THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DAVID L. ELLIOTT,
Grievant,

v. **Docket No. 2011-1457-MAPS**

DIVISION OF CORRECTIONS/NORTHERN CORRECTIONAL CENTER,
Respondent.

DISMISSAL ORDER

Grievant, David Elliott, filed this grievance against his employer, the Division of Corrections, on April 13, 2011. His statement of grievance alleges that "I am employed as a Supervisor I. A COII has been assigned to assist in my department for a very long time (2 years+). When I accepted the position, I had to take a 5% pay reduction. The "assigned COII", has not had to take any pay reduction whatsoever. She also serves as a acting Supervisor II in the absence of, thus denying me "career progression." It is my belief that I'm being discriminated against." His relief sought is "to be monetarily compensated the 5% deduction that I had to take upon appointment, with back pay. I also should be permitted to serve in a supervisory capacity, in absence of. If this person is to remain in this position, I would request that I be given a 5% increase in salary, and/or to be made whole."

This grievance was granted, in part, at level one by decision dated May 11, 2011. A level two mediation session was conducted on August 26, 2011. Appeal to level three was perfected on September 2, 2011. Prior to a level three hearing, Respondent filed a

Motion to Dismiss this grievance on August 7, 2012. Grievant appeared by his representative, Keith Butcher, and in person. Respondent appeared by its counsel, John H. Boothroyd, Assistant Attorney General.

The following findings of fact are undisputed.

Findings of Fact

1. Grievant is employed as a Supervisor I for Respondent. Upon accepting the position, Grievant, who was employed as a Correction Officer II, took a voluntary demotion and a 5% pay deduction.

2. Correctional Officer II Deb Tedrow was assigned to the Operations Department effective January 23, 2008, as a Correctional Officer II doing the duties of a Supervisor I. Grievant alleges he accepted a 5% pay decrease but Correctional Officer Tedrow did not have to take a pay decrease while working in the same capacity as the Grievant.

3. Officer Tedrow did not apply for the vacant Supervisor I position due to the subsequent pay decrease for the position. Officer Tedrow and Grievant's essential duties are similar in nature.

4. The level one hearing examiner addressed Grievant's allegation of favoritism and/or discrimination. The grievance was granted in so far as Correctional Officer Tedrow was directed to complete a Position Description Form and forward it to Wayne Armstrong, Respondent's Human Resources Director. The hearing examiner instructed Mr. Armstrong to forward the form to the West Virginia Department of Personnel for review.

5. The hearing examiner highly recommended that Officer Tedrow be returned to the duties of a Correctional Officer II in the Security Division. If coverage is necessary

in the Operations Department it was suggested a rotation of officers be implemented until such time as the Division of Personnel reviews and releases its determination on classification. Subsequently, Respondent elected to use a rotating assignment for that post.

6. The grievance was denied as it related to the request for back pay and the 5% salary lost at the time of the voluntary demotion.

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 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).

Respondent asserts that the level one decision granted the Grievant the relief of either having Officer Tedrow's position reclassified or having any correctional officer assigned to the post rotated on a regular basis in line with what is considered to be a temporary assignment. The Grievant has received all the relief to which he is entitled and the matter is now moot. The undersigned agrees.

As the level one hearing examiner aptly noted, this whole scenario appears to be the result of mistake rather than an intentional act of discrimination or favoritism. The Grievance Board has long held that a mistake does not constitute discrimination nor does it bind Respondents to continue to make further mistakes with Grievant.[1] Correctional Officer Tedrow was directed to complete a Position Description Form and forward it to Wayne Armstrong, Respondent's Human Resources Director. The hearing examiner instructed Mr. Armstrong to forward the form to the West Virginia Department of Personnel for review. In addition, the undersigned is without authority, under any reading of the facts in this grievance, to grant the request for a 5% pay increase.

Based upon the above, the claims that Grievant raises and the relief Grievant requests in this grievance have been addressed at level one, or are wholly unavailable and present no case in controversy. 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

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[1]*Ritchie v. Dep't of Health and Human Res., and Div. of Personnel,* Docket No. 96-HHR-181 (May 30, 1997).

(Sept. 30, 1996). *Pritt, et al., v. Dep't of Health and Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008).

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 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).

3. 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).

4. This grievance presents no claim upon which relief can be granted.

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: September 19, 2012

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Ronald L. Reece
Administrative Law Judge