.

5. Grievant left the employ of Respondent on November 15, 2011.

Discussion

Respondent asserts that Grievant is not an "employee" within the meaning of WEST VIRGINIA CODE § 6C-2-2, and therefore has no standing to pursue her grievance. Respondent also asserts that this matter is now moot since Grievant is no longer employed by Respondent. When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. *See Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep't of Educ.*, Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). *See generally Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996). In addition, standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right. BLACK'S LAW DICTIONARY (Eighth Edition 2004).

The Public Employees Grievance Procedure was established to allow public employees and their employers to reach solutions to problems which arise within the scope of their respective employment relationships. W. VA. CODE § 6C-2-1(a); *See Wilson v. Dep't of Health and Human Res.*, Docket No. 2011-1769-DHHR (Oct. 31, 2011). WEST VIRGINIA CODE § 6C-2-2(e)(1) defines "employee" for the purposes of the grievance procedure, as follows:

> (1) "Employee" means any person hired for permanent employment by an employer for a probationary, full- or part-time position.

WEST VIRGINIA CODE § 6C-2-2(g) defines "employer" for the purposes of the grievance procedure, as follows:

> [A] state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, **using the services of an employee** as defined in this section. (Emphasis added.)

A "Grievance" is "a claim by an employee." W. VA. CODE § 6C-2-2(i). Only an employee may file a grievance. W. VA. CODE § 6C-2-2(a)(1).

Respondent aptly points out in its Motion to Dismiss that this Board has dismissed grievances once the Grievant is no longer employed by the Respondent. *See Fizer v. Dep't of Health and Human Res.*, Docket No. 2008-1698-DHHR (Mar. 4, 2009); *Bragg v. Dep't of Health and Human Res.*, Docket No. 03-HHR-348 (May 28, 2004). Grievant has ensured that she will no longer be subjected to Respondent's disciplinary decision with which she disagreed. It is undisputed that Grievant ended her employment on November 15, 2011. This action makes it unnecessary for the Grievance Board to act in this matter even if she had proven the action of Respondent was improper. *See Collins v. Dep't of Transp./Div. of Highways*, Docket No. 02-DOH-227/248 (Jan. 30, 2003).

Grievant's resignation from her employment has rendered the issue of her reprimand moot. 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]." *Fizer*, *supra*, *Bragg*, *supra*; *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003). A decision on this grievance either granting or denying the relief sought would have no effect on Grievant's employment, hence the grievance is now moot.

Grievant left Respondent's employment after the level one hearing, rendering her grievance moot. There are no issues of back pay or benefits that have been raised or argued by Grievant that need to be addressed. The remaining issues are now moot. Accordingly, this grievance must be dismissed.

The following conclusions of law support the dismissal of this grievance.

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]." *Fizer*, *supra*; *Bragg*, *supra*; *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003).

2. Grievant's resignation from her employment with Respondent rendered her grievance moot.

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 Order. *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: December 19, 2011

Ronald L. Reece
Administrative Law Judge