WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

THOMAS LACY,

Grievant,

v. **Docket No. 2011-1690-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Thomas Lacy, filed this grievance against his employer, Respondent, Kanawha County Board of Education, on or about April 8, 2011.[1] In his statement of grievance and attachment, Grievant challenges the "written warning" he received dated March 8, 2011, and asserts harassment.[2] As relief, Grievant seeks, "[g]ive the taxpayers a break and find someone who can handle the job correctly." *See*, Statement of Grievance.

At Level One, the grievance was denied by the decision issued on May 16, 2011. Grievant appealed to Level Two on May 25, 2011. A Level Two Mediation was conducted on August 1, 2011. The appeal to Level Three was perfected on August 12, 2011. A Level Three hearing was conducted by the undersigned administrative law

[1] It appears that Grievant did not file his statement of grievance with the Grievance Board. Instead, Grievant sent the same to the Respondent. Respondent stamped the document received on April 8, 2011. Thereafter, someone working for Respondent mailed it to the Grievance Board. The envelope containing the statement of grievance was postmarked May 17, 2011. Therefore, the records of the Grievance Board indicate that the statement of grievance was filed on May 17, 2011. However, Respondent has not raised the issue of timeliness.

[2] Grievant's statement of grievance with attachments is hereby incorporated by reference as if stated in its entirety.

judge on October 6, 2011, at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, *pro se*. Respondent appeared by counsel, James W. Withrow, Esquire. This decision became mature upon receipt of the last of the parties' proposed Findings and Fact and Conclusions of Law on November 8, 2011.[3]

Synopsis

Grievant challenged a "written warning" he received and alleged that he was being harassed by his supervisor. Respondent argued that the "written warning" imposed on Grievant was appropriate, and denied the allegations of harassment. With respect to his challenge to the "written warning," Grievant failed to request any relief that the Grievance Board has the authority to grant. Further, Grievant failed to prove his harassment claim by a preponderance of the evidence. Therefore, the portion of this grievance challenging the "written warning" is DISMISSED, and the remaining portion of this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a substitute general maintenance service employee. Grievant has been so employed for approximately seven years.

[3] Grievant did not submit proposed Findings of Fact and Conclusions of Law for consideration by the undersigned.

2. Grievant filed a prior grievance over not being offered the opportunity to perform an assignment to spread mulch on school playgrounds on two weekends.[4] Instead, Respondent had offered the assignment to two other regularly employed service personnel who had performed such assignments in the summer. Grievant appeared without counsel, or other representation, in that grievance action. Respondent was represented by James W. Withrow, Esq., as in the instant case. The Grievance Board issued a decision denying that grievance on March 25, 2011.

3. On March 18, 2011, Grievant's supervisor, William Hughart, directed Grievant to spread mulch at the Elk Elementary Center. Grievant informed Mr. Hughart that he could not perform that job because he had "grievance papers" that said it was "extra-curricular."[5] As such, Mr. Hughart directed Grievant to do another job picking up computers.

4. Mr. Hughart then went to speak with Terry Hollandsworth, Administrative Assistant for Maintenance, about the pending grievance and whether Grievant could do the mulching as previously directed.

5. Mr. Hollandsworth called Mr. Hughart and Grievant into his office to discuss the situation. Neither had the grievance papers Grievant referenced. Mr. Hollandsworth asked to see the grievance papers to which Grievant referred. Although

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[4] *See, Lacy v. Kanawha County Bd. of Educ.,* Docket No. 2010-1255-KanED (Mar. 25, 2011)

[5] Grievant uses the word "extra-curricular"; however, "extra-duty" is the appropriate term.

Grievant thought he had the papers in his vehicle, he could not find them.[6] Mr. Hollandsworth then explained to Grievant that refusal of a job may be insubordination. Mr. Hollandsworth informed Grievant that he still needed to do the mulching job. Grievant stated that he was not going to go against the grievance. Mr. Hollandsworth then told Grievant to clock out and go home for the day, which Grievant did.

6. On March 18, 2011, Mr. Hollandsworth sent Grievant a letter designated "written warning", in which he summarized the day's events, and went on to advise Grievant that refusal to perform a job assignment is considered insubordination for which disciplinary action can be imposed. Mr. Hollandsworth further stated, "[y]our refusal to perform the assignment is unacceptable behavior and has given me cause to provide this Written Warning. Further insubordinate behavior will lead to additional disciplinary action which can include suspension or possible discharge." *See*, March 18, 2011 Letter, Respondent's Exhibit 1.

7. On March 30, 2011, Grievant again refused an assignment based upon his understanding of the March 25, 2011, grievance decision in *Lacy v. Kanawha Co. Bd. of Educ.,* Docket No. 2010-1255-KanED (Mar. 25, 2011). Grievant, again, clocked out and went home.

8. On April 7, 2011, Grievant met with Mr. Hollandsworth and William Courtney at their request. The purpose of this meeting was to attempt to resolve the problem the parties were having over whether Grievant was to perform mulching assignments, Grievant's refusal to perform assignments, instead each time opting to

[6] It is most likely that the document Grievant had received to which he was referring was Respondent's proposed Findings of Fact and Conclusions of Law submitted in the prior grievance action.

clock-out and go home. This conduct had resulted in Grievant receiving a "written warning" from Mr. Hollandsworth on March 18, 2011. At this meeting, Mr. Hollandsworth and Mr. Courtney discussed with Grievant the definitions of the terms "insubordination" and "extra-duty assignments" in an effort to clarify any misunderstandings between the parties.[7]

9. By letter dated April 8, 2011, from Mr. Hollandsworth to Grievant, Mr. Hollandsworth confirmed their discussions during the April 7, 2011, meeting, and reiterated the definitions of the terms "extra-duty assignment" and "insubordination." Mr. Hollandsworth further stated, "[w]ith this understanding of 'extra duty assignments' and 'insubordination' any future insubordinate acts will result in additional disciplinary action up to and including dismissal." *See*, April 8, 2011 Letter, Respondent's Exhibit 2.

10. Grievant submitted his statement of grievance to the Respondent on April 8, 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.

[7] The evidence presented demonstrates that Mr. Hollandsworth had initially wanted to terminate Grievant's contract of employment as a result of Grievant's refusals to perform assignments. However, counsel for Respondent suggested that Mr. Hollandsworth hold this meeting to resolve the issue instead of terminating Grievant's employment contract.

> 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).

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). Further, the Grievance Board is without authority, statutory or otherwise, to

order that disciplinary action be taken against another employee. *Coster v. W. Va. Div. of Corrections,* Docket No. 98-CORR-506 (Feb. 24, 1999); *Daugherty v. Bd. of Directors*, Docket No. 93-BOD-295 (Apr. 27, 1994*). See Daggett v. Wood County Bd. of Educ*., Docket No. 91-54-497 (May 14, 1992).

Although Grievant appears to be challenging the "written warning" he received, Grievant has failed to request any relief that the Grievance Board has the authority to grant. The only relief requested in the statement of grievance is "[g]ive the taxpayers a break and find someone who can handle the job correctly." When the undersigned asked Grievant to clarify the relief he was seeking during the Level Three hearing, he stated that he was seeking "peace of mind" and "to get [Hollandsworth] off his back." The relief Grievant has requested is wholly unavailable to him. To further address the issues raised regarding the "written warning" would only result in an advisory opinion. Accordingly, the portion of the grievance challenging the "written warning" shall be dismissed, and will not be further addressed herein.

Grievant asserts that he is being bullied and harassed by his supervisor. As these claims are not disciplinary in nature, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.,* Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.,* Docket No. 33-88-130 (Aug. 19, 1988). Although Grievant did not state such in his statement of grievance, during the Level Three hearing, while clarifying the relief he sought, Grievant stated that he wanted "to get [Hollandsworth] off his back." The undersigned interprets this statement as a request for the alleged harassment to cease.

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.” W. VA. CODE § 6C-2-2(l). What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ*., Docket No. 97-52-183 (Sept. 30, 1997). "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). A single incident does not constitute harassment. *Johnson v. Dep't of Health and Human Res*., Docket No. 98-HHR-302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ*., Docket No. 97-54-463 (July 6, 1998).

In support of his harassment claim, Grievant asserts that he is always given the dirtiest jobs, that Mr. Hollandsworth instructs other employees to watch him and to keep him busy. Further, Grievant alleges that his April 7, 2011, meeting with Mr. Hollandsworth and William Courtney was another act of harassment. Grievant introduced no evidence to support these allegations or that he suffered any repeated disturbance, irritation, or annoyance that is contrary to law, policy or profession.[8] The

[8] Grievant had subpoenaed a number of witnesses to testify at the Level Three hearing held on November 1, 2011. Those subpoenaed appeared at the Grievance Board office as ordered. However, at the commencement of this proceeding, Grievant indicated that the witnesses had been subpoenaed to the wrong grievance action. Grievant indicated that he should have requested that the witnesses present on November 1, 2011, appear at another pending grievance action, that being *Lacy v. Kanawha County Bd. of Educ.,*

evidence presented Grievant failed to offer sufficient evidence to support his allegation of harassment. As such, Grievant has failed to meet his burden of proving his claim of harassment by a preponderance of the evidence.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. 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."

2. 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).

3. With respect to Grievant's claim challenging the "written warning" he received, Grievant seeks only relief that is wholly unavailable to him.

4. In non-disciplinary matters, the Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Public

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Docket No. 2011-1767-KanED. Because of his mistake, Grievant asked that the witnesses present on November 1, 2011, be released from the subpoenas. Given Grievant's apparent mistake in subpoenaing the witnesses who appeared on November 1, 2011, and given Grievant's request, the undersigned released the witnesses from their subpoenas.

Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.,* Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.,* Docket No. 33-88-130 (Aug. 19, 1988).

5. Harassment is defined as the "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l).

6. Grievant has failed to prove his harassment claim by a preponderance of the evidence.

Accordingly, the portion of this Grievance challenging the "written warning" is DISMISSED, and this Grievance is **DENIED**.

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 2, 2012.

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Carrie H. LeFevre
Administrative Law Judge