THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

Michelle Zimmerman,
Grievant,

v. **Docket No. 2011-0826-DEA**

DIVISION OF RHABILITATION SERVICES,
Respondent.

DISMISSAL ORDER

Michelle Zimmerman, ("Grievant") a Senior Disability Evaluation Specialist for the Division of Rehabilitation Services at the Clarksburg office filed level one grievance forms on November 23, 2010. The Statement of Grievance alleges:

> Grievant was not selected for position of Rehabilitation Office Supervisor. Grievant was working as acting supervisor and the position was given to an applicant with less work experience and no supervisory experience.

For relief Grievant sought:

> Grievant requests supervisor job to be reposted and awarded to Grievant and or pay for which that position holds if position is not reposted.

A level one hearing was convened and a day of hearing was held at the F. Ray Power Building in Institute, West Virginia on December 8, 2010. The grievance was denied for failure to prove by a preponderance of evidence that the selection process was flawed and that grievant was the most qualified applicant for the position.

A level two mediation session conducted on May 27, 2011, was unsuccessful and a level three hearing on the grievance was set for September 12, 2012.

On August 31, 2012, Respondent filed a Motion to Dismiss the grievance as moot. A telephonic hearing was held regarding the Motion to Dismiss on September 25, 2012. Grievants' representative, Gordon Simmons, participated in the hearing as did Katherine Campbell, Assistant Attorney General, counsel for the Respondent. Both sides explained their positions and Grievants' representative was offered an opportunity to provide a written response to Respondent's motion, which he declined.

Findings of Fact

1. Grievant is employed by the Division of Rehabilitation Services at the Clarksburg office

2. Grievant filed because she was not selected for the position of Rehabilitation Office Supervisor.

3. The position is now vacant since the individual who was selected which prompted this grievance has resigned from the position.

4. Grievant has reapplied for the open position.

Discussion

In Respondent's Motion to Dismiss, respondent notes that grievant requests that the supervisor job to be reposted and awarded to grievant because she was the better applicant.

That position has been reposted because the individual who was selected has resigned from the position and Grievant has reapplied for the open position. Grievant can no longer claim she was the better applicant since the individual who was awarded the position is no longer in it, and it is now an open position.

. Additionally, any order requiring the Respondent to repost the office supervisor position would be meaningless since that position has in fact been reposted.

The Procedural Rules for the West Virginia Public Employees Grievance Board state in part that:

> 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.

"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]." *Pritt, et al., v. Dep't of Health & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008). Because Grievant would gain no concrete remedy from this grievance, it is now moot.

The availability of remedies elsewhere notwithstanding, there is no further remedy available to Grievants in the Public Employees Grievance Procedure. Consequently, the consolidated grievances are DISMISSED.

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. 156 C.S.R. 1 § 6.11.

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

3. The office supervisor position has been reposted because the individual who was selected has resigned from the position and Grievant has reapplied for the open position. Grievant can no longer claim she was the better applicant since the individual who was awarded the position is no longer in it, and it is now an open position. Since there is no longer any remedy available to Grievant through the Grievance Procedure, the Grievance is moot.

Accordingly, the 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 (2008).

DATE: December 7, 2012

HUNTER D. SIMMONS
ADMINISTRATIVE LAW JUDGE