THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES DONOHUE, et al.,

Grievants,

v. **Docket No. 2010-1590-CONS**

DIVISION OF HIGHWAYS,

Respondent.

DISMISSAL ORDER

Grievants James Donohue and Darrell Brown filed Level One grievances on May 17, 2010. Grievant Torres Williamson filed his Level One grievance on May 20, 2010. In each of these actions, the Grievants grieved their non-selection for a Transportation Equipment Worker III position. Only one Grievant, Torres Williamson, specified any particular relief he was seeking. On his statement of grievance, Mr. Williamson specified that the relief he sought was "granting the selection to grievant and to otherwise make whole." Grievants Brown and Donohue left blank the "relief sought" section of the statement of grievance form. By Order entered June 23, 2010, the grievances were consolidated and assigned the docket number set forth above.[1]

A Level One hearing was conducted on July 30, 2010. This consolidated grievance was granted, in part, by decision dated September 10, 2010. The Level Two appeal was perfected on November 24, 2010. A Level Two Mediation was conducted on July 25, 2011. An Order of Unsuccessful Mediation was entered on July 26, 2011. On August 5, 2011, Grievants Darrell Brown and James Donohue perfected their appeal

[1] Grievants, by and through their Representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union, objected to the consolidation, and filed a Request for Reconsideration of Consolidation, which was later denied.

to Level Three, stating the following on their statements of grievance: "[a]mend and add discrimination." The relief sought stated in each was "[t]o be made whole."[2]

A Level Three hearing was convened on February 8, 2012, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievants James Donohue and Darrell Brown appeared in person, and with their Representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union.[3] Respondent appeared by counsel, Barbara L. Baxter, Esquire. Respondent, by counsel, then orally moved the undersigned to dismiss the grievance. Grievants' Representative was given the chance to orally respond to Respondent's motion.

However, given that the Respondent's Motion to Dismiss was based solely upon legal arguments, and that Grievants did not have notice of the same, the undersigned continued the hearing, and ordered Respondent to file a written Motion to Dismiss within five days to allow the Grievants the opportunity to appropriately respond. Grievants were ordered to file their response within ten days of their receipt of Respondent's Motion. *See*, Order entered February 9, 2012.

Respondent filed its Motion to Dismiss as ordered by facsimile on February 15, 2012, serving the same upon Grievants' Representative. Grievants filed no response to Respondent's Motion to Dismiss. This matter became mature for decision on March 7, 2012. For the reasons stated below, this motion is granted.

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[2] Grievants were represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union, at Levels One and Two.

[3] At the February 2012 hearing, Grievants' Representative advised the undersigned that Grievant Torres Williamson is now retired and would no longer be pursing his grievance.

Synopsis

Grievants filed grievances challenging their non-selection for a position. At Level One, the selection process was found to be arbitrary and capricious. Therefore, Grievants prevailed, in part, at Level One. Respondent was ordered to repost the position and to go through the selection process again. Respondent complied with that order and a new selection was made. However, neither of the Grievants was selected for the position. Grievants did not appeal their second non-selection. Because the relief ordered at Level One was implemented, and as Grievants failed to appeal their 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. Grievants Torres Williamson, James Donohue, and Darrell Brown filed grievances challenging their non-selection for the position of Transportation Equipment Operator III in May 2010. However, Mr. Williamson was the only one of the three Grievants who specified any relief sought in his original statement of grievance.

2. Torres Williamson retired from DOH prior to the Level Three hearing and no longer wishes to pursue his grievance.[4] As such, Mr. Williamson is no longer considered a party to this matter.

3. A Level One hearing was conducted on July 30, 2010.

[4] Grievants' Representative informed counsel for Respondent and the undersigned of this at the commencement of the Level Three hearing.

4. A Level One decision was issued on September 10, 2010, granting the grievance in part, stating that Grievants proved that the selection at issue was arbitrary and capricious, but not who the most qualified candidate was. The decision ordered Respondent to "re-post the position, making it open to any qualified applicant, then select the most qualified candidate based on a fair comparison of experience, qualifications and abilities."

5. Grievants appealed to Level Two on November 24, 2010. The Level Two statement of grievant states as follows: "[a] March 1, 2010, posting for an equipment operator 3 opening was ordered to be re-posted, but Respondent has failed to do so." Grievants sought the following relief: "[t]o be made whole, including backpay with interest from May 16, 2010 until the ordered selection is properly made."

6. Between October 2010 and July 25, 2011, Respondent reposted the position, conducted interviews, and selected a person for the position.[5] However, neither of the Grievants was the successful candidate.

7. Grievants did not file grievances over their second non-selection.

8. On August 5, 2011, Grievants appealed to Level Three. Their statements of grievance read, "[a]mend and add discrimination." In the relief sought section, the Grievants request only "[t]o be made whole."

9. Respondent moved for dismissal of this grievance asserting that the grievance is moot, and that the Grievants attempted to avoid the issue of mootness by attempting to raise a new grievance at Level Three.

[5] Although there appears to be no dispute that the position was reposted and a second selection was made, neither party indicated when such occurred.

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). This issue before the undersigned is Respondent's Motion to Dismiss. The burden of proof is on the Respondent to demonstrate that the motion should be granted by a preponderance of the evidence.

At the outset, it is noted that there are numerous procedural oddities in this matter. One such oddity is that the two remaining Grievants failed to request any relief at Level One, requested only compliance with the Level One Order at Level Two, and requested only "to be made whole" at Level Three. However, as Respondent did not raise these issues, the undersigned will not delve further into this issue.

Grievants prevailed, in part, at Level One when the original selection process was found to have been arbitrary and capricious. Respondent was then ordered to repost the position and to go through the selection process again. Prior to the Level Two Mediation, Respondent completed the second selection process as ordered; however, neither of the Grievants was selected for the position. Grievants did not grieve their 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 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 Grievants failed to grieve their 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. Further, Grievants' weak attempt to add a discrimination claim at Level Three will not act to revive the grievance. 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. "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.

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]." *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).

3. "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 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*.

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

5. 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 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 (eff. July 7, 2008).

DATE: May 24, 2012.

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Carrie H. LeFevre
Administrative Law Judge