

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**TIMOTHY HERRON,
Grievant,**

v.

Docket No. 2024-0602-DHS

**DEPARTMENT OF HOMELAND SECURITY/
DIVISION OF CORRECTIONS AND REHABILITATION, and
DIVISION OF PERSONNEL,
Respondents.**

DISMISSAL ORDER

Grievant, Timothy Herron, filed a level one grievance on or about March 15, 2024, asserting that he was given a tentative offer for the position of Investigator I from the Department of Homeland Security in March 2023: however, there were issues with his qualifications for the position. Grievant seeks, “promotion into denied Investigator I position at the Huttonsville Correctional Center, back pay for time denied the position while it was held in limbo for no reason.”

This grievance was waived to level two on April 19, 2024, by Meredith N. Ayers, Hearing Examiner, because she lacked authority to decide the issue. Grievant appealed. A level two mediation was conducted on October 1, 2024. Grievant appealed to level three. The Division of Personnel was joined as a party respondent by Billie Thacker Catlett, Chief Administrative Law Judge, on or about June 10, 2024. The case was set for a level three hearing before the undersigned. Prior to the hearing, the Division of Personnel filed a motion to dismiss the grievance on the basis that they were not an indispensable party to the litigation, and/or the case was moot and untimely. The undersigned used the previously noticed level three hearing to conduct a hearing on the

motion on February 13, 2025, by Zoom video conferencing. Grievant appeared in person and *pro se*. The Department of Homeland Security appeared by its counsel Jonathan Calhoun, Assistant Attorney General. The Division of Personnel appeared by its counsel, Katherine A. Campbell, Assistant Attorney General, and by Elisabeth Arthur, Assistant Director, Staffing and Recruitment, Division of Personnel. This matter became mature for consideration at the end of the hearing.

Synopsis

Grievant was employed by Respondent, Department of Homeland Security, at the Huttonsville Correctional Center in the position of Correction Program Specialist. The record established that Grievant applied for an Investigator I position in March 2023. Grievant was given a tentative job offer by the Department of Homeland Security, but there was a subsequent delay because the Division of Personnel had concerns about Grievant's qualifications. In the meantime, Grievant applied for another position of Investigatory I in December 2023, for which he was informed that he was not selected in February 2024. It does not appear from the record that Grievant was provided any notification that he was not selected for the initial position for which he applied in March 2023. In addition, Grievant accepted employment with the West Virginia Alcohol Beverage Control Commission. Germane to this ruling is the undisputed fact that Grievant is no longer an employee of the Department of Homeland Security, and no back pay claims were presented to the undersigned. Accordingly, this grievance is dismissed.

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

Findings of Fact

1. Grievant was employed by Respondent, Department of Homeland Security, at the Huttonsville Correctional Center in the position of Correction Program Specialist.
2. On March 15, 2024, Grievant filed this action challenging his non-selection for a position with the Department of Homeland Security. Grievant sought promotion into the position with back pay for the time denied the position.
3. Grievant had reason to know in March 2023 that there were issues with his qualifications for the position of Investigator I and filed a grievance one year later March 15, 2024. The record does not support a finding that an award of back pay is appropriate in this case.
4. It is undisputed that Grievant is no longer employed by the Department of Homeland Security and is currently employed by the West Virginia Alcohol Beverage Control Commission.

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 (2008). 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).

WEST VIRGINIA CODE § 6C-2-2(e)(1) defines “employee” for the purposes of the grievance procedure, as follows:

(1) "Employee" means any person hired for permanent employment by an employer for a probationary, full- or part-time position.

WEST VIRGINIA CODE § 6C-2-2(g) defines “employer” for the purposes of the grievance procedure, as follows:

[A] state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, **using the services of an employee** as defined in this section. (Emphasis added.)

A “Grievance” is “a claim by an employee.” W. VA. CODE § 6C-2-2(i). Only an employee may file a grievance. W. VA. CODE § 6C-2-2(a)(1).

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 is no longer employed by the Department of Homeland Security and there is no issue of back pay before the undersigned, thus, there is no remedy to grant Grievant. Accordingly, this grievance is dismissed.

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

Conclusions of Law

1. WEST VIRGINIA CODE § 6C-2-2(e)(1) defines “employee” for the purposes of the grievance procedure, as follows:

(1) "Employee" means any person hired for permanent employment by an employer for a probationary, full- or part-time position.

WEST VIRGINIA CODE § 6C-2-2(g) defines “employer” for the purposes of the grievance procedure, as follows:

[A] state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, **using the services of an employee** as defined in this section. (Emphasis added.)

A “Grievance” is “a claim by an employee.” W. VA. CODE § 6C-2-2(i). Only an employee may file a grievance. W. VA. CODE § 6C-2-2(a)(1).

2. “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. 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).

4. Grievant is no longer an employee of Respondent, the issues raised in this grievance are moot.

Accordingly, this grievance is **DISMISSED**.

“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: March 28, 2025

Ronald L. Reece
Administrative Law Judge