

**THE WEST VIRGINIA
PUBLIC EMPLOYEES GRIEVANCE BOARD**

PAULA M. CUNNINGHAM,

Grievant,

v.

Docket No. 2018-0535-DOT

DIVISION OF MOTOR VEHICLES,

Respondent.

DISMISSAL ORDER

On October 5, 2017, Paula M. Cunningham (“Grievant”) filed a grievance at Level One against the Division of Motor Vehicles (“DMV” or “Respondent”) which contained the following statement of grievance:

As recently as 25 September 2017 (received 27 September 2017) I was denied a promotional position that I was better qualified for by virtue of experience, education and expertise. (See [correspondence] attached).

A Level One conference on this grievance was conducted on November 8, 2017. Following denial of her grievance at Level One on December 4, 2017, Grievant appealed to Level Two, and mediation was completed at Level Two on February 23, 2018. Grievant then appealed to Level Three. On April 3, 2018, a Level Three hearing on this grievance was scheduled for June 21, 2018.

On June 1, 2018, Respondent, by counsel, Gretchen A. Murphy, Assistant Attorney General, filed a Motion to Dismiss the above-styled grievance. In its Motion, Respondent contends that the present grievance should be dismissed because it is now moot, Grievant’s employment having been terminated and no timely appeal filed. On June 7, 2017, correspondence was sent to Grievant, who is appearing *pro se*, soliciting

a response to Respondent's Motion to Dismiss not later than June 15, 2018. No response has been received. Therefore, this matter is mature for determination.

Synopsis

Grievant was employed by Respondent and filed the instant grievance contesting her nonselection for another position with Respondent. Following the filing of this grievance, Grievant's employment was terminated by Respondent, and Grievant has not filed an appeal contesting her termination. Respondent filed a Motion to Dismiss this grievance as moot. Grievant was provided an opportunity to respond to the motion but failed to do so. As Grievant is no longer employed by Respondent, any relief she seeks would be speculative, and this grievance must accordingly be dismissed.

The following Findings of Fact are undisputed, and therefore accepted as true for purposes of ruling on the Motion to Dismiss.

Findings of Fact

1. Grievant was employed by the Division of Motor Vehicles ("DMV") as a Customer Service Representative.

2. On October 5, 2017, Grievant filed a grievance at Level One alleging the following:

As recently as 25 September 2017 (received 27 September 2017) I was denied a promotional position that I was better qualified for by virtue of experience, education and expertise. (See [correspondence] attached).

3. A Level One conference regarding this grievance was conducted on November 8, 2017. On December 4, 2017, the grievance was denied at Level One by the Grievance Evaluator, Sandra Castillo, and Grievant appealed to Level Two on December 12, 2017.

4. A Level Two mediation was completed on February 23, 2018.
5. Grievant appealed to Level Three on March 4, 2018.
6. On April 3, 2018, this Grievance Board issued a Notice of Hearing scheduling a Level Three hearing on this grievance for June 21, 2018.
7. Grievant's employment was terminated by Respondent DMV in correspondence dated April 10, 2018.
8. Grievant's termination became effective on April 26, 2018. Grievant has not filed a grievance challenging her termination.
9. Grievant was notified by written correspondence dated June 7, 2018, that any response she wished to file opposing Respondent's Motion to Dismiss needed to be submitted not later than June 15, 2018.
10. Grievant did not respond to Respondent's Motion to Dismiss which asserts that this grievance is now moot based upon Grievant's termination, and her failure to appeal that termination.

Discussion

"Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order." 156 C.S.R. 1 § 6.19 (2008). "Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue." 156 C.S.R. 1 § 6.19.2 (2008). "Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same

manner as appeals of decisions on the merits.” 156 C.S.R. 1 § 6.19.3 (2008). “Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.” 156 C.S.R. 1 § 3 (2008). See *Higginbotham v. W. Va. Dep’t of Public 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).

This Grievance Board will not address moot issues. It is well established that moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not cognizable through the grievance process. *Hicks v. Div. Of Highways*, Docket No. 2018-0824-DOT (May 30, 2018); *Redman v. Div. of Corrections*, Docket No. 2017-1349-MAPS (Feb. 1, 2017); *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 20, 2003). See *Pridemore v. W. Va. Dep’t of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996). This Grievance Board has previously concluded that where a grievant is no longer an employee, a decision on the merits of her grievance would be a meaningless exercise and would merely constitute an advisory opinion. *Compton v. Div. of Motor Vehicles*, Docket No. 2018-0275-DOT (Feb. 22, 2018); *Nestor v. Dep’t of Health & Human Res.*, Docket No. 2012-0149-CONS (Dec. 4, 2012). This Grievance Board does not issue advisory opinions. *Dingess v. Div. of Homeland Sec. & Emergency Mgmt.*, Docket No. 2018-0185-MAPS (Dec. 11, 2017); *Priest v. Kanawha County Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000). See 156 C.S.R. 1 § 6.21 (2008).

Despite written notice and an opportunity to present her argument, Grievant failed to respond to Respondent's motion asserting that her claim is now moot. In a grievance involving nonselection, where the grievant is no longer employed, any relief that Grievant might have been granted, had she remained employed, would be purely speculative. Thus, any ruling on the merits of this grievance would constitute an advisory opinion, which this Grievance Board does not render. Therefore, this grievance must be dismissed.

The following Conclusions of Law support the decision reached on this Motion to Dismiss.

Conclusions of Law

1. "Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order." 156 C.S.R. 1 § 6.19 (2008). "Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue." 156 C.S.R. 1 § 6.19.2 (2008). "Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits." 156 C.S.R. 1 § 6.19.3 (2008).

2. When an employer seeks to have a grievance dismissed, the employer has the burden of demonstrating such request should be granted by a preponderance of the evidence. *Frost v. Bluefield State College*, Docket No. 2013-2110-BSC (Aug. 6, 2014). See 156 C.S.R. 1 § 6.21 (2008); *Higginbotham v. W. Va. Dep't of Public 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).

3. Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not cognizable through the grievance process. *Hicks v. Div. Of Highways*, Docket No. 2018-0824-DOT (May 30, 2018); *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 20, 2003).

4. This Grievance Board does not issue advisory opinions. *Dingess v. Div. of Homeland Sec. & Emergency Mgmt.*, Docket No. 2018-0185-MAPS (Dec. 11, 2017); *Priest v. Kanawha County Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000). See 156 C.S.R. 1 § 6.21 (2008).

5. Where a grievant is no longer an employee, a decision on the merits of her grievance would involve a meaningless exercise and would merely constitute an advisory opinion. *Compton v. Div. of Motor Vehicles*, Docket No. 2018-0275-DOT (Feb. 22, 2018); *Nestor v. Dep't of Health & Human Res.*, Docket No. 2012-0149-CONS (Dec. 4, 2012).

6. Respondent established that this grievance is now moot because Grievant's employment was terminated and she has not appealed her termination.

Accordingly, Respondent's Motion to Dismiss is hereby **GRANTED**. This grievance is hereby **DISMISSED and STRICKEN** from the docket of this Grievance Board.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

DATE: June 28, 2018

LEWIS G. BREWER
Administrative Law Judge