WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BARBARA KOBLINSKY,
Grievant,

v. **Docket No. 2011-1772-CONS**

PUTNAM COUNTY HEALTH DEPARTMENT,
Respondent.

DISMISSAL ORDER

Barbara Koblinsky, Grievant, filed the following grievances regarding an alleged demotion and reprimand against Respondent, Putnam County Health Department (PCHD):

Docket No. 2011-1650-PutCH	filed 5/12/2011
Docket No. 2011-1717-PutCH	**filed 5/24/2011**
Docket No. 2011-1731-PutCH	filed 5/27/2011
Docket No. 2011-1735-PutCH	filed 5/31/2011
Docket No. 2011-1770-PutCH	filed 6/2/2011
Docket No. 2011-1771-PutCH	filed 6/3/2011

On June 10, 2011, the above referenced grievances were consolidated, Docket No. 2011-1772-CONS. A level three hearing is scheduled for July 20, 2011 before the undersigned at the Grievance Board's office in Charleston, WV. Karen H. Miller, Esq., Miller, Weiler & Walters, Attorneys at Law, is counsel of record on behalf of Respondent, Putnam County Health Department (PCHD). Grievant appears in this matter by her representative, Gordon Simmons, UE Local 170. On July 12, 2011, Respondent filed "Respondent's Partial Motion to Dismiss Grievance" in the grievance previously styled as Docket No. 2011-1717-PutCH for reasons more fully set out below. This matter is mature

for a ruling after the undersigned received Grievant's filed "Response to Motion to Dismiss" on July 14, 2011.

Synopsis

The issue of Respondent requesting Grievant undergo a functional assessment is moot since Respondent has withdrawn the request. Accordingly, this one grievance, 2011-1717-PutCH, within the consolidated grievance, 2011-1772-CONS, is dismissed.

Findings of Fact

1. Grievant is employed by Respondent, PCHD.

2. On May 24, 2011, Grievant filed a grievance stating:

> On May 24, 2011, Grievant [was] informed that she would be put off work unless she complied with a required "functional assessment" from a therapist in violation of West Virginia Code 21-3-17 and 27-3-1, as well as federal regulations governing medical confidentiality.

3. Grievant's May 24, 2011, grievance form states as relief:

> To be made whole, including monetary fines provided by statute and removal of any and all medical restrictions.

4. The May 24, 2011, grievance was docket no. 2011-1717-PutCH. This grievance, along with five additional grievances, was later consolidated as docket no. 2011-1772-CONS.

5. On July 12, 2011, Respondent filed "Respondent's Partial Motion to Dismiss Grievance" seeking to dismiss only the 2011-1717-PutCH grievance portion of 2011-1772-CONS. Respondent's Motion asserts that Respondent did not act in violation by

requesting Grievant to undergo a functional assessment.[1] Respondent's Motion further states that Grievant has been notified that Respondent drops its request that she undergo this assessment.

6. On July 14, 2011, Grievant filed a "Response to Motion to Dismiss". Grievant's Motion asserts that Respondent cannot require Grievant to undergo a medical or psychological examination unless it is shown to be a job-related business necessity. Grievant's Motion further asserts that Respondent's withdrawal of its request for a functional assessment, is a "clear admission that the requirement was without merit or legality".

7. Grievant's Motion requests the undersigned to grant the grievance originally styled docket no. 2011-1717-PutCH.

Discussion

The only issue to be decided is raised by "Respondent's Partial Motion to Dismiss Grievance". All grievances consolidated in 2011-1772-CONS, other than grievance previously styled 2011-1717-PutCH, will proceed as scheduled for level three hearing. The grievance in question, 2011-1717-PutCH, is regarding Respondent's request for Grievant to undergo a functional assessment. The statement of grievance alleges violation of WEST VIRGINIA CODE which requires an employer to pay for the cost of a medical examination if the employer is requiring an employee to have the examination as a condition of

[1]Respondent's Motion asserts the West Virginia Human Rights Act provides that once employment has begun, an employer can make inquiry regarding whether an employee has a disability or regarding the extent of that disability when the inquiry is job-related and consistent with business necessity.

employment.[2] Grievant also asserts a violation of confidentiality by Respondent for seeking disclosure of Grievant's medical records and information.

Respondent has withdrawn its request for Grievant to undergo a functional assessment. Respondent has moved that this grievance be dismissed because the issue is now 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]." *Pritt, et al., v. Dep't of Health & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008). The Grievance Board will not hear issues that are moot. *Cobb, et al. v. Div. of Highways*, Docket No. 2009-1017-CONS (Dec. 31, 2009). Because the request for functional assessment has been withdrawn, the grievance is now moot.

The Procedural Rules for the West Virginia Public Employees Grievance Board state in part that:

> 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.

156 C.S.R. 1 § 6.11. In this grievance, Grievant sought generally to be "made whole", to receive a monetary fine, and to remove any medical restrictions resulting from the functional assessment. Grievant is not entitled to an award of monetary damages through the grievance process. Damages such as medical expenses, mental anguish and pain and suffering are generally viewed as "tort-like" damages which have been found to be unavailable under the Grievance Procedure. *See Spangler v. Cabell County Board of Education*, Docket No. 03-06-375 (March 15, 2004); *See also Snodgrass v. Kanawha*

---

[2] *See* W.VA. CODE § 21-3-17

County Bd. of Educ., Docket No. 97-20-007 (June 30, 1997). Because Grievant did not undergo a functional assessment, there is no medical expense to be paid by Respondent. Additionally, because Grievant did not undergo a functional assessment, Grievant's medical records have not been disclosed to Respondent. Grievant was not placed on medical restrictions as a result of the assessment because there was no assessment.

As the issue of the grievance is now moot, there is no remedy that can be granted. Accordingly, the grievance previously styled 2011-1717-PutCH is dismissed. The remaining grievances consolidated as docket no. 2011-1772-CONS will proceed to level three hearing as scheduled.

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. 156 C.S.R. 1 § 6.11

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]. *Pritt, et al., v. Dep't of Health & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008).

3. The Grievance Board will not hear issues that are moot. *Cobb, et al. v. Div. of Highways*, Docket No. 2009-1017-CONS (Dec. 31, 2009).

4. Damages such as medical expenses, mental anguish and pain and suffering are generally viewed as "tort-like" damages which have been found to be unavailable under the Grievance Procedure. *See Spangler v. Cabell County Board of Education*, Docket No.

03-06-375 (March 15, 2004); *See also Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).

5. Because Respondent has withdrawn its request for Grievant to undergo a functional assessment, the issue of the grievance is now moot. There is no remedy that can be granted.

Accordingly, the grievance previously styled 2011-1717-PutCH is DISMISSED.

Any party may appeal this Decision 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: July 20, 2011

_____
Jennifer Lea Stollings-Parr
Administrative Law Judge