THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KIMBERLY JO SIMONS,
Grievant,

v. **Docket No. 2011-1053-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DISMISSAL ORDER

Grievant, Kimberly Jo Simons, filed this grievance on January 31, 2011, in which she alleges a safety violation due to actions of another employee. She requests that the employee be removed from his position, be demoted, have a reduction in pay imposed, and issue Grievant an apology. Respondent filed a Motion to Dismiss the grievance on February 17, 2011, because the Grievance Evaluator did not have authority to order an agency to impose discipline on an employee. Grievant did not provide a response to this motion. A level one hearing was held on February 18, 2011. The grievance was dismissed at level one by correspondence dated March 3, 2011. Appeal to level two was perfected on March 17, 2011. While setting forth essentially the same assertions, Grievant modified her relief sought to include a request that the Grievance Board order Respondent to establish a policy addressing her concerns. Thereafter, Respondent once again filed a Motion to Dismiss this grievance on April 18, 2011. Grievant was given an opportunity to respond to this motion but did not do so. Grievant was represented by William Holley, and Respondent was represented by its counsel, Jason Workman, Legal Division. The consideration of this motion became mature on May 2, 2011.

The undersigned makes the following findings of facts.

Findings of Fact

1. Grievant is classified as a Transportation Worker 2 Equipment Operator in District Three with the Division of Highways. Grievant has been employed with the Division of Highways since November 13, 1979.

2. On or about January 15, 2011, Grievant was hauling salt on Route 5 in Wirt County as directed by her supervisor.

3. Upon returning to Medina, Grievant reports that she was forced off the road by Keith Lynch. Mr. Lynch is an employee of the Division of Highways. Mr. Lynch was in his personal vehicle, not a Division of Highways marked truck.

4. The incident that is alleged to have occurred on Route 5 has been brought to the attention of the Division of Highways' management, and an investigation was undertaken.

Discussion

Respondent asserts that the grievance fails to state a cause of action upon which relief could be granted, and therefore it must be dismissed. Pursuant to the Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 156-1-6 6.11(2008), "[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 to the grievant is requested." In instances 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).

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 events, as reported, are troubling; however, the undersigned recognizes that the motion does have merit since no claim upon which relief can be granted is stated and/or a remedy wholly unavailable to the Grievant is requested. Concerning the initial Statement of Grievance, which was filed on January 31, 2011, the remedy sought by Grievant is disciplinary action against a co-worker. 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).

Grievant also requests an apology in this January 31, 2011, grievance form. An apology is not available as relief 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*.

Turning to the level two appeal and the variation in the relief requested filed on March 17, 2011, Grievant seeks an order from the Grievance Board establishing policy. Grievant requests that the Division of Highways establish a policy for workers on duty, as well as off duty, who impersonate a police officer as to what the penalty will be when they are caught. "The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources,* Docket No. 97-HHR-461 (June 9, 1999)." *Frame v. Dep't of Health and Human Res.,* Docket No. 00-HHR-240/330 (April 20, 2001).

Based upon the above, no claim upon which relief can be granted is stated and the remedy requested is wholly unavailable to the Grievant; these facts 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).

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. 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).

5. An apology is not available as relief 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).

6. "The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources,* Docket No. 97-HHR-461 (June 9, 1999)." *Frame v. Dep't of Health and Human Res.,* Docket No. 00-HHR-240/330 (April 20, 2001).

7. "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).

8. This grievance presents no claim upon which relief can be granted and a remedy wholly unavailable is requested.

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: May 25, 2011

Ronald L. Reece
Administrative Law Judge