

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**TOMMY DINGESS,  
Grievant,**

**v.**

**Docket No. 2018-0185-MAPS**

**DIVISION OF HOMELAND SECURITY  
AND EMERGENCY MANAGEMENT,  
Respondent.**

**DISMISSAL ORDER**

Grievant, Tommy Dingess, was employed by Respondent, Division of Homeland Security. On August 4, 2017, Grievant filed this grievance against Respondent stating, "Nonselection for CFO." For relief, Grievant sought to be selected for CFO.

On August 17, 2017, Grievant, by representative, filed a *Motion to Compel Discovery*. By email dated August 18, 2017, Grievant, by representative, requested the grievance be waived to level two or level three based on Respondent's failure to provide discovery. On August 24, 2017, Respondent, by counsel, filed its *Motion to Dismiss for Failure to State a Grievable Claim, Agency Answer to Statement of Grievance, Agency's Response to Grievant's Motion to Compel Discovery and Assertion of Statutory Defense of Untimeliness*. On September 13, 2017, Grievant, by representative, filed his *Response to Respondent's Motion to Dismiss*. On September 29, 2017, Respondent, by counsel, filed *Agency's Second Motion to Dismiss*, asserting the grievance should be dismissed as Grievant had retired. On October 17, 2017, Grievance Board staff informed Grievant, by representative, that any response to the motion to dismiss be filed on or before October 27, 2017, that no hearing would be held on the motion, and that failure to respond may result in dismissal of the grievance. Grievant did not file a response to the motion to dismiss. Although the record does not reflect Grievant filed a second motion to compel

discovery, on October 2, 2017, Respondent filed *Agency's Response to Grievant's Second Motion to Compel Discovery*. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Daniel K. Armstrong, General Counsel.

### **Synopsis**

Grievant was employed by Respondent and filed the instant grievance protesting his nonselection for a position with Respondent. Following the filing of this grievance, Grievant retired from employment with Respondent. Respondent moved to dismiss the grievance due to Grievant's retirement. As Grievant has now retired, the relief he seeks would be speculative, and the grievance must be dismissed. Respondent's request for attorney's fees and costs is denied. Accordingly, the grievance is dismissed.

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 and filed the instant grievance protesting his nonselection for a position with Respondent.
2. Following the filing of this grievance, Grievant retired from employment with Respondent.
3. Despite notice and opportunity to be heard, Grievant did not respond to Respondent's motion to dismiss this grievance due to Grievant's retirement.

### **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. "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 (2008).

"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); *Pritt, et al., v. Dep't of Health & Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008). 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. *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). "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). Further, the Grievance Board will not decide matters that are “speculative or premature, or otherwise legally insufficient.” *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991); *Dooley v. Dep’t of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994).

Respondent has asserted Grievant voluntarily retired from employment. Despite notice and opportunity to be heard, Grievant failed to respond. In a nonselection grievance, in which the grievant has retired, any relief that might have been granted had he not retired, and had he prevailed in his grievance, would be purely speculative. *Komorowski v. Marshall County Bd. of Educ.*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision). The Grievance Board does not decide matters that are speculative or issue advisory opinions. Therefore, this grievance must be dismissed.

As the grievance is dismissed, the remaining motions, with the exception of the request for costs in Respondent’s *Agency’s Response to Grievant’s Second Motion to Compel Discovery*, are moot and will not be addressed. Respondent asserts in *Agency’s Response to Grievant’s Second Motion to Compel Discovery* it is entitled to attorney’s fees and costs due to Grievant’s “vexatious filing” of a second motion to compel. As stated above, the record does not reflect that a second motion to compel was filed, and Respondent does not provide the title or date of filing of this alleged motion.

“[T]he Grievance Board is not authorized by law to grant attorney’s fees. W. VA. CODE § 6C-2-6; *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Brown-Stobbe/Riggs v. Dep’t of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep’t*, Docket No. 95-BCHD-

362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). West Virginia Code § 6C-2-6 states in part, '(a) [a]ny expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.' W. VA. CODE § 6C-2-6." *Stuart v. Div. of Juvenile Serv.*, Docket No. 2011-0171-MAPS (Sept. 23, 2011). An administrative law judge may award the cost of the level three hearing only in extreme instances of bad faith. W. VA. CODE § 6C-2-4(c)(6). As this matter was not heard at level three, and the Grievance Board has no authority to award attorney's fees, Respondent's request for attorney's fees and costs is itself improper.<sup>1</sup>

Furthermore, even if a second motion had been filed as Respondent asserts, such a motion would not have been a "vexatious filing." Grievant's representative made a timely and reasonable request for clearly relevant information prior to the level one hearing; information, without which, Grievant would be unable to present any meaningful case at level one. It would have been impossible for Grievant to prove that the selection decision was flawed or that he was the most qualified candidate without the information he requested. Respondent informed Grievant that he was not entitled to this material because Respondent did not intend to introduce it at level one. While discovery is only specifically required for copies of all material submitted to the chief administrator or administrative law judge, or for discovery requested at level three, the refusal of Respondent to provide this clearly relevant information is contrary to the purpose of the

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<sup>1</sup> In support of its request, Respondent cited *Daily Gazette Co. v. Canady*, 175 W. Va. 249, 332 S.E.2d 262 (1985), which is clearly inapplicable as that case was based on the inherent power of a court to administer justice within the scope of its jurisdiction. The Grievance Board is an administrative agency, not a court, has no common-law power, and does not have the authority to award attorney's fees under its authorizing statute.

grievance process and the legislative intent. The purpose of the grievance process is to “[r]esolv[e] grievances in a fair, efficient, cost-effective and consistent manner.” “Parties to grievances shall at all times act in good faith and make every possible effort to resolve disputes at the lowest level of the grievance procedure.” Respondent clearly had no intention of allowing Grievant the opportunity to resolve this grievance at the lowest level, which resulted in the waste of its own resources and that of the Grievance Board when it then proceeded to file four unnecessary motions. Grievant’s lay representative was simply responding to the obstructive efforts of Respondent in this matter.

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. “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.

2. “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 (2008).

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

4. 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. *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). “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).

5. In a nonselection grievance, in which the grievant has retired, any relief that might have been granted had he not retired, and had he prevailed in his grievance, would be purely speculative. *Komorowski v. Marshall County Bd. of Educ.*, No. 11-1659 and 11-1767 (W. Va. Supreme Court, February 22, 2013) (memorandum decision).

6. As Grievant has now retired, the relief he seeks would be speculative, and the grievance must be dismissed

7. “[T]he Grievance Board is not authorized by law to grant attorney’s fees. W. Va. Code § 6C-2-6; *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Brown-Stobbe/Riggs v. Dep’t of Health and Human Resources*, Docket No.

06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). West Virginia Code § 6C-2-6 states in part, '(a) [a]ny expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.' W. VA. CODE § 6C-2-6." *Stuart v. Div. of Juvenile Serv.*, Docket No. 2011-0171-MAPS (Sept. 23, 2011). An administrative law judge may award the cost of the level three hearing only in extreme instances of bad faith. W. VA. CODE § 6C-2-4(c)(6).

8. Respondent's request for attorney's fees and costs is denied.

Accordingly, the grievance is **DISMISSED**.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. See 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 so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

**DATE: December 11, 2017**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**