THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KEVIN JONES,
Grievant,

v. **Docket No. 2010-1598-DOR**

STATE TAX DEPARTMENT,
Respondent.

DISMISSAL ORDER

Grievant, Kevin Jones, filed this grievance against his former employer, State Tax Department, on June 16, 2010. Grievant challenged a verbal reprimand and mandatory harassment training directive given to him on June 16, 2010. Grievant seeks to be made whole including the removal of the disciplinary action from his personnel file.

This grievance was denied at level one by Decision dated August 2, 2010. Level two mediation was conducted on November 23, 2010. Grievant perfected his appeal to level three on that same date. A level three hearing was conducted on March 2, 2011, before Administrative Law Judge Landon R. Brown. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170 West Virginia Public Workers Union. Respondent appeared by its counsel, L. Wayne Williams, Assistant Attorney General. The matter was reassigned to the undersigned Administrative Law Judge on November 9, 2011, due to administrative reasons. The case became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on April 5, 2011. Respondent filed a Motion to Dismiss this grievance on May 5, 2011, for reasons more fully set out below.

Synopsis

Grievant was given a verbal reprimand for conduct which he grieved. Grievant severed his employment relationship with Respondent by abandoning his job on March 17, 2011. This was after the level three hearing, but before the matter became mature for a decision. Grievant's abandonment of his employment with Respondent rendered his grievance moot. Accordingly, this grievance is dismissed.

The following findings of facts are presumed to be true for the purpose of ruling on the Motion to Dismiss, and have not been disputed by Grievant.

Findings of Fact

1. Grievant was employed by the West Virginia State Tax Department as an Office Assistant.

2. On May 28, 2010, Grievant filed an Equal Employment Opportunity Investigative Complaint with the Tax Department alleging harassment by one of his co-workers.

3. During the course of the investigation, the Tax Department concluded that both Grievant and the co-worker had engaged in inappropriate conduct. The Tax Department issued a verbal reprimand to Grievant and the co-worker.

4. Grievant filed the instant grievance challenging the reprimand and the determination that he had sexually harassed his co-worker.

5. A level three hearing was conducted on March 2, 2011.

6. On March 17, 2011, Grievant failed to report for work and did not report after that date. The Tax Department served a letter of termination on Grievant on April 14, 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 his 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 employer 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 he will no longer be subjected to Respondent's disciplinary decision with which he disagreed. It is undisputed that Grievant abandoned his employment on March 17, 2011. This action makes it unnecessary for the Grievance Board to act in this matter even if he 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).

In essence, all Grievant seeks is a declaration that he was right in making the harassment complaint and his co-worker, in fact, engaged in sexual harassment. This is also known as an advisory opinion. "This Grievance Board does not issue advisory opinions." *Collins*, *supra*. When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Fizer*, *supra*, *Bragg*, *supra*. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 156-1-6 6.21(2008).

In addition, Grievant's job abandonment has rendered the issue of his 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 three hearing, rendering his 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 and a decision would amount to an advisory opinion. Accordingly, this grievance must be dismissed.

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

Conclusions of Law

1. When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Fizer v. Dep't of Health and Human Res.*, Docket No. 2008-1698-DHHR (Mar. 4, 2009); *Bragg v. Dep't of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004); Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 156-1-6 6.21(2008).

2. "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).

3. Grievant's severing of his employment with Respondent rendered his 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: November 22, 2011

_____
Ronald L. Reece
Administrative Law Judge