THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

LISA TENNEY,
Grievant,

v. **Docket No. 2012-0141-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DISMISSAL ORDER

Grievant, Lisa Tenney, filed a grievance against her employer, Department of Health and Human Resources, William R. Sharpe Hospital, on July 29, 2011. In her grievance, Grievant alleged that the Hospital placed unreasonable restrictions on leave use, and denied her a reasonable accommodation by requiring her to work overtime. The grievance was denied at level one by Decision dated November 1, 2011. A level two mediation was conducted on May 21, 2012. Appeal to level three was filed on that same date. A level three hearing was noticed to be conducted on November 30, 2012. On July 23, 2012, Respondent filed a Motion to Dismiss. Grievant responded to this motion on July 31, 2012. Respondent appeared by its counsel, Michael E. Bevers, Assistant Attorney General. Grievant appeared by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. This matter is now mature for consideration.

Synopsis

Grievant filed a grievance regarding reasonable medical accommodations and restrictions on leave. The Respondent dismissed Grievant for job abandonment effective

January 18, 2012. Grievant did not file a grievance or otherwise challenge her termination. Grievant's dismissal from employment with Respondent rendered her grievance moot. Accordingly, this grievance is dismissed.

Findings of Fact

1. Grievant was employed by Respondent Department of Health and Human Resources, William R. Sharpe, Jr. Hospital, as a Health Service Worker.

2. A level three hearing was noticed to be conducted on November 30, 2012.

3. By letter dated January 3, 2012, Grievant was terminated from her employment for job abandonment.

4. Grievant did not file a grievance or otherwise challenge her termination.

5. The termination is final. Grievant is no longer an employee of Respondent.

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). W. VA. CODE § 6C-2-2(e)(1) defines "employee" for the purposes of the grievance procedure, as follows: "'Employee' means any person hired for permanent employment by an employer for a probationary, full- or part-time position." W. VA. CODE § 6C-2-2(e)(1). W. VA. 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." See, W. VA. CODE § 6C-2-2(i). Only an employee may file a grievance. *See,* W. VA. CODE § 6C-2-2(a)(1).

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). It is undisputed that Grievant ended her employment on January 18, 2012. This action makes it unnecessary for the Grievance Board to act in this matter. *See, Collins v. Dep't of Transp./Div. of Highways*, Docket No. 02-DOH-227/248 (Jan. 30, 2003).

Grievant's unchallenged dismissal from her employment has rendered the issues raised in her grievance 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; therefore, the grievance is now 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 unchallenged dismissal 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 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: August 21, 2012

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Ronald L. Reece
Administrative Law Judge