

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**BLAIN ARNOLD BOWMAR,
Grievant,**

v.

Docket No. 2024-0051-DOT

**DIVISION OF HIGHWAYS,
Respondent.**

DISMISSAL ORDER

Blain Arnold Bowmar, Grievant, filed this action on July 27, 2023, challenging a three-day suspension without pay. Grievant seeks to “[R]estore 3 day pay and to be made whole.” This grievance was filed directly to level three due to being disciplinary. Respondent filed a Motion to Dismiss for Mootness on January 23, 2024. Grievant was given an opportunity to respond to the motion following receipt by the undersigned. Grievant filed a response by his representative on January 26, 2024. A hearing on the Motion to Dismiss was conducted on February 12, 2024. An initial deadline to file any further emails or briefs addressing the issue was extended following the hearing at the request of Grievant to explore any settlement negotiations. The Motion to Dismiss is now in a posture for consideration and a ruling. Grievant appeared in person and by his representative, Larry B. Weaver. Respondent appeared by its counsel, Jack E. Clark, Division of Highways, Legal Division.

Synopsis

Grievant filed this action following receipt of a form RL-544 in which it was recommended that he receive a three-day suspension without pay. Central Human Resources decided that it would not accept the recommended disciplinary action against Grievant. Respondent proved in its Motion to Dismiss that this grievance is moot, and

Grievant has not offered any meaningful grounds to deny the motion. Accordingly, this grievance is dismissed.

The following Findings of Fact are based on the record of the case.

Findings of Fact

1. On July 27, 2023, Grievant filed the instant grievance against the Respondent, Division of Highways.

2. Grievant challenges what he represented as a three-day suspension without pay. Grievant seeks to “[R]estore 3 day pay and to be made whole.”

3. The grievance was filed directly to level three and a hearing was held on February 12, 2024, addressing Respondent’s Motion to Dismiss.

4. Although the District recommended disciplinary action against the Grievant, Central Human Resources determined that it would not accept or enforce the recommended discipline action against Grievant. The record established that Respondent has no intention of attempting to enforce the recommended discipline.

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.*” W.VA. CODE ST. R. § 156-1-6.2 (2018). 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 preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep’t of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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. 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).

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).

The record is clear that the recommended three-day suspension was not imposed on Grievant. Grievant was not disciplined. Therefore, the grievance is moot. Accordingly, this grievance is dismissed.

The following Conclusions of Law support the dismissal of this grievance.

Conclusions of Law

1. “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).

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. Because the relief sought by Grievant is not available from the Grievance Board, the grievance is moot and must be dismissed pursuant to Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2018).

Accordingly, this grievance is **DISMISSED**.

“The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court situated in the judicial district in which the grievant is employed.” W. VA. CODE § 6C-2-5(a) (2024). “An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with

§ 51-11-4(b)(4) of this code and the Rules of Appellate Procedure.” W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: April 30, 2024

Ronald L. Reece
Administrative Law Judge