

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**LISA ANNETTE BILLUPS,
Grievant,**

v.

Docket No. 2024-0099-DOR

**DEPARTMENT OF REVENUE/
TAX DIVISION,
Respondent.**

DISMISSAL ORDER

Grievant, Lisa Annette Billups, was employed by Respondent, the West Virginia Tax Division. On August 16, 2023, Grievant filed this grievance against Respondent attaching a lengthy statement of grievance that essentially alleged retaliation, disability discrimination, hostile work environment, and favoritism. For relief, Grievant sought restoration of her computer access and to be treated fairly without fear of job loss, hostility, or retaliation.

On January 11, 2024, the level one grievance evaluator dismissed the grievance. Grievant appealed the dismissal of her grievance to level two on January 23, 2024. In her appeal to level two, Grievant additionally included a claim that she had received an improper written warning and requested as relief that it be removed from her personnel file. By order entered March 6, 2024, the Grievance Board found that the grievance evaluator had failed to make sufficient findings of fact and conclusions of law to support the dismissal of the grievance and remanded the case to level one.

On March 15, 2024, Respondent, by counsel, filed *State Tax Division's Motion to Dismiss and Motion to Hold All Proceedings in Abeyance* asserting the grievance must be dismissed due to Grievant's voluntary separation from employment and moving that all proceedings, including the remand to level one, be held in abeyance. By order entered

March 19, 2024, the grievance was held in abeyance and Grievant was given until March 26, 2024, to file a response to the motion. By email dated March 21, 2024, Grievant responded but expressed confusion because she mistakenly thought her grievance had already been dismissed. The Grievance Board sent an email to the parties on March 25, 2024, clarifying the procedural history and stating that Grievant could respond to explain why her grievance should not be dismissed if she disagreed. Grievant filed her response on March 29, 2024. On April 9, 2024, Respondent, by counsel, filed *State Tax Division's Motion for Leave to File Reply in Support of Motion to Dismiss* and *State Tax Division's Reply in Support of Motion to Dismiss*.¹ Grievant appears *pro se*. Respondent appears by counsel, Cassandra L. Means-Moore.

Synopsis

Grievant was employed by Respondent as an Administrative Services Manager 2. Grievant alleged harassment and retaliation. Grievant sought for the harassment, retaliation, and computer monitoring to cease. The grievance was dismissed at level one. In her appeal of the level one dismissal order, Grievant attempted to add untimely claims

¹ Respondent argued Grievant's March 29, 2024, response should not be considered as it was untimely filed. Grievant responded to the abeyance order by email by the March 26, 2024, deadline but was confused. Following the Grievance Board's clarifying email sent to the parties on March 25, 2024, Grievant submitted her additional response on March 29, 2024. There is no prescribed timeframe for a response to a motion by statute or rule. The West Virginia Supreme Court of Appeals has repeatedly admonished the lower courts to uphold the legislative intent of simple, expeditious and fair grievance procedures, and to give such procedures flexible interpretation in order to carry out the legislative intent. See *Duruttya v. Board of Educ.*, 181 W.Va. 203, 382 S.E.2d 40 (1989); *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990); *Hale v. Mingo County Bd. of Educ.*, 199 W. Va. 387, 484 S.E.2d 640 (1997). The grievance process is not "to be a procedural quagmire where the merits of the cases are forgotten." *Spahr*, 182 W. Va. at 730, 391 S.E.2d at 743. For this reason, both Grievant's response and Respondent's reply are proper and should be allowed and considered.

protesting a written warning, the failure to grant a discretionary pay increase, and constructive discharge. Grievant has now resigned from her position. The grievance is moot. Accordingly, the grievance is dismissed.

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 was employed by Respondent as an Administrative Services Manager 2.

2. Grievant alleged in her grievance harassment and retaliation and requested as relief for the harassment, retaliation, and computer monitoring to cease.

3. In her appeal of the level one dismissal order, Grievant attempted to add a claim protesting a written warning she had previously received.

4. The written reprimand was issued on October 16, 2023.

5. Grievant resigned from her position on February 5, 2024, effective February 16, 2024.

6. In her March 29, 2024, response to Respondent's motion to dismiss, Grievant attempted to raise new claims of constructive discharge and failure to grant a discretionary pay increase.

7.

Discussion

"Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order." W. VA. CODE ST. R. § 156-1-6.19 (2018). "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." W. VA. CODE ST. R. § 156-1-6.19.2. "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." W. VA. CODE ST. R. § 156-1-6.19.3. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3.

Respondent argues that the grievance must be dismissed because Grievant voluntarily resigned from employment and the grievance is moot. Respondent asserts that Grievant's attempt to revive her moot claim by the addition of other claims is time barred. Grievant admits that she resigned from her employment but denies that her resignation was voluntary. Grievant asserts the grievance should not be dismissed to allow a decision on the written warning.

"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. 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 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 & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008). When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Smith v.*

Lewis County Bd. of Educ., Docket No. 02-21-028 (June 21, 2002); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). “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).

“Relief 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).” *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997). The Grievance Board will not decide matters that are “speculative or premature, or otherwise legally insufficient.” *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991); *Dooley v. Dept. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994).

Grievant has attempted to amend her grievance to add claims of an improper written warning, the failure to grant a discretionary pay increase, and constructive discharge. “Each grievant shall file a grievance form, signed by the grievant, within the time limits specified in this article” W. VA. CODE § 6C-2-3(a)(1). The Code further sets forth the time limits for filing a grievance as follows:

Within fifteen days following the occurrence of the event upon which the grievance is based, within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing

W. VA. CODE § 6C-2-4(a)(1). “Days’ means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice.” W. VA. CODE § 6C-2-2(c). “The specified time limits may be extended to a date certain by mutual written agreement or the grievance evaluator, mediator, or administrative law judge at the request of any party. The specified time limits shall be extended for cause whenever an agency representative, intervenor, or a grievant is not working because of accident, sickness, death in the immediate family, or other cause for which the agency representative or grievant has approved leave from employment.” W. VA. CODE § 6C-2-3(a)(2).

The written reprimand was issued on October 16, 2023. Grievant attempted to add the written reprimand to her claim in her level two appeal on January 23, 2024. Grievant resigned from employment effective February 16, 2024, and attempted to raise constructive discharge and failure to receive a discretionary increase in her claim in her March 29, 2024, response to the motion to dismiss. Both attempted amendments were made well past the fifteen-day time limit so are barred.

The grievance is moot. The grievance concerns only the conditions of Grievant’s employment and Grievant is no longer employed by Respondent. Grievant argues the written warning is not moot because, if she seeks employment with the state in the future, then the written warning could be disclosed to a prospective employer who may then choose not to hire her. As stated, the claim for the written warning is untimely, but even if it were timely, Grievant’s contention is obviously speculative. A decision on the written warning would have no substantive, practical consequences for Grievant now that she is

no longer employed by Respondent, so a decision on this grievance would be merely advisory. The Grievance Board has consistently dismissed claims of an improper written reprimand following a Grievant's separation from employment. *Ruffin v. Div. of Natural Res.* Docket No. 2012-0231-DOC (Dec. 9, 2011); *Riley v. Div. of Natural Res.* Docket No. 2018-1067-DOC (Dec. 17, 2018). Accordingly, the grievance must be dismissed.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. "Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order." W. VA. CODE ST. R. § 156-1-6.19 (2018). "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." W. VA. CODE ST. R. § 156-1-6.19.2. "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." W. VA. CODE ST. R. § 156-1-6.19.3.

2. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3.

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 properly cognizable [issues]." *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 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 & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008).

4. When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). "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).

5. Grievant's attempt to add claims to her grievance is untimely.

6. As the grievance only involves conditions of her employment and Grievant has resigned, the grievance is moot.

Accordingly, the grievance is **DISMISSED**. Respondent's motion to place Grievant's response under seal due to the disclosure of confidential medical information regarding a third party is **GRANTED**.

Any party may appeal this decision to the Intermediate Court of Appeals.² Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE

² 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

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

DATE: April 12, 2024

Billie Thacker Catlett
Chief Administrative Law Judge

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.