THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID MILAM,

Grievant,

v. **Docket No. 2012-0890-DEA**

WEST VIRGINIA DIVISION OF REHABILITATION SERVICES,

Respondent.

DISMISSAL ORDER

Grievant, David Milam, filed this grievance against his employer, Respondent, Division of Rehabilitations Services ("DRS"), dated February 29, 2012, alleging "[i]mproper denial of requested annual leave." As relief sought, Grievant seeks, "[t]o be made whole, including agency compliance with the DOP Administrative Rule."

A Level One Conference was held on March 1, 2012. By decision dated March 23, 2012, the grievance was denied at Level One. Grievant appealed to Level Two on March 28, 2012. A Level Two mediation was conducted on August 13, 2012. Grievant perfected his appeal to Level Three on August 17, 2012. On August 31, 2012, Respondent filed a Motion to Dismiss. Thereafter, on September 13, 2012, Respondent filed an Amended Motion to Dismiss. Grievant filed no written response to the same. On October 10, 2012, a telephonic hearing on the Motions to Dismiss was conducted by the undersigned. At this telephonic hearing, Grievant appeared by his Representative, Gordon Simmons, West Virginia Public Workers Union, UE Local 170. Respondent appeared by counsel, Katherine A. Campbell, Esq., Assistant Attorney General. Whereupon, the undersigned heard the arguments of the parties and granted Grievant the opportunity to file a written response to the Motions to Dismiss. Grievant filed his

Response to Respondent's Motion to Dismiss on October 11, 2012. On October 16, 2012, Respondent filed its Reply to Respondent's Motion to Dismiss. This matter is now mature for consideration.

Synopsis

Grievant's request for annual leave was denied by his supervisor. However, the denial was rescinded a day later. Without knowing of the rescission, Grievant canceled his travel plans. Grievant filed this grievance alleging improper denial of annual leave, but sought no relief that can be granted by the Grievance Board. Accordingly, this grievance is DISMISSED.

Findings of Fact

1. Grievant is employed by Respondent Division of Rehabilitation Services as a Disability Examiner in the Disability Determination Section.

2. Grievant requested annual leave for the days of March 7, 2012 through March 9, 2012, to go on a trip. Grievant was informed on February 29, 2012, that his request for annual leave was denied.

3. On that same date, Grievant filed the instant grievance alleging "improper denial of requested annual leave."

4. The next day, on March 1, 2012, Respondent rescinded its denial of Grievant's annual leave request.

5. However, Grievant was not at work on March 1, 2012. Grievant was informed that Respondent had rescinded its denial of his annual leave request when he returned to work on March 2, 2012.

6. Before he returned to work on March 2, 2012, Grievant had changed his travel plans and canceled his reservations. Grievant lost no money or deposits upon canceling his reservations.

7. When he learned that the denial had been rescinded, Grievant declined to take annual leave as he had previously requested.

8. Grievant was not charged with the annual leave he initially requested.

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. 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).

In his statement of grievance, Grievant requests only, "[t]o be made whole, including agency compliance with the DOP Administrative Rule." Within a day of denying Grievant's request for annual leave, Respondent rescinded its decision. Unfortunately, Grievant was not at work at the time, and learned of the rescission only after he canceled his travel plans. Grievant declined to take the annual leave that was eventually granted. Further, Grievant was not charged with annual leave he did not take. Although this turn of events is unfortunate, the relief Grievant seeks is speculative and seeks merely a declaration of which party is right. Such relief is illusory, and unavailable from the Grievance Board. As there is no relief that can be granted, any ruling made in this matter would be nothing more than an advisory opinion.

Accordingly, this grievance must be DISMISSED.

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 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).

3. 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).

4. "[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).

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 (2008).

DATE: January 11, 2013.

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Carrie H. LeFevre
Administrative Law Judge