

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TONY EASLEY, et al.,

Grievants,

v.

Docket No. 2017-1379-CONS

GENERAL SERVICES DIVISION,

Respondent.

DISMISSAL ORDER

Grievants, Tony A. Easley, Anthony C. Brooks, and Charles L. Long, filed expedited level three grievances against their employer, Respondent, General Services Division, each dated December 9, 2016, each grieving inappropriate language used by their supervisor. As the relief sought, Grievants sought discipline and/or diversity training for their supervisor.¹ By Order entered December 30, 2016, the three grievances were consolidated and dismissed from the level three docket and transferred to the level one docket because the consolidated grievance did not meet the statutory requirements for filing directly to level three.

A level one conference was conducted on January 25, 2017. This grievance was denied by decision dated February 3, 2017. Grievants timely appealed to level two, and a level two mediation was conducted on May 15, 2017. Grievants perfected their level three appeal on or about May 17, 2017. Thereafter, this matter was scheduled for a level three hearing on August 16, 2017. Respondent filed a Motion to Dismiss the grievance on June 23, 2017, asserting that the relief sought by Grievants is wholly unavailable. As the Grievants had no email addresses on file with the Grievance Board, by letter dated

¹ In the appeal to level three, at least one Grievant changed the relief requested to include the transfer of the supervisor.

June 28, 2017, the Grievance Board informed the three Grievants that they had until July 14, 2017, to respond in writing to the motion, and included for their review a copy of Respondent's Motion to Dismiss. This letter also noted that the Administrative Law Judge would decide this motion based upon the written arguments and that no hearing would be held on the same. Further, the letter advised that "[f]ailure to respond may result in the grievance being dismissed." Grievants filed no written responses to Respondent's Motion to Dismiss. Accordingly, it appears that Grievants do not dispute the facts as stated in Respondent's motion. Respondent was originally represented by Greg S. Foster, Assistant Attorney General. Katherine A. Campbell, Assistant Attorney General, advised the Grievance Board on July 27, 2017, that she would now be representing the Respondent in this matter. Grievants appeared in this matter *pro se*.

Synopsis

The only relief Grievants seek in this matter is that Respondent impose additional, or more severe, discipline upon their supervisor for his misconduct. As the Grievance Board does not have the authority to order an agency to impose discipline on an employee, Grievants seek a remedy that is wholly unavailable through the grievance process, and a decision on the merits of the claim would only result in an advisory opinion. Thus, the Motion to Dismiss should be granted, and this grievance, 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. Upon information and belief, at the times relevant herein, Grievants were employed by Respondent as Groundskeepers.

2. It is undisputed that Grievants' supervisor used a racial slur in their presence on December 15, 2016. Thereafter, the supervisor apologized for his use of the racial slur, and reported himself to management.

3. Respondent does not deny that the supervisor made such statement, and that such was improper. Further, Respondent acknowledges that such is a violation of the Division of Personnel's Prohibited Workplace Harassment Policy.

4. Respondent suspended the supervisor without pay for two days for his actions on December 5, 2016. The supervisor served this suspension on December 13, 2016, and December 14, 2016. Also, Respondent required the supervisor to attend the Division of Personnel's class, "Managing and the Law," which he completed in April 2017.

5. Grievants filed this grievance asking that the Grievance Board order more severe discipline be imposed upon the supervisor. It is noted that in his statement of grievance, Grievant Long first requested the supervisor be transferred to another department or be terminated from employment. Later, Grievant Long marked through the transfer and termination language, and asked that the supervisor be sent to diversity training. Grievant Easley requested that the supervisor be suspended without pay and transferred. Grievant Brooks asked only that the supervisor be disciplined.

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. § 159-1-6.2 (2008). The issue before the undersigned is Respondent's Motion to Dismiss. The burden of proof is on the Respondent, the moving party, to demonstrate

that the motion should be granted by a preponderance of the evidence. “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).

“A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” W. VA. CODE ST. R. § 159-1-6.11 (2008).

In their consolidated grievance, Grievants seek only additional, or more severe, discipline toward their supervisor for his actions on December 5, 2016. They have not raised other claims or issues. The parties do not appear to dispute what occurred on December 5, 2016, or the discipline Respondent already imposed upon the supervisor.

“It is a well settled rule that the Grievance Board does not have the authority to order an agency to impose discipline on an employee. Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Grievance Board. *Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996).” *Viers v. Div. of Highways*, Docket No. 2016-1281-DOT (Aug. 22, 2016). The relief Grievants seek in this matter is wholly unavailable to them through the grievance procedure. Further, “[b]ecause 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, et al., 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). Therefore, any ruling on the merits of this consolidated grievance would result in an advisory opinion. Accordingly, the Respondent’s Motion to Dismiss is granted, and this grievance, dismissed.

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

Conclusions of Law

1. “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. § 159-1-6.2 (2008).

2. The burden of proof is on the Respondent, the moving party, to demonstrate that the motion should be granted by a preponderance of the evidence. “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).

3. “A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” W. VA. CODE ST. R. § 159-1-6.11 (2008).

4. “It is a well settled rule that the Grievance Board does not have the authority to order an agency to impose discipline on an employee. Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Grievance Board. *Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31,

2005); *Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996).” *Viers v. Div. of Highways*, Docket No. 2016-1281-DOT (Aug. 22, 2016).

5. “Because 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, et al., 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. The only relief sought by Grievants in this matter is wholly unavailable to them through the grievance procedure. Therefore, any ruling on the merits of this consolidated grievance would result in an advisory opinion.

Accordingly, this Grievance is **DISMISSED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this 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 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: September 8, 2017.

Carrie H. LeFevre
Administrative Law Judge