THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BARBARA JEAN JACKSON,

Grievant,

v. **Docket No. 2012-0442-MAPS**

DIVISION OF JUVENILE SERVICES/GENE SPADARO JUVENILE CENTER,

Respondent.

DISMISSAL ORDER

Grievant, Barbara Jackson, filed a grievance against her employer, Respondent Division of Juvenile Services/Gene Spadaro Juvenile Center ("DJS"), on October 19, 2011, stating as follows:

> "[f]or the past seven years I have been expected to work double duty when the Laundry Lady is absent. The most recent occurrence was when Mrs. Regina Kessler's mother-in-law became ill. I performed both jobs for about a month. I have a full time position as the Custodian (please see attached job descriptions) and feel the extra work is becoming more of a burden than I am willing to continue to do. I am an employee who takes pride in the quality of the duties I perform; however, I am often unable to complete my own duties to my satisfaction while performing the laundry duties at the same time. (second page attached) Approximately one year ago I broached this subject to Director Terry who threatened me by saying, if I could not do the laundry when I was asked, he did not need a Custodian. He was more or less letting me know that I would be jeopardizing my job if I did not continue to do both jobs. After this the tension between me and Director Terry became oppressive. Working in this environment has become stressful.
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> On Monday 17 Oct 2011 at approximately 1230 hours Director Terry was escorting Ms. Cathy McGuire through the laundry room when he, for no apparent reason, kicked a big container of fabric softener and sent it sailing across the laundry room floor startling me. He then spoke directly to

> me and stated that **"the Laundry room doors have to be kept shut. I am not going to pay a fine cause you all leave these doors open."** At this time I replied that I was not the one who had propped the doors open. Later that same day I spoke to Unit Manager John Ferda and he informed me that the doors had been left open by the Youth Specialists that morning because they were getting ready for a transport.
>
> This situation is extremely stressful. The incident on Monday was my breaking point. I do not feel that this behavior, directed toward me, is warranted. I have never had a complaint regarding satisfaction of my work performance in the seven years that I have worked for Gene Spadaro Juvenile Center. I am at a loss to understand why Director Terry continues to disrespect me in this manner. I feel that, after seven years, Director Ralph Terry has had sufficient time to correct the problem and has failed to do so because he has relied upon my willingness to cooperate and do it all."

As the relief sought, Grievant seeks the following: "1) Director Ralph Terry never again speak to me in this disrespectful manner, especially in front of a fellow employee. 2) my job will never again be threatened because I do not wish to perform extra duties that are not in my job description 3) I will continue to cooperate when my services are needed but not exclusively and not when I feel my regular duties would suffer at the time."

A Level One conference was conducted on November 1, 2011, and denied by a decision served on the parties on June 2, 2011. Grievant appealed to Level Two on June 8, 2011. The Level Two Mediation was conducted on October 3, 2011. Grievant perfected her appeal to Level Three on October 13, 2011. A Level Three hearing was held before the undersigned Administrative Law Judge on February 2, 2012, at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, *pro se*. Respondent appeared by counsel, Steven R. Compton, Esquire, Assistant Attorney General. Proposed Findings of Fact and Conclusions of Law were to be submitted on

or before July 2, 2012; however, neither party submitted such. Therefore, this matter became mature for decision on that date.

Synopsis

Grievant seeks relief conditioned upon events or injuries that have not yet occurred. Accordingly, the relief sought is speculative and any ruling made thereon would be an advisory opinion. As the Grievance Board does not issue advisory opinions, this grievance is DENIED.

Findings of Fact

1. Grievant, Barbara Jean Jackson, is employed by Respondent as a Custodian. Grievant has been employed by Respondent for seven years.

2. Even though Grievant is a custodian, at times, she has been required to do laundry at the Respondent facility.

3. Ralph Terry is the Director of the Gene Spadaro Juvenile Center.

4. On October 17, 2011, while Grievant was working in the laundry room at the facility, Director Ralph Terry entered the room and raised his voice at Grievant regarding the laundry room doors being propped open with a bottle of fabric softener. Director Terry then kicked the bottle away from the doors and made it slide across the floor toward Grievant. Director Terry's actions upset Grievant and the two argued.

5. On October 19, 2011, Director Terry told Grievant to do the laundry and Grievant refused.

6. Grievant was not disciplined for failing to do the laundry as directed by Director Terry.

7. Director Terry has apologized to Grievant for the way he spoke to her on October 17, 2011; however, Grievant refused to accept his apology.

8. Grievant has not done laundry duty regularly since October 17, 2011.

Discussion

Pursuant to the Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2008), "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."

> 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). In addition, 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]." *Bragg v. Dept. of Health & Human Res.,* Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.,* Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996).

Pritt, et al., v. Dep't of Health and Human Res., Docket No. 2008-0812-CONS (May 30, 2008). In situations 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).

Typically, a Grievant must show "an injury-in-fact, economic or otherwise" to have what "constitutes a matter cognizable under the grievance statute." *Lyons v. Wood County Bd. of Educ*., Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavy v. Kanawha County Bd. of Educ.*, Docket No. 20-87-102-1 (June 30, 1987). This 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). “[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).

Even though Grievant does not use the term “harassment in her grievance, she does complain certain actions of her supervisor which could be liberally construed to be an allegation of harassment. WEST VIRGINIA CODE § 6C-2-2(l) defines “harassment” as “repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession.” "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ*., Docket No. 98-22-495 (Jan. 29, 1999).

Grievant's supervisor shouted at her once and kicked a bottle of fabric softener that was holding a door open. This single incident coupled with her supervisor's stated expectations of Grievant's performance do not meet the "repeated and continual conduct" standard established in the statute. Obviously, if her supervisor repeated shouting at her in the future, such behavior might constitute harassment justifying a future claim.

Moreover, the relief Grievant seeks is conditioned upon events, or injuries, that have not yet occurred, but could occur in the future. As such, the relief Grievant seeks is premature and speculative. Relief such as this is wholly unavailable from the Grievance Board. Grievant has not demonstrated an actual injury-in-fact under the statute. Grievant complains about the way Director Terry treated her on October 17, 2011; however, she seeks no relief that can be granted by the Grievance Board at this time. To otherwise address the issues raised by Grievant would result in the issuance of an advisory opinion. Accordingly, this grievance must be denied.

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. "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

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4. "[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).

Accordingly, the grievance is **DISMISSED.**

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: December 19, 2012.

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Carrie H. LeFevre
Administrative Law Judge