

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

OMAR F. ATTARABEEN,

Grievant,

v.

Docket No. 2022-0452-MU

MARSHALL UNIVERSITY,

Respondent.

DISMISSAL ORDER

Grievant, Omar Attarabeen, was employed by Respondent, Marshall University, ("MU") as an Assistant Professor/Director of Assessment & Accreditation in the School of Pharmacy. Grievant Attarabeen filed a level one grievance alleging that MU has missed significant deadlines in the process for promoting him and granting him tenure.

As relief, Grievant seeks the following:

[T]he school administration to not hold up my tenure/promotion application any longer. Additionally, I request an explanation on why the school administration is not treating me in the same way it treats/treaded other faculty members.

A level one conference was held on December 16, 2021, and a decision was rendered on December 20, 2021. Grievant filed a level two appeal dated January 12, 2022, and a Mediation was conducted on March 1, 2022. Grievant filed a level three appeal dated March 9, 2022.

Respondent filed a Motion to Dismiss on July 7, 2022, alleging that the grievance is now moot because Grievant has voluntarily left employment with MU. Respondent alleges that the remedy Grievant seeks (tenure and promotion) is no longer available.

A level three hearing scheduled for July 19, 2022, was cancelled so the motion to dismissed could be addressed. The Grievance Board sent a copy of the motion to Grievant and gave him until August 1, 2022, to respond. To date, Grievant has not responded. This matter is now mature for a decision on the Motion to Dismiss.

Synopsis

Grievant claims that Respondent has missed deadlines and improperly delayed the process through which he would receive a promotion and tenure. Grievant wants Respondent to process his application for tenure and promotion expeditiously. Grievant also seeks that he be treated fairly. Respondent argues that Grievant voluntarily left employment with MU and is no longer eligible for the tenure and promotion he seeks. Since Grievant is no longer employed by Respondent, the remedy he seeks is unavailable. This matter is moot.

Findings of Fact

1. At the time the grievance was filed, Grievant, Dr. Attarabeen, was employed by MU as an Assistant Professor/Director of Assessment & Accreditation in the School of Pharmacy.

2. Grievant alleges that MU has missed significant deadlines in the process for promoting him and granting him tenure. The implication being that Respondent was improperly delaying Grievant's promotion and tenure.

3. The Grievant seeks the following relief:

[T]he school administration to not hold up my tenure/promotion application any longer. Additionally, I request an explanation on why the school administration is not treating me in the same way it treats/treated other faculty members.

4. Grievant talked with his supervisor, Associate Professor, Dr. Craig Kimble in early July 2022. Grievant requested that Dr. Craig not schedule any classes for him to teach in the fall semester of 2022. Grievant told Dr. Craig that he would not be returning to MU and beginning in August 2022, Grievant would be teaching at the University of Eastern Maryland Eastern Shore School of Pharmacy.¹

5. Based upon the discussion Grievant had with his immediate supervisor, MU Chief Talent and DEI Officer, Bruce Felder, sent a letter to Grievant dated July 5, 2022, accepting Grievant's resignation effective August 12, 2022. Mr. Felder also noted that Grievant had cleaned out his office and began utilizing his accrued annual leave on June 2, 2022.²

6. Grievant is listed in the faculty directory for the University of Maryland Eastern Shore as an Associate Professor.³

7. After receiving Respondent's Motion to Dismiss, the Grievance Board sent a copy of the motion to Grievant on July 11, 2022. Grievant was advised that if he wished to respond to the motion he needed to do so on or before August 1, 2022. To date, no response has been received.

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

¹ Affidavit of Associate Professor Craig Kimble.

² Respondent Exhibit 4.

³ Respondent Exhibit 2.

§ 6.2 (2018). It is within an administrative law judge's discretion as to whether a hearing needs to be held before a decision is made on a motion to dismiss. See *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012).

Respondent alleges that the grievance is moot and that there is no relief to be granted to Grievant by the Grievance Board. When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. See, *Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep't of Educ.*, Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). See generally, *Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996).

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).

Pursuant to the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board:

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.

Grievant has voluntarily left employment with MU and has found a job elsewhere.⁴ Grievant has made it clear to Respondent's agents that he has no intention of returning to employment with MU. The only remedy Grievant seeks is promotion and tenure as well as fair treatment by Respondent. Since Grievant is no longer employed by MU, those remedies are not available.

The West Virginia Supreme Court of Appeals has addressed the issue of an employee's severance of employment while a grievance was pending in the case of *Komorowski v. Marshall County Bd. of Educ.*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision). In *Komorowski*, the grievant applied for a position as principal in a public school system. Had he received the position it would have raised his salary. Mr. Komorowski filed a grievance contesting his non-selection for the principal position, and participated in the grievance procedure through a level three hearing. Subsequent to the hearing, Mr. Komorowski retired. In dealing with the issue of whether Mr. Komorowski's retirement rendered the grievance moot, the Supreme Court wrote the following:

The grievance system provides a procedure for public employees to resolve grievances with regard to their employment. W.Va. Code § 6C2-1(a). Any relief that might have been accorded to petitioner had he not retired, and had he prevailed before the grievance board, is now purely speculative . . . “ ‘Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes. . . .’ Syllabus point 2, in part, *Harshbarger v. Gainer*, 184 W.Va. 656, 403 S.E.2d 399 (1991).” Syl. Pt. 4, *Huston v. Mercedes-Benz USA, LLC*, 227 W.Va. 515, 711 S.E.2d 585 (2011). “ ‘Courts will not ordinarily decide a moot question.’ Syl. pt. 1, *Tynes v. Shore*, 117 W.Va. 355, 185 S.E. 845

⁴ Apparently Grievant has reached the level of Associate Professor at his new school which was the promotion he sought at MU.

(1936).” Syl. Pt. 4, *Bland v. State*, Nos. 11– 0746, 11–0747, 11–1146, 2012 WL 5898071 (W.Va. 2012).

Just as in *Komorowski*, any relief that might have been available to Dr. Attarabeen had he not left employment at MU, and had he prevailed before the grievance board on the promotion/tenure issue, is now purely speculative. As the Supreme Court noted, “Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes. . . .” Syllabus point 2, in part, *Harshbarger v. Gainer*, 184 W.Va. 656, 403 S.E.2d 399 (1991).” *supra*.

As in *Komorowski*, the Grievance Board has consistently held that, in situations where “it is not possible for any actual relief to be granted, any ruling issued 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).

Accordingly, the motion is granted, and the grievance is **DISMISSED**.

Conclusions of Law

1. When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. See, *Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep’t of Educ.*, Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). See generally, *Payne v. Mason County Bd. of Educ.*, Docket No. 96-

26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996).

2. 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).

3. Pursuant to the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board:

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.

4. In situations where "it is not possible for any actual relief to be granted, any ruling on the issues 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).

5. “The grievance system provides a procedure for public employees to resolve grievances with regard to their employment. W.Va. Code § 6C2-1(a). . . Courts

are not constituted for the purpose of making advisory decrees or resolving academic disputes. . . .” Syllabus point 2, in part, *Harshbarger v. Gainer*, 184 W.Va. 656, 403 S.E.2d 399 (1991).” Syl. Pt. 4, *Huston v. Mercedes-Benz USA, LLC*, 227 W.Va. 515, 711 S.E.2d 585 (2011). “Courts will not ordinarily decide a moot question.” Syl. pt. 1, *Tynes v. Shore*, 117 W.Va. 355, 185 S.E. 845 (1936).” Syl. Pt. 4, *Bland v. State*, Nos. 11– 0746, 11–0747, 11–1146, 2012 WL 5898071 (W.Va. 2012).” *Komorowski v. Marshall County Bd. of Educ.*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision).

6. Respondent proved by a preponderance of the evidence that no relief is available to Grievant, and this matter is moot.

Accordingly, the Motion to Dismiss is **GRANTED** and the grievance is **DISMISSED**.

Any party may appeal this Order decision to the Intermediate Court of Appeals.⁵ Any such appeal must be filed within thirty (30) days of receipt of this Order. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the

⁵ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE §
29A-5-4(b).

DATE: AUGUST 30, 2022.

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**