THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

BRENDA H. WELLS,
Grievant,

v. **Docket No. 2010-0131-UpsED**

UPSHUR COUNTY BOARD OF EDUCATION,
Respondent.

DISMISSAL ORDER

Grievant, Brenda Wells, filed this grievance on August 6, 2009, challenging her termination from employment with Respondent, Upshur County Board of Education. The grievance form reflects that Grievant requested a conference at level one, however, it does not appear from the record that a conference was conducted. The record does indicate that the Grievance Board was later notified that this grievance was being mediated by a private mediator. A level two mediation session was conducted on January 12, 2010, and February 23, 2010, before Brenda Waugh, Attorney at Law, L.C. An Order of Unsuccessful Mediation was entered on March 11, 2010. Appeal to level three was perfected on March 19, 2010. A level three hearing was conducted before the undersigned Administrative Law Judge on March 29, 2011, at the Grievance Board's Elkins office location. Grievant appeared in person and by her counsel, Andrew J. Katz, The Katz Working Families' Law Firm, L.C. Respondent appeared by its counsel, Rebecca M. Tinder, Bowles Rice McDavid Graff & Love LLP. Prior to convening a second day of the level three hearing, Respondent filed a Motion to Dismiss on September 6, 2011. Thereafter, the parties exchanged a series of responses to the underlying grounds for

dismissal of this grievance. The last of the those briefs was received by the Grievance Board on October 17, 2011. This matter is now mature for a ruling on Respondent's Motion to Dismiss.

Synopsis

Grievant's employment was terminated by Respondent while she was serving as principal of Buchannon Upshur High School. Grievant challenged this termination, but was unable to articulate what relief she sought. The undisputed record of this grievance established that reinstatement was not an available remedy. After months of delay in responding to an order of the Grievance Board, Grievant disclosed that she sought reinstatement to her former position to continue her reforms at the high school. Accordingly, Respondent's Motion to Dismiss is granted.

The undersigned makes the following findings of fact based upon the record of this grievance developed at level three.

Findings of Fact

1. Grievant filed this grievance in August of 2009 wherein she contested the termination of her employment. Grievant requested a rescission of that action along with back pay, interest, and back benefits.

2. Prior to the first day of the level three hearing on March 29, 2011, Grievant accepted and began employment as an administrator with the Braxton County Board of Education.

3. During the course of the level three hearing, Respondent requested a statement of relief being sought by Grievant. Counsel for Grievant advised that that

information was not yet available.

4. At the conclusion of the March hearing, the undersigned instructed Grievant to supply Respondent with a statement of her requested relief within ten days of the hearing.

5. By electronic correspondence dated April 19, 2011, Grievant was again asked to provide an updated requested relief to the Grievance Board and Respondent.

6. Grievant filed a response to the Motion to Dismiss on September 8, 2011, months after the cut off date, and indicated that "Dr. Wells desires to return to her former employment so she can continue the reform and progress that BUHS was experiencing during her tenure as principal."

7. Grievant has been employed as an administrator with the Braxton County Board of Education during the course of this grievance.

8. Grievant filed a supplemental memorandum on or about October 14, 2011, which provided additional information on the issue of relief requested. It provides the following:

> Grievant was simply unsure of what relief she wanted. Dr. Wells is happy in her present employment. Additionally, she harbored some doubts about whether she would be treated fairly if she prevailed on her termination grievance and sought reinstatement as principal of Buchannon Upshur High School. Grievant talked to her husband and family about what she should do and considered this matter thoroughly. It took some time, many weeks in fact, for her to reach a decision. Ultimately, in the late spring, early summer of 2011, Dr. Wells decided that she wanted to be reinstatement [sic] to BUHS and communicated this information to her counsel, the undersigned herein.
>
> Unfortunately, counsel did not relay such information to this body or to opposing counsel. Counsel took a long planned vacation to Europe from the last week of June into the early part of July. In the rush to get things done before leaving, providing this information was neglected.

9. The record of this grievance established that the majority of the faculty at Grievant's former high school filed harassment grievances concerning Grievant's conduct as principal at the Buchannon Upshur High School.

Discussion

Respondent has moved the Grievance Board to dismiss this grievance on the basis of two grounds. First, the relief requested by Grievant was not timely provided. Second, the relief that was finally provided by Grievant requests a remedy wholly unavailable to the Grievant.[1] Pursuant to the Procedural Rule of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 156-1-6 6.11(2007), "[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 addition, the Rules of Practice and Procedure of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 156-1-6 6.2 provides that an, "administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § § 6C-2-1, *et seq*."

In August of 2009 this grievance was filed challenging Grievant's termination and requesting a rescission of that action along with back pay, interest, and back benefits. Prior to the first day of the level three hearing conducted on March 29, 2011, Grievant accepted and began employment as an administrator with the Braxton County Board of

---

[1]Respondent also points out in its pleadings that the 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).

Education. At that time, Grievant acknowledged that she did not desire to return to employment with the Upshur County Board of Education because of the manner in which she was treated. During the first day of the level three hearing, Respondent requested a statement as to the relief being sought by Grievant. Counsel advised that that information was not yet available. Nevertheless, the hearing proceeded in absence of a statement of relief sought. At the conclusion of the hearing, the undersigned requested that Grievant supply Respondent and the Grievance Board a statement of her relief requested within ten days of the hearing. Grievant filed a response to the Motion to Dismiss on September 8, 2011, months after the cut off date, and indicated that, "Dr. Wells desires to return to her former employment so she can continue the reform and progress that BUHS was experiencing during her tenure as principal."[2]

It is undisputed that Grievant failed to respond to the undersigned's request that her relief sought in this grievance be provided to Respondent ten days following the level three hearing. Respondent argues that the undersigned has inherent authority to rule on the motion on that ground alone, and the undersigned did reference the general authority of an administrative law judge above. The undersigned is not entirely convinced by Respondent's argument that it was prejudiced by this failure to disclose relief sought due to the representation that multiple days of hearing were set to follow the March 29th hearing. It is unfortunate that Grievant chose to ignore the request of the undersigned; however, the Grievance Board does allow some latitude in modifying a particular statement

[2]The undersigned agrees with Respondent's assessment that this request may be somewhat disingenuous since it is in direct opposition to Grievant's position at the beginning of the level three process. In any event, reinstatement to the principal position was Grievant's articulated relief sought as recently as December 2, 2011.

of relief during the level three process. It is a discretionary decision by the assigned administrative law judge. A tighter rein might be taken since this is a disciplinary action, but the undersigned does not grant Respondent's motion on this ground.

Respondent's motion is granted because Grievant's relief requested, even if she were to prevail in this grievance, is untenable. In light of the totality of the circumstances surrounding this grievance, reinstatement to her former position as principal of Buchannon Upshur High School is a remedy wholly unavailable to the Grievant. The notion that Grievant seeks to continue the reforms and progress the high school was experiencing during her tenure is a specious argument given the number of years that have passed since Grievant's termination. It is also undisputed that the atmosphere between Grievant and the administration was acrimonious at best. In addition, it is undisputed that the vast majority of the faculty at the high school filed harassment grievances against Grievant. To request to be placed back in this position is counterintuitive; would prove to go directly against Grievant's desire to somehow put in place reform in light of the harassment complaints that face Respondent; would likely prove to escalate the acrimonious atmosphere that existed; and, in light of these uncontested circumstances, is a request unavailable to Grievant.[3]

---

[3]"[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).

Grievant has presented nothing to the undersigned in her grievance forms, in subsequent pleadings, or on the record of this grievance that leads to any other conclusion than the relief requested by Grievant is wholly unavailable.

The following conclusions of law support the decision reached.

Conclusions of Law

1. Pursuant to the Procedural Rule of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 156-1-6 6.11(2007), "[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."

2. "[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).

Based upon the foregoing, the Motion to Dismiss is **GRANTED** and the above-styled action is **DISMISSED** due to Grievant requesting a remedy which is wholly unavailable.

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 § 6.19 (eff. Dec. 27, 2007).

Date: December 9, 2011

Ronald L. Reece
Administrative Law Judge