

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES KALEB LEWIS,
Grievant,

v.

Docket No. 2023-0799-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,**
Respondent.

DISMISSAL ORDER

James Kaleb Lewis, Grievant, filed this action on or about April 24, 2023, alleging that he “was suspended indefinitely without good cause. Like penalties like offenses. Suspension was retaliatory and discriminatory in nature. Due process rights have been violated.” Grievant seeks to be made whole with back pay, interest and benefits restored. Respondent filed a Motion to Dismiss for Mootness on or about January 25, 2024. Grievant was given an opportunity to respond to the motion following receipt by the undersigned. No response was received. The undersigned scheduled a hearing on the motion to be conducted on February 5, 2024. Grievant was asked to notify the undersigned of his intent to appear for this scheduled hearing. No response was received. Grievant failed to appear for the hearing set for February 5, 2024. Grievant appears *pro se*. The Department of Health and Human Resources appears by its counsel, Heather L. Olcott, Assistant Attorney General. The motion is mature for consideration and a ruling.

Synopsis

Grievant filed this grievance challenging what he represented as an indefinite suspension. Following an investigation by Respondent, the allegations against Grievant were unsubstantiated. Grievant was placed back to work and compensated for his time off during the investigation. Respondent proved in its January 25, 2024, Motion to Dismiss that this grievance is moot, and Grievant has not offered any response to the Motion to Dismiss. Accordingly, this Grievance is dismissed.

The following Findings of Fact are based on the undisputed facts of this case.

Findings of Fact

1. Grievant was employed as a Recreation Specialist with the Division of Health and Human Resources at the William R Sharpe, Jr. Hospital at the time he filed this action.
2. On April 22, 2023, Grievant was suspended and placed on administrative leave pending the results of an Adult Protective Services investigation.
3. Grievant filed this action on that date alleging he was suspended indefinitely without good cause.
4. The allegations against Grievant were unsubstantiated and he was returned to work on April 26, 2023. Grievant received no discipline.
5. Grievant was reimbursed for the time he was suspended during the investigation. Grievant's tenure, leave, and benefits lost during the suspension were restored.

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. 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).

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).

Grievant was not disciplined. Grievant was reimbursed for the time he was suspended during the investigation. Grievant’s tenure, leave, and benefits lost during the suspension were restored. 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**.

Any party may appeal this Dismissal Order to the Intermediate Court of Appeals.¹ Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order.

¹On 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

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

Date: February 20, 2024

Ronald L. Reece
Administrative Law Judge

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 W. VA. 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.