

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**STEVEN NEIL,
Grievant,**

v.

Docket No. 2023-0815-DOT

**DIVISION OF HIGHWAYS,
Respondent,**

DISMISSAL ORDER

Steven Neil, Grievant, filed this action against his former employer, Division of Highways, on April 28, 2023. Grievant seeks reinstatement to his position and backpay. This case proceeded directly to level three of the grievance process. Respondent filed a Motion to Dismiss the grievance on May 31, 2023. Grievant was provided an opportunity to respond to the Motion to Dismiss by June 14, 2023. Grievant did not respond. This motion is mature for a ruling. Grievant appears *pro se*. Respondent, Division of Highways, appears by its counsel, Jack E. Clark, West Virginia Department of Transportation/Division of Highways, Legal Division.

Synopsis

Grievant was notified on April 24, 2023, by Respondent of a recommendation for disciplinary action due to not possessing a valid driver's license. This grievance was filed on or about April 28, 2023, in which Grievant seeks reinstatement to his position. Grievant notified the Division of Highways on May 10, 2023, that he was resigning from his position. It is well established that in the event a grievant is no longer an employee, a decision on the merits would be a meaningless exercise and would merely constitute an advisory opinion. The Grievance Board does not issue advisory opinions. This case is dismissed.

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

Findings of Fact

1. Grievant was employed by the Division of Highways as a Transportation Worker I Equipment Operator.

2. The District's Human Resource Section became aware in March of 2023 that Grievant's driver's license had an interlock restriction. A license with an interlock restriction is not considered a valid driver's license.

3. On April 24, 2023, Grievant was informed that his position required a valid driver's license and a recommendation by the County Administrator would be made to end his employment.

4. Grievant filed an expedited level three grievance on April 27, 2023, seeking reinstatement to his position. This filing was precipitous. The predetermination conference was scheduled for May 1, 2023.

5. On May 10, 2023, Grievant notified the Division of Highways that he was resigning from his position as a Transportation Worker I Equipment Operator effective that date.

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).

It is undisputed that Grievant is no longer employed by Respondent. Therefore, there is no remedy to grant Grievant. 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. Since Grievant is no longer an employee of Respondent, the issues raised in this grievance are moot.

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: July 28, 2023

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.