THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHRISTOPHER M. WILLIAMS,

Grievant,

v. **Docket No. 2011-1488-MAPS**

DIVISION OF CORRECTIONS/
DENMAR CORRECTIONAL CENTER,

Respondent.

DISMISSAL ORDER

Grievant, Christopher M. Williams, filed a Level One grievance against his employer, Respondent, Division of Corrections/Denmar Correctional Center, on April 15, 2011, asserting that the "[j]ob posting procedure was not followed." As the relief sought, Mr. Williams requested that he be given the job for which he applied.

A Level One hearing was conducted on April 29, 2011. This grievance was granted, in part, by decision issued on June 9, 2011. The Grievance Board received Grievant's Level Two appeal on August 12, 2011, the same bearing the postmark of August 11, 2011. However, Grievant's signature on the statement of grievance form is dated July 6, 2011. Respondent filed a Motion to Dismiss the grievance on September 15, 2011, asserting that the grievance was untimely filed and moot. A Level Two Mediation was conducted on September 28, 2011. An Order resulting from the Level Two Mediation was entered on September 30, 2011. Grievant perfected his Level Three appeal on October 6, 2011. The appeal was received by the Grievance Board on October 7, 2011, but was signed by Grievant on October 5, 2011.

A Level Three hearing was convened on June 27, 2012, before the undersigned administrative law judge at the Raleigh County Commission on Aging in Beckley, West

Virginia. Grievant appeared in person, without counsel. Respondent appeared by counsel, John H. Boothroyd, Esquire.

It is noted that Grievant appeared late at the Level Three hearing, asserting that he had just received correspondence from the Grievance Board stating that the Level Three hearing was scheduled for June 28, 2012. As such, Grievant asked for a continuance stating that he came to the hearing straight from work and did not have with him the documents he needed to present as evidence in his case. However, Grievant advised that he did not intend to call any witnesses. As Respondent was prepared to present a number of exhibits, the undersigned asked the parties to confer to see if Respondent had the documents Grievant needed and recessed the hearing.

During the recess, the undersigned contacted the Grievance Board office and reviewed the file and correspondence sent to Grievant to determine what document he could have just received in the mail. The undersigned discerned that a copy of a cover letter enclosing the subpoenas requested by Respondent was sent to Grievant on June 18, 2012. Other than that letter, the Grievance Board had sent Grievant no correspondence in this matter since the Notice of Hearing on March 13, 2012.

When the hearing was reconvened, the Grievant advised that there were one or more documents he had to present that Respondent did not have. Further, the parties advised that they could make no stipulations. Whereupon, the undersigned heard Respondent's Motion to Dismiss, and allowed Grievant the opportunity to respond.[1] After hearing the arguments of each party, the undersigned held the Motion to Dismiss in abeyance, continued the matter, and ordered Grievant to submit a copy of the document he claimed to have received scheduling the matter for hearing on June 28,

[1] Grievant filed no written response to Respondent's Motion to Dismiss.

2012, by July 2, 2012. The undersigned explained that the she would issue a ruling on the Motion to Dismiss, considering the arguments and the documents filed. If the Motion to Dismiss was denied, the Level Three hearing would be rescheduled. As of this date, Grievant has not submitted a copy of the document as was ordered at the hearing.

This matter is now mature for decision. For the reasons stated below, Respondent's Motion to Dismiss is granted.

Synopsis

Grievant filed a grievance challenging his non-selection for a position. At Level One, it was found that an error was made during the selection process. Therefore, Grievant prevailed, in part, at Level One. Respondent was ordered to rescind its original selection and to go through the selection process again. Respondent complied with that order. However, Grievant was again not selected for the position. Grievant did not grieve his second non-selection. Because the relief ordered at Level One was implemented, and as Grievant failed to grieve his second non-selection, no live controversy exists in this matter. Therefore, this grievance is moot. Accordingly, Respondent's Motion to Dismiss should be granted and this grievance, DISMISSED.

The undersigned makes the following Findings of Fact:

Findings of Fact

1. Grievant filed his Level One grievance on April 15, 2011, challenging his non-selection for the position of case manager.

2. A Level One hearing was conducted on April 29, 2011.

3. A Level One decision was issued on June 9, 2011, granting the grievance in part, stating that an error was made in the selection process as Grievant was not allowed to be interviewed for the position. The decision ordered the original selection rescinded and the position "reprocessed by a new interview team, and all qualified candidates who applied originally will be re-interviewed and a selection made." Grievant's request to be placed in the position was denied.

4. As indicated by the certified mail receipt, Grievant received the Level One decision on June 20, 2011.

5. The Grievance Board received Grievant's Level Two appeal on August 12, 2011, bearing the postmark of August 11, 2011. Grievant's signature on this document is dated July 6, 2011. Included with the appeal documents was a letter dated August 9, 2011, reportedly drafted by Rose Kirby of the Alderson Public Library, explaining that this was the second set of copies sent to the Grievance Board and that it had been approximately three weeks since the first set were sent.

6. Following the issuance of the Level One decision, the original selection was rescinded and the interview process repeated. Grievant was interviewed for the position, but again was not selected.

7. Grievant did not file a grievance over his second non-selection.

8. On October 6, 2011, Grievant submitted his Level Three appeal to the Public Employees Grievance Board.

Discussion

"Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered

appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 et seq." Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2008). The issue before the undersigned is Respondent's Motion to Dismiss. The burden of proof is on the Respondent, the moving party, to demonstrate that the motion should be granted by a preponderance of the evidence.

Respondent contends that this grievance is untimely filed because it was not initiated within the timelines set forth in WEST VIRGINIA CODE § 6C-2-4(c)(1). Timeliness is an affirmative defense. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *See, Higginbotham v. W. Va. Dep't of Pub. Safety,* Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't,* Docket No. 95-MCHD-435 (Dec. 29, 1995); *aff'd, Circuit Court of Mason County,* No. 96-C-02 (June 17, 1996); *Ball v. Kanawha County Bd. of Educ.,* Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.,* Docket No. 90-DHS-524 (May 14, 1991).

WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-3(a)(1). Further, WEST VIRGINIA CODE § 6C-2-4(c)(1) sets forth the time limits for appealing a grievance from Level Two, stating as follows:

> Within ten days of receiving a written report stating that level two was unsuccessful, the grievant may file a written appeal

> with the employer and the board requesting a level three hearing on the grievance . . . .

W. VA. CODE § 6C-2-4(c)(1).

As Grievant received the Level One decision on June 20, 2011, he would have had to file his appeal to Level Two on or before July 5, 2011. However, Grievant's Level Two appeal, although the signature is dated July 6, 2011, was not received at the Grievance Board until August 12, 2011, bearing the postmark August 11, 2011. Grievant argues that the appeal documents received in August 2011 were from the second time he sent the documents. The undersigned notes that July 4, 2011, was a federal holiday; therefore, the mail did not run that day. As such, one additional day would be added into the computation of time for filing the appeal. Given the totality of the circumstances, taking into consideration the holiday which complicates the computation of time for filing, and Grievant's argument that the first copies of the Level Two appeal he filed were apparently lost in the mail, the undersigned finds that Grievant substantially complied with the timeframes for filing his Level Two appeal. Therefore, the remaining issue is whether the grievance is moot.

Grievant prevailed, in part, at Level One when the original selection process was found to have been flawed. Respondent was then ordered to rescind the original selection and to go through the selection and interview process again. Respondent completed the second selection process as ordered; however, Grievant was again not selected for the position. Grievant did not grieve his second non-selection.

> 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. Dep't 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 & Human Res., Docket No. 2008-0812-CONS (May 30, 2008); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). "Because 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, et al., 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); *Spence*, *supra*.

As Respondent implemented the relief ordered at Level One, and as Grievant failed to grieve his second non-selection, no live controversy exists between the parties. Therefore, this grievance is moot, and any ruling on the merits of the case would amount to an advisory opinion. Therefore, the Respondent's Motion to Dismiss is granted, and this grievance, dismissed.

The following Conclusions of Law support the dismissal of this grievance:

Conclusions of Law

1. Timeliness is an affirmative defense. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the

burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *See, Higginbotham v. W. Va. Dep't of Pub. Safety,* Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't,* Docket No. 95-MCHD-435 (Dec. 29, 1995); *aff'd, Circuit Court of Mason County,* No. 96-C-02 (June 17, 1996); *Ball v. Kanawha County Bd. of Educ.,* Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.,* Docket No. 90-DHS-524 (May 14, 1991).

2. Grievant substantially complied with the time frame established for filing his Level Two appeal.

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.

4. "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. Dep't 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).

5. "Because 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, et al., 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); *Spence*, *supra*.

6. Respondent's implementation of the relief ordered at Level One and Grievant's failure to grieve his second non-selection rendered this grievance moot.

7. Because this grievance is moot, any ruling issued by the undersigned on the merits of the case would amount to an advisory opinion. As such, Respondent's Motion to Dismiss shall 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 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 (eff. July 7, 2008).

DATE: September 7, 2012.

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Carrie H. LeFevre
Administrative Law Judge