

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**CHAD DAYTON LESTER,
Grievant,**

v.

Docket No. 2024-0436-DHS

**DEPARTMENT OF HOMELAND SECURITY/
DIVISION OF CORRECTIONS AND REHABILITATION/
SOUTHERN REGIONAL JAIL AND CORRECTIONAL FACILITY,
Respondent.**

DISMISSAL ORDER

Grievant, Chad Dayton Lester, was employed as a Corrections Unit Manager by Respondent Department of Homeland Security within the Division of Corrections and Rehabilitation ("DCR") at the Southern Regional Jail and Correctional Facility ("SRJ"). On November 28, 2023, Grievant filed this grievance directly to level three, raising several issues surrounding his non-disciplinary suspension following his receipt of a "target letter" from the United States Attorney for the Southern District of West Virginia regarding criminal allegations arising from an incident at SRJ. The grievance also challenged the termination of Grievant's temporary upgrade to the position of Corrections Unit Manager. The grievance statement is incorporated by reference.¹

On March 13, 2024, Respondent, by counsel, moved to hold this matter in abeyance until the pending federal criminal action was concluded. By Order entered December 3, 2024, this matter was held in abeyance through March 14, 2025. However,

¹ While the grievance form indicated that Grievant was represented by attorney Michael W. Carey, the Grievance Board was later made aware that Mr. Carey was representing Grievant only in the federal criminal case and not in this grievance proceeding. No other attorney or non-attorney representative has noticed an appearance on behalf of Grievant in this grievance proceeding.

on March 10, 2025, Respondent filed "Respondents' Motion to Dismiss Grievance for Failure to State a Claim." In it, Respondent alleges that Grievant misapplied policy and asked for relief that he cannot be granted, namely punitive damages and appointment of counsel in his federal criminal case.

By order dated March 14, 2025, the Grievance Board granted the motion to dismiss Grievant's request for punitive damages because the relief available to a Grievant under the grievance procedure is limited to equitable relief and cannot include monetary awards for emotional distress or punitive damages. *Bishop Coal Co. v. Salyers*, 181 W. Va. 71, 380 S.E.2d 238 (1989). Regarding the remaining issues and requests for relief raised in the grievance, the Grievance Board ordered Grievant to file a response to Respondent's motion to dismiss no later than March 21, 2025. Grievant did not respond. Neither party requested a hearing on the motion, and the matter is ripe for decision.

Synopsis

Grievant was placed on non-disciplinary suspension by Respondent after he received a federal "target letter" of investigation. A month after his suspension, Grievant's temporary upgrade was rescinded. He subsequently filed this grievance, challenging both his suspension and the termination of his temporary upgrade. Grievant was ultimately convicted in federal court, and Respondent moved to dismiss this grievance. Grievant's claims regarding his suspension are untimely. His claim regarding his temporary upgrade is moot. Accordingly, Respondent's motion to dismiss is GRANTED.

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 a Corrections Unit Manager.
2. On October 20, 2023, Grievant was hand-delivered a letter memorializing his non-disciplinary suspension, which was handed down by Respondent after Grievant received a "target letter" from the United States Attorney.
3. On November 20, 2023, Grievant received a letter from Respondent informing him that his temporary classification upgrade, which "was put in place due to the extended leave of absence of the corrections unit manager" was rescinded because it "is no longer necessary."
4. Grievant filed this grievance directly to level three on November 28, 2023, alleging:
 - a. Respondent misapplied Division of Personnel policy inasmuch as Respondent has its own policies that should apply instead.
 - b. Grievant was subjected to "double jeopardy" when he was handed a corrected suspension letter 15 minutes after being given the first suspension letter. Further, the suspension letters are null and void due to clerical errors.
 - c. Respondent failed to provide legal representation to Grievant to defend against his federal criminal charges as promised by policy.
 - d. Respondent failed to assist Grievant and his family in finding assistance after his suspension as promised by policy.

- e. Respondent impeded Grievant's ability to find other employment by refusing to approve his requests for secondary employment while he was suspended.
 - f. Grievant was demoted without cause when Respondent rescinded his temporary upgrade.
 - g. Respondent denied Grievant eligibility for leave donations.
 - h. Grievant should be allowed to accrue leave while on a non-disciplinary suspension.
5. By his own account, Grievant was given notice of his non-disciplinary suspension on October 20, 2023.
6. By his own account, Grievant was given notice of the end of his temporary placement on November 20, 2023.
7. On March 10, 2025, Respondent filed a motion to dismiss this grievance, alleging failure to state a claim upon which relief can be granted and appending the motion with documentation related to Grievant's federal criminal action.²
8. According to Exhibit 1 to Respondent's motion to dismiss, Grievant was convicted of tampering with a witness, use of intimidation or force against a witness, and making false statements. Per the conviction Order, Grievant was set to be sentenced on April 16, 2025.

² The Grievance Board may properly consider exhibits attached to a grievance form or motion. See Syl. Pt. 1, *Forshey v. Jackson*, 222 W. Va. 743, 671 S.E.2d 748 (2008).

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.

"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). "If the grievant proceeds directly to level three, the administrative law judge shall make a determination on timeliness prior to scheduling the level three hearing." W. VA. CODE § 6C-2-3(c)(1)(2023). The law is clear that "[e]ach 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)(2023).

Within 15 days following the occurrence of the event upon which the grievance is based, within 15 days of the date upon which the event became known to the employee, or within 15 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)(2023). “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)(2023). “[T]he time in which to invoke the grievance procedure [begins] to run [when] the grievant knows of the facts giving rise to a grievance.” Syl. Pt. 1, *Spahr v. Preston Cty. Bd. of Educ.*, 182 W. Va. 726, 727, 391 S.E.2d 739, 740 (1990).

Here, Grievant was made aware of his suspension on October 20, 2023. Thus, any grievance related to that suspension must have been filed no later than November 13, 2023. This grievance was not filed until November 28, 2023, ten business days and 15 calendar days too late. While Respondent did not raise the timeliness of Grievant’s claims in its motion to dismiss, the Grievance Board is required by law to assess the timeliness of the grievance.³ Clearly the grievance was not timely filed as it relates to Grievant’s suspension and the implications thereof.

Regarding Grievant’s claim that Respondent wrongfully rescinded his temporary upgrade, the timeline is different. According to Grievant, he was notified that his temporary upgrade had been rescinded on November 20, 2023. Therefore, his November 28, 2023, grievance is timely in that respect. However, in the wake of Grievant’s federal criminal conviction and impending imprisonment, his claim is now moot.

³ Prior to the 2023 amendment to West Virginia Code § 6C-2-3(c), the Grievance Board reviewed timeliness only as an affirmative defense.

The Grievance Board cannot reinstate Grievant at the upgraded rate of pay, as he requests.⁴ Therefore, any decision by this body would be merely an advisory opinion.

"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]." *Pritt, et al., v. Dep't of Health & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008); *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). Furthermore, 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. *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009); *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002). "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). "The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article." W. VA. CODE § 6C-2-1(a).

Grievant's claims related to his suspension are untimely and must be dismissed as such. Because the relief requested related to Grievant's claim related to his temporary

⁴ There is no claim for back pay because Grievant was already suspended when the temporary upgrade was rescinded and Grievant never returned to work.

upgrade cannot be granted for the aforementioned reasons, the claim must be dismissed as moot. 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. "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.
2. "If the grievant proceeds directly to level three, the administrative law judge shall make a determination on timeliness prior to scheduling the level three hearing." W. VA. CODE § 6C-2-3(c)(1)(2023).
3. "Within 15 days following the occurrence of the event upon which the grievance is based, within 15 days of the date upon which the event became known to the employee, or within 15 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)(2023).

4. “T]he time in which to invoke the grievance procedure [begins] to run [when] the grievant knows of the facts giving rise to a grievance.” Syl. Pt. 1, *Spahr v. Preston Cty. Bd. of Educ.*, 182 W. Va. 726, 727, 391 S.E.2d 739, 740 (1990).

5. Grievant’s claims related to his suspension are untimely.

6. “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].” *Pritt, et al., v. Dep’t of Health & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008); *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).

7. 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. *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009); *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002). The Grievance Board does not issue advisory opinions. See *Mitias v. Pub. Serv. Comm’n*, Docket No. 05-PSC-107R (Sept. 22, 2010), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 10-AA-185 (Sept. 11, 2012); *Biggerstaff v. Mingo Cnty. Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 03-AA-55 (Feb. 10, 2005); *Priest v. Kanawha Cnty. Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000).

8. Grievant’s claim related to his temporary upgrade is moot.

Accordingly, the Respondent's motion to dismiss is **GRANTED**, and it is hereby **ORDERED** that this matter be **DISMISSED** and **STRICKEN** from the Grievance Board's docket.

Any party may appeal this decision to the Intermediate Court of Appeals in accordance with W. VA. CODE § 51-11-4(b)(4) 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) (2024).

DATE: April 30, 2025

Lara K. Bissett
Administrative Law Judge